ICSID Case No. ARB/20/13
ICSID Case No. ARB/21/55

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ESPÍRITU SANTO HOLDINGS, LP,
L1BRE HOLDING, LLC,

Claimants,

v.

UNITED MEXICAN STATES,

Respondent.

CLAIMANTS' REPLY MEMORIAL

HOGAN LOVELLS US LLP

600 Brickell Avenue
Suite 2700
Miami, Florida 33131
United States of America

FRESHFIELDS BRUCKHAUS DERINGER US LLP

601 Lexington Avenue
31st Floor
New York, New York 10022
United States of America

Attorneys for Claimants

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Claimants Espíritu Santo Holdings, LP ("ES Holdings") and L1bre Holding LLC ("L1bre Holding" and together with ES Holdings, "Claimants") serve this Memorial on the United Mexican States ("Mexico" or "Respondent") pursuant to Article 1120 of the North American Free Trade Agreement ("NAFTA" or the "Treaty"), Rule 31 of the Arbitration Rules of the International Centre for Settlement of Investment Disputes ("ICSID Rules") and the Tribunal's Procedural Order No. 1 dated 29 March 2021 and amended procedural calendar, and submit the following requests to the Tribunal:

Requests:

(i) A declaration that Mexico breached Articles 1102, 1105, and 1110 of the Treaty;

(ii) An order directing Mexico to compensate Claimants for their losses, and those suffered by Lusad, resulting from Mexico's breaches of the Treaty and international law in an award of damages not less than USD $2.109 billion; such compensation to be paid without delay, be effectively realizable and be freely transferrable, and bear post-award interest at a compound rate sufficient to fully compensate ES Holdings for the loss of the use of this capital as from the date of Mexico's breaches of the Treaty;

(iii) A declaration that the award of damages and interest be made net of all Mexico's taxes, and that Mexico may not deduct taxes in respect of the payment of the award of damages and interest;

(iv) An order that Mexico reimburse Claimants for all costs, expenses, expert fees, and reasonable attorneys' fees incurred or paid by Claimants in connection with this arbitral proceeding, plus interest; and

(v) An order granting any further relief as the Tribunal considers appropriate.

Claimants reserve their right to alter, amend, and/or supplement their claims as necessary and in accordance with the applicable rules during the course of this arbitral proceeding. Claimants reserve the right to request the Tribunal's permission to supplement this Reply Memorial with additional fact witness testimony and accompanying documentary evidence if and when Claimants are provided appropriate access to Mr. Zayas. Given Mexico's obstruction of Claimants' access to Mr. Zayas, Claimants also ask that the Tribunal make negative inferences against Mexico, crediting Mr. Zayas's first declaration in its entirety and disregarding all of Mexico's allegations regarding Mr. Zayas in its Counter-Memorial. Claimants reserve all rights regarding relief they have sought or may seek in connection with access to Mr. Zayas and his ongoing pre-trial detention and the conditions to which he is being subjected at the *Reclusorio Sur*, as well as with their pending motion to compel.

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. Mexico breached numerous provisions of NAFTA and destroyed Claimants' business in Mexico, causing Claimants to suffer substantial damages, which is readily evident based on the record in this Arbitration. Mexico granted, to Claimants' subsidiary, Servicios Digitales Lusad S. de R.L. de C.V. ("Lusad"), an exclusive concession for a period extendable to 30 years for the replacement, installation and maintenance of taximeters in Mexico City's taxi fleet and for the development of a remote ride-hailing application (the "Concession"). The Concession itself acknowledged that it was required to address, *inter alia*, the need to afford taxi users a "transparent" billing system and to ensure "certainty, efficiency and security" for passengers.[1]

2. Claimants and Lusad subsequently invested substantial sums in building a business in Mexico that met the requirements under the Concession. Then, after Lusad obtained all necessary government approvals, passed two testing periods, and was on the precipice of launching full-scale revenue-producing operations, Mexico indefinitely suspended the Concession because—in its own words—of a "political change" brought about by the election of a new mayoral administration in Mexico City. Mexico's breaches of NAFTA are manifest. The only relevant question in dispute ought to be the value of the Concession and the amount of compensation necessary to make Claimants whole for the damages they have suffered.

3. Before addressing Mexico's attempts to avoid liability in its Counter-Memorial, it bears recalling the basic circumstances giving rise to the claim.

A. Lusad Was Fully Prepared to Install the L1bre System in Mexico City's 138,000 Taxis

4. In June 2016, Mexico City's Adjudication Committee for Concessions for Public Transport ("Adjudication Committee") decided to grant Lusad a Concession to install a digital taximeter system across all of Mexico City's taxis, which were in drastic need of technological improvement and digitalization. The Adjudication Committee reviewed Lusad's proposal, as well as seven others that it had received to deliver the services envisaged by the Concession, and decided that Lusad best fulfilled the Adjudication Committee's requirements with its L1bre-branded digital taximeter system (the "L1bre System"). There was substantial government oversight of the granting of the Concession to Lusad because the Adjudication Committee was comprised of a number of high-ranking officials, including (i) Mexico City's Secretary of Mobility, (ii) Secretary of Housing and Urban Development, (iii) Secretary of the Environment, (iv) Secretary of Public Works, and others. Lusad and Mexico City's Secretariat of Mobility ("Semovi") subsequently signed the Concession on 20 June 2016, and it was then amended in January 2017.

5. Under the terms of the Concession, Lusad assumed substantial risk and committed to make a large capital investment in developing new taximeters and a ride-hailing application for Mexico City's taxis. In addition to incurring the financial risk of developing the technology, Lusad committed to: (i) bear the cost of the acquisition, installation, maintenance, and reparation of all

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[1] **Exhibit C-0007-ENG**, Background X (Amended Concession Agreement, as reissued on 21 March 2017 (translation)).

necessary equipment, (ii) maintain the technology and its operation in good condition, (iii) update the technology as required, (iv) guarantee global positioning satellite ("GPS") service 24 hours per day, every day of the year, for all of the taximeters, (v) operate the service according to the technical feasibility study that Lusad had submitted, and (vi) maintain appropriate control systems to guarantee the quality of the service. In exchange for taking on the risk of these technological developments and the associated substantial investment required, Lusad was entitled to recover a fees associated with every taxi ride in Mexico City involving a taxi using the L1bre System taximeter, and any taxi ride hailed through its mobile application. Aside from the benefits associated with an improved taxi service in Mexico's most important city, Mexico City would also derive direct economic benefits from the Concession, as it would share in Lusad's revenues despite having made no capital investment of its own.

6. Upon executing the Concession in June 2016, Lusad proceeded immediately with implementing it. With an experienced technology team directing software development, Lusad expended millions of dollars developing scaled-up versions of its software programs, namely: a program to run on the driver tablet in the front of the taxi, a program to run on the passenger tablet in the back of each taxi, and a smartphone application. Lusad also developed an e-wallet, which allowed passengers to pay by credit card and would automate payment of the fees due to Lusad for each ride. Finally, Lusad developed back-end software to integrate all of these programs together and connect them with government services and servers. Each of Lusad's software programs had to be individually developed and then integrated together to function seamlessly across the different pieces of hardware. One of the most significant aspects of the software development was the process of connecting the L1bre System's panic button to Mexico City's Command, Control, Computing, Communication, and Citizen Contact Center (known as the "C5"). Once connected, taxi drivers and passengers would have an instantaneous and direct line to Mexico City's central emergency services. The panic button's connection to C5 was a critical element of the L1bre System because it was a means to ensure safe taxi rides for passengers and drivers within a service that had historically been plagued by insecurity for passengers.

7. Semovi and Lusad were in constant communication regarding the implementation of the Concession. Many milestones were achieved over the course of the subsequent two years. For example, during 2016, Lusad installed initial versions of the L1bre System across 1,100 taxis in Mexico City and provided Semovi with data about those installations. Semovi carried out an inspection and, in March 2017, confirmed that the inspection generated "favorable and satisfactory" results.[2] Lusad later updated these installations, again under Semovi's supervision, with Semovi confirming that all installations were completed to its satisfaction.[3] In February 2018, Semovi confirmed that the panic button connected to Mexico City's C5 was functioning satisfactorily.[4] Then, on 17 April 2018, as Lusad had completed all of its obligations under the Concession, Semovi issued a Mandatory Installation Notice requiring taxi drivers to install the

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2 **Exhibit C-0010-SPA** (Oficio No. DNRM-0626-2017 from Semovi reissuing Concession agreement, dated 21 March 2017).

3 **Exhibit C-0191-SPA** (Oficio No. DNRM-3180-2017 from Semovi to Lusad, dated 20 December 2017).

4 **Exhibit C-0015-SPA** (Oficio No. C5/CG/DGT/132/2018 from the Dirección General de Technologías acknowledging proper functioning of the panic button, dated 28 February 2018).

L1bre System by March 2019 into all of 138,000 Mexico City taxis.[5] Lusad was ready to deliver on the installations, as it had already acquired the necessary tablet hardware, contracted for substantial installation capacity at a number of sites across Mexico City, developed training and installation manuals, and developed a plan to scale and expedite installations.[6]

8. Everything was in place for Lusad to begin collecting revenue under the Concession, but Semovi did not fulfill its end of the bargain. Under the Concession, Semovi was required to launch a reservation platform for taxis to have the L1bre System installed (by Lusad), but it never did. Instead, soon after the publication of the Mandatory Installation Notice, the Concession became the subject of political rhetoric and threats during campaigns for Mexico City's forthcoming mayoral election. Then-candidate Claudia Sheinbaum campaigned on an agenda that included ending the Concession. Semovi reacted to this by suspending the mandatory installation of the L1bre System. On 30 May 2018, Semovi wrote to Lusad to effectuate this suspension, pointing to the "electoral period [in] Mexico City" and observing that the "suspension is not attributable to [Lusad] since . . . the concessionaire has fully complied with its rights and obligations."[7] A few weeks later, in early July 2018, Ms. Sheinbaum won the election.

9. Lusad had no reason to believe that the temporary suspension would extend beyond the "electoral period [in] Mexico City" and so it did not stand idly by. Among other productive activities, Lusad engaged Goldman Sachs to evaluate Lusad's value and its rights under the Concession and lead a process for the sale of a minority stake in Lusad to fuel Claimants' planned continued growth in other markets in Mexico and elsewhere in Latin America.[8] Goldman Sachs prepared an initial valuation in June 2018. It was then given access to a large data room, conducted due diligence on Lusad, began outreach to potential investors and, on 4 October 2018, provided a more informed valuation. Goldman Sachs valued Lusad's rights under the Concession, using the discounted cash flow ("DCF") methodology, at USD $ 2.43 billion.[9]

10. On 28 October 2018, weeks before Mayor Sheinbaum was to take office, Semovi sent a letter notifying Lusad that the Concession would be suspended because of the recent "political change in the leadership of the Major of the Government of Mexico City."[10] Not a

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5 **Exhibit C-0016-SPA** (Mandatory Installation Notice mandating the installation of the taximeters, published in the Gaceta Oficial de la Ciudad de México, dated 17 April 2018).

6 **Exhibit C-0073-SPA** (L1bre installation centers operations manual, dated 24 August 2018); **Exhibit C-0074-SPA** (Physical requirements for Installation Centers, dated May 2018); Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 49, 70.

7 **Exhibit C-0018-SPA** (Oficio No. DGSTPI-965-2018 from Semovi announcing suspension of the Concession, dated 30 May 2018); **Exhibit C-0226-SPA** (Original version of Oficio No. DGSTPI-965-2018 from Semovi announcing suspension of the Concession, dated 30 May 2018).

8 **Exhibit C-0077-ENG** (Goldman Sachs financial advisory services proposal, 14 June 2018).

9 **Exhibit C-0079-ENG**, pp. 14–15, 18–20 (Goldman Sachs Report, Pre-Marketing Recap and Potential Next Steps, dated 4 October 2018).

10 **Exhibit C-0019-SPA** (Oficio No. DGSTPI-1943-2018 from Semovi announcing indefinite suspension of the Concession, dated 28 October 2018); **Exhibit C-0227-SPA** (Original version of Oficio No. DGSTPI-1943-2018 from Semovi announcing indefinite suspension of the Concession, dated 28 October 2018).

single other reason was cited in Semovi's 28 October 2018 suspension letter, nor in any other subsequent communication with Semovi or Mayor Sheinbaum's office. Mexico wiped out a business independently valued at USD $2.43 billion on the basis of political preference.[11]

11. A few months later, in summer of 2019, Mayor Sheinbaum's administration announced that the Mexico City government would launch its own mobile ride-hailing smartphone application for Mexico City's taxi fleet. The Mexico City government boasted that its application had many of the features that Lusad had developed for the L1bre System.

12. It is because of these facts, all well supported by documentary evidence, that Claimants forcefully maintain that Mexico's breaches of NAFTA are manifest. In bringing an end to the Concession and Claimants' business in Mexico, Mexico did not even bother inventing an ostensibly lawful or justifiable reason. The new administration simply decided that the Concession that had been signed and in respect of which Claimants and Lusad had invested substantial sums, was no longer "politically" convenient, and that it preferred to launch its own ride-hailing mobile application for Mexico City's taxis. Mexico's conduct amounts to an unlawful expropriation of Claimants' investments contrary to NAFTA Article 1110, unfair and inequitable treatment contrary to NAFTA Article 1105, and treatment inconsistent with the national treatment standard contrary to NAFTA Article 1102.

B. Mexico's Defense is Built on Unsubstantiated Allegations

13. Mexico could not possibly contend, on the facts of this case presented in Claimants' Memorial, that its conduct amounted to anything other than a breach of its obligations under NAFTA. Instead of taking on the facts, Mexico deflects attention elsewhere. Mexico spends a substantial portion of its Counter-Memorial avoiding a discussion of the Concession and the government's suspension of it, and focuses instead on arguments that have nothing to do with the events giving rise to the dispute. Mexico's Counter-Memorial reads instead as a regrettable and unfortunate smear campaign against Claimants' witnesses who were involved in Lusad winning the Concession and developing the L1bre System. And, when Mexico finally turns to facts relevant to the dispute, it relies on inference and innuendo, not evidence, in its unfounded attempts to generate a dark cloud over the Concession and its award to Lusad. Mexico's arguments reflect a transparent effort to distract at all costs and read as an acknowledgement that the actual facts of the case are stacked against it. Mexico's own articulation of its arguments shows that they are not made with any conviction. That is because there is nothing behind Mexico's most salacious allegations. Not a shred of evidence.

14. Mexico's arguments are addressed comprehensively throughout this Reply Memorial. For purposes of the present introduction, a few of Mexico's allegations deserve special mention as being particularly indicative of Mexico's *modus operandi*, namely (i) its allegations of wrongdoing and bribery, (ii) its allegations of forgery, (iii) its focus on irrelevant judicial proceedings involving third parties, and (iv) its confused arguments regarding when the Concession was granted and its suspension.

[11] Second Expert Report of Howard Rosen (Secretariat Advisors), dated 4 November 2022, ¶ 228.

15. *First*, from the very first paragraphs of its Counter-Memorial, Mexico begins its smear campaign by accusing Claimants of procuring the Concession through "possible" acts of bribery. Mexico accuses Claimants and their personnel of "*possible* illicit acts" (¶ 1), expresses "serious concerns . . . in respect of unlawful acts regarding the 'investment'" that is the subject of the dispute (¶ 2), contends that "there is evidence in this arbitration about: a *possible* collusion between individuals and certain public officials to obtain a concession" (¶ 3), contends that "Claimants' witnesses carried out unlawful acts to obtain a concession from the former Minister of Semovi" (¶ 3) and, finally, it claims that "evidence shows that Claimants' alleged 'investment' was created or obtained through illicit acts" (¶ 4).[12] In its Counter-Memorial, the only document that Mexico offers to support these salacious allegations is an "anonymous" letter that it says it received nearly three years ago, in November 2019, providing information regarding these "*possible*" acts.[13] Notably, Mexico could not produce even one witness with contemporaneous knowledge to support that letter, nor to attest to the provenance of the letter, who received it, what envelope it came in and what steps its recipient took to ascertain its authorship. The copy of the letter that Mexico sent contains pagination that Mexico added to the letter but that begins on page "0004", suggesting that Mexico has withheld the first three pages of the document—which is also entirely unexplained.

16. Claimants deny in the strongest possible terms any wrongdoing of any kind and deny the contents of the anonymous letter, which includes sensationalist allegations including, *inter alia*, that Claimants bribed a Mexican government official to procure the Concession. Mexico's allegations—framed as "possible" infractions—are made without conviction and without any evidence aside from the anonymous letter. Yet, despite the importance that the anonymous letter plays in its defense, Mexico entirely fails to explain in its Counter-Memorial what, if any, action it has taken to investigate or verify the contents of the anonymous letter. Given the passage of time since the letter's receipt, Mexico should have been prepared to describe the results of any investigation in its Counter-Memorial. Mexico's silence in this regard is telling. Mexico's reliance on the "anonymous letter" at the heart of its defense (elevating it to the very first paragraphs of the Counter-Memorial) without providing any further information that was gathered in the intervening three years it had the letter before it submitted its Counter-Memorial undermines Mexico's credibility.

17. During document production, the Tribunal ordered (over Mexico's objection) that Mexico produce "all internal or external [c]orrespondence or [d]ocuments reflecting analysis prepared by or sent to or from Semovi related to the 'anonymous complaint' . . . including any [c]orrespondence with the sender of that letter and any action taken by Semovi in response to that letter (including any internal investigations)."[14] If responsive documents were helpful to its case, Mexico ought to have been keen to have these documents come to light; the fact that it instead objected is telling. In response to the Tribunal's order, Mexico produced only four letters. Two of the letters are a simple exchange in which a Semovi legal affairs representative is requested and

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[12] *See also*, Counter-Memorial, ¶ 30, fn. 270. Mexico contends that Semovi received the letter on 10 December 2019, but the document bears a stamp belonging to the Mayor's office dated 28 November 2019.

[13] Counter-Memorial, ¶ 30, fn. 270.

[14] Procedural Order No. 4, Annex A (Claimants' Redfern Schedule), Request 26.

then provides the file (*expediente* or *legajo*) relating to the Concession to a Semovi representative in Investigation Department B of Semovi's Internal Control Organ.[15] In the third letter, a representative from Mexico City's mayor's office does nothing more than forward the anonymous letter to Mexico City's *Secretario de la Contraloría* (notably, Mexico only produced the cover letter and not the complete communication with the anonymous letter precisely in the form that it was received).[16] In the final letter, dated 10 December 2019, the representative from the *Contraloría* sends the anonymous letter to Semovi's Internal Control Organ and directs it to carry out the "actions and diligence" required to investigate the contents of the anonymous letter and to report to the *Contraloría* "fortnightly" of any relevant evidence collected.[17] No such reports or evidence were produced.

18. The lack of contemporaneous documents to support Mexico's arguments relating to an unsubstantiated letter is telling. Indeed, Mexico produced not a single other document responsive to Claimants' Request 26. It is irresponsible and inexcusable for Mexico to lodge allegations of bribery and corruption without any actual evidence. In the absence of such evidence, Mexico's reliance and emphasis placed on the "anonymous letter" ought to be considered as nothing more than a transparent ploy to distract from the substance of this case.

19. *Second*, Mexico's Counter-Memorial not only alleges bribery, but—in equally tepid fashion—also alleges forgery. Mexico contends that a number of documents that Claimants submitted with their Claim Memorial are the subject of "potential forgery."[18] Mexico elaborates Semovi allegedly looked for certain documents, "did not locate these documents in its records, archives and files" and so Mexico concluded that the documents must have been forged.[19] Mexico's allegations are without foundation and demonstrably incorrect. For instance, some documents that Mexico contends were the product of fraud or forgery were later produced **<u>by Mexico</u>** to Claimants in response to some of Claimants' document production requests.[20] Others exist in original form, and have been certified as authentic by Mexico's own officials in charge of authenticating such documents.[21] Claimants vehemently deny that they forged or doctored any document at any time, including those documents that they submitted into evidence in this

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[15] **Exhibit C-0264-SPA** (Letter from Semovi's Internal Control Organ to Semovi's Legal Affairs Department dated 7 February 2020 and Letter from Semovi's Legal Affairs Department to Semovi's Internal Control Organ dated 13 February 2020, produced by Mexico as document number "26.2").

[16] **Exhibit C-0263-SPA** p. 3 (Letter from Mexico City's Mayor's Office to Mexico City's Secretaría de la Contraloría, dated 5 December 2019, produced by Mexico as part of document number "26.1").

[17] **Exhibit C-0263-SPA** pp. 1–2 (Letter from Mexico City's Secretaría de la Contraloría to Semovi's Internal Control Organ, dated 10 December 2019, produced by Mexico as part of document number "26.1").

[18] *See* Counter-Memorial, ¶ 192.

[19] *See* Counter-Memorial, ¶ 197.

[20] *See infra*, Section II.A.2.

[21] **Exhibit C-0228-SPA** (Certified and Apostilled version of Oficio No. SEMOVI/OSSM/137-2016 from Semovi confirming interest in the Taxis Llbre project (C-0038-SPA), dated 20 April 2015).

arbitration. As described in more detail throughout this submission, Claimants' have confirmatory evidentiary support for the documents that Mexico challenges.

20. *Third*, Mexico spends a considerable part of its Counter-Memorial attempting to further disparage Claimants' representatives, Eduardo Zayas Dueñas and Santiago León Aveleyra, by describing various lawsuits that have nothing to do with the present dispute and some of which do not even involve them as parties. Mexico emphasizes in particular allegations that were made in the course of those proceedings, which it characterizes as "extremely disturbing."[22] Mexico then considers it noteworthy that "Claimants have not mentioned" those proceedings in their Memorial.[23] Mexico contends that the Tribunal ought to make findings of fact from these allegations, including with respect to "serious accusations regarding illicit conduct[], including robbery, fraud and death threats."[24] Mexico contends that "the cases Taxinet, Cosío Espinoso, and L1bero Partners demonstrate the unviability of the L1bre Project and the various illicit acts carried out by Messrs. Zayas and León."[25]

21. Given how Mexico heavily relies on those other proceedings, one would have expected them to have resulted in final judgments in which findings of fact were made supporting the salacious allegations Mexico derives from them. However, not a single one of the proceedings to which Mexico refers ever resulted in a final judgment with any finding of fact consistent with the conclusions and inferences that Mexico asks this Tribunal to draw. As discussed in further detail below, the *Taxinet* case was brought against Mr. León, and a final judgment was rendered in Mr. León's favor. The *Cosío Espinoso* trial was discontinued and, at any rate, was not brought against the Claimants, Mr. Zayas, or Mr. León. The L1bero Partners case, which involved a dispute for control of Lusad (which is not necessarily surprising given the substantial value associated with Lusad and the L1bre brand that was being developed in Mexico), was resolved amicably with Claimants remaining the sole indirect owners of Lusad's parent companies.[26]

22. Any rejected or subsequently withdrawn allegations of wrongdoing in those proceedings are legally irrelevant and of no value here. That Mexico resorts to relying not on findings of fact but on withdrawn allegations made in third-party judicial proceedings to advance its arguments in this case is a sign of its extreme desperation. Mexico has little to say on the substance of this dispute, and so it focuses on unproven and unsubstantiated allegations made in others.

23. *Fourth*, when Mexico does venture into matters that are relevant to these proceedings, its positions are confused and contradictory. This is most evident with respect to submissions it makes regarding the Concession and its suspension. Relevantly, Mexico denies the publicly reported award of a Concession to Lusad in 2016, yet acknowledges that a Concession

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[22] *See* Counter-Memorial, ¶ 282.

[23] *See* Counter-Memorial, ¶ 283.

[24] *See* Counter-Memorial, ¶ 329.

[25] *See* Counter-Memorial, ¶ 330.

[26] *See infra*, Section II.E.

was ultimately granted to Lusad, while disagreeing as to the terms that apply to the Concession, and provides a disorienting explanation for what ultimately happened to the Concession, oddly maintaining that it remains in force to this day (contending that "[i]n clear terms, Semovi has not suspended the Lusad Concession").[27]

24. For instance, Mexico maintains that Lusad was not actually awarded the Concession in June 2016 but was instead awarded an opportunity to be awarded the Concession at some point in the future, which Mexico describes as a "*proyecto de concesión*." Again, Mexico cannot provide a single witness with contemporaneous knowledge to support this contention, which is in any case inconsistent with the applicable legal framework, which does not provide for the award of a "*proyecto de concesión*." Instead, Mexico relies on a document that it says are the "correct" minutes of the Adjudication Committee's meeting in June 2016 during which it discussed Lusad's proposal, proposals submitted by competing companies, and the Concession.[28] Claimants submitted a different version of the minutes with their Memorial.[29] Claimants' copy of the minutes states that the Adjudication Committee agreed to *grant* the Concession to Lusad ("*otorgar la concesión*"), whereas Mexico's version contends that Lusad was instead granted the opportunity for a concession if it fulfilled additional conditions (in Mexico's telling, Lusad was granted a "*proyecto de concesión*").[30]

25. There are a number of reasons why the minutes on which Mexico relies in its Counter-Memorial are suspect. For present purposes, Claimants note simply that, during document production, **<u>Mexico produced to Claimants a copy of the Adjudication Committee's meeting minutes that are identical to the exhibit that Claimants submitted with their Memorial</u>**.[31] This should put an end to Mexico's attempt to create doubt as to whether Lusad was awarded the Concession in June 2016, but—to be sure—there are a number of other contemporaneous documents—including both public media reports and government files—corroborating Claimants' position that Lusad was indeed awarded the Concession at that time.[32]

26. Moreover, Mexico further argues that the Concession was never suspended, including the October 2018 indefinite suspension letter as one of the documents that Mexico suspects was "possibly forged."[33] Incredibly, Mexico contends in these proceedings that the Concession remains entirely in force (which only further underscores how Mexico cannot possibly believe its allegations regarding bribery or wrongdoing because, if it did, it certainly would have

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27 *See* Counter-Memorial, ¶ 401.

28 *See* Counter-Memorial, ¶¶ 97-98.

29 **Exhibit C-0051-SPA** (Minutes of the Adjudication Committee, awarding the concession to Lusad, dated 17 June 2016).

30 *See* Counter-Memorial, ¶¶ 97-98.

31 **Exhibit C-0162-SPA** (So-called Amended Adjudication Committee Minutes produced by Mexico from Semovi's files, dated 17 June 2016).

32 *See infra*, Section II.A.4.

33 *See* Counter-Memorial, ¶ 197.

sought to terminate the Concession on those grounds).[34] While Mexico feigns ignorance regarding Mexico City's suspension of the Concession for purposes of these proceedings, it bears recalling that Mayor Sheinbaum had publicly promised during her campaign that she would put an "end" to the Concession.[35] Since her election, and following the October 2018 suspension notice from Semovi put forward in Claimants' submissions, Mexico City's government officials have confirmed that they moved on from the L1bre System to their preferred, government-run Mi Taxi system. The reasons for this replacement were declared contemporaneously in media interviews:

- During a press interview in September 2019, a representative from Mexico's Digital Agency of Public Innovation—the body charged with developing the Mi Taxi application—was asked "what happened with [the] contract with the company [Lusad], to which he responded that "the contract . . . took place with the last administration" and "the contract no longer has any effect." The reason cited was not any alleged corruption or any nullity of the Concession, but rather because of "problems it generated . . . in the media and with the cab drivers."[36]

- In February 2020, in promoting the Mi Taxi application, Mayor Sheinbaum differentiated the offering as being a **replacement** to the "application of the prior administration."[37]

- During a July 2020 interview in which she was asked about the alleged expropriation of Claimants' investment, Mayor Sheinbaum bemoaned that the concession was something that "had been made in the last administration" and explained that "what we said at that time was that if the cab drivers did not want it to be done in that way . . . it should not be done and from there we developed an application . . . through the Digital Agency for Public Innovation."[38]

27. Simply put, Mayor Sheinbaum promised on the campaign trail that she would put an end to the Concession, and since her election, her administration has repeatedly confirmed publicly that the L1bre System affiliated with the "old administration" has been replaced by the Mi Taxi system. As such, it is difficult to understand Mexico's contention that the Concession was never suspended and somehow remains in effect. Mexico's misinformed contentions regarding the circumstances in which the Concession was awarded and then suspended appear to

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34 *See* Counter-Memorial, ¶ 401.

35 **Exhibit C-0017-SPA** (Press article "*Sheinbaum says she will end abuses to taxi drivers*," dated 11 May 2018).

36 **Exhibit C-0023-SPA**, timestamp 06:07–7:16 (Interview with Eduardo Clark, General Director of the Center of Technological Development of the Digital Agency of Public Innovation of the Government of Mexico City, dated 6 September 2019).

37 **Exhibit C-0033-SPA** (Press article "*Taxi Drivers Will Operate via App as of 15 March 2020*," dated 16 February 2020).

38 **Exhibit C-0265-SPA** pp. 7–8 (*Entrevista a la Jefa de Gobierno, Claudia Sheinbaum Pardo, durante la videoconferencia de prensa en Farnell Antiguo Palacio del Ayuntamiento*, dated 15 July 2020).

be a consequence of its selection of fact witnesses: Mexico has not provided a witness statement from a single Semovi official who was at the agency either at the time the Concession was awarded, at any point during its implementation, or at the time it was suspended. It is not surprising, then, that Mexico and its witnesses are lacking as to the facts. In contrast, Claimants are submitting with this Reply Memorial a witness statement from Agustín Muñana Zúñiga, a government attorney who worked as Legal Director at Semovi during the relevant time period and who disagrees with many of Mexico's factual contentions regarding the Concession's award, implementation, and suspension.

28. Mexico's arguments addressed above are not mentioned in this introduction because they are central to the resolution of the present dispute but rather because they are indicative of Mexico's approach to defending itself in this case. Mexico shows no restraint in making the most serious allegations of wrongdoing, even where it has no evidence. It posits a range of theories that are internally inconsistent. And Mexico is mostly intent on slandering the Claimants' witnesses by resorting not to evidence but instead to allegations from unrelated third-party disputes that never resulted in any findings whatsoever (let alone relevant ones) regarding the conduct of Claimants, Lusad, Mr. Zayas, or Mr. León.

29. In the circumstances, the Tribunal ought to have no difficulty in concluding that, in indefinitely suspending the Concession and subsequently launching the Mi Taxi service, Mexico breached its obligations under NAFTA.

C. Mexico Must Pay Compensation Commensurate to the Total Value of the Concession Under the DCF Method

30. Mexico is required under international law to pay Claimants compensation to wipe out the effects of its unlawful conduct. In that regard, the effect of Mexico's indefinite suspension of the Concession is clear and not in dispute. While Mexico feigns confusion as to the authenticity of the indefinite suspension letter of 28 October 2018, Mexico cannot dispute that the indefinite suspension wipes out all value associated with the Concession. Plainly, rights under the Concession that are permanently suspended to reflect the government's "political" preference have no value at all. Mexico accepts that conclusion, which is why it does not dispute that the suspension would have an expropriatory effect. Accordingly, to restore Claimants to the position they would have in all probability occupied but for the unlawful acts, Mexico must pay compensation commensurate to the total value of the Concession regardless of the NAFTA provision that Mexico is found to have breached because of (*inter alia*) its indefinite suspension of the Concession.

31. International law is clear that, by default (and without limitation), the correct date on which to compute damages flowing from an internationally wrongful act is the one coinciding with the unlawful act and the loss. Accordingly, Claimants instructed their valuation expert, Mr. Howard Rosen of Secretariat International ("Secretariat"), to compute damages as of 27 October 2018, *i.e.* the day prior to Semovi's 28 October 2018 indefinite suspension letter. International law is also clear that, where a State's unlawful conduct has totally wiped out or otherwise reduced the value of an investment, the correct measure of damages is the diminution in the fair market value of the investment.

32. The computation of the fair market value of Lusad's rights under the Concession is informed, necessarily, by the state of Lusad's preparedness to deliver on its obligations under the Concession just prior to its indefinite suspension. Here, several months prior to the indefinite suspension in October 2018, Lusad was fully prepared to deliver upon its Concession obligations and begin revenue-producing operations. Lusad had developed all the software and hardware required for the taximeters and accompanying mobile ride-hailing application. Lusad had stockpiled an inventory of custom tablets to be in a Mexico City warehouse ready for installation. Lusad contracted with installation sites and had substantial installation capacity to timely scale up the installation of taximeters across Mexico City's 138,000-vehicle taxi fleet. Lusad had firm contracts with its most important suppliers. Finally, Lusad had obtained from the government all necessary approvals for the full-scale launch of revenue-producing operations, including—most importantly—the government's publication in April 2018 of the Mandatory Installation Notice requiring that all of Mexico City's taxis arrange appointments for the installation of the L1bre System by no later than March 2019. There was nothing left for Lusad to do to prepare for the full-scale launch of revenue-producing operations under the Concession. Instead of permitting Lusad to proceed, however, the government instead brought everything to a halt through its indefinite suspension of the Concession.

33. The cashflows under the Concession of which Lusad was deprived because of the suspension can be estimated with a high degree of confidence and certainly well beyond the applicable standard of proof. As confirmed by the Mandatory Installation Notice, but-for Mexico's unlawful conduct, Lusad would have proceeded with the full-scale launch of revenue-producing operations under the Concession. The revenues of which Lusad was deprived can be estimated with ease because the Concession provided a predictable revenue stream based on (i) the fixed fees that Lusad could collect for every taxi ride in every Mexico City taxi (as every taxi was required to have the L1bre System installed) and (ii) reliable government-backed data on the number of taxi rides per day in Mexico City. Given Lusad's advanced stage of preparedness, its costs structure can also be reliably estimated.

34. In these circumstances, Secretariat considers that the appropriate calculation of the fair market value of Lusad's rights under the Concession is by reference to the DCF method. That is, given that Lusad's cash flows can be estimated with a high degree of confidence (among other relevant factors), Secretariat considers that the most appropriate way to determine the fair market value of the Concession is by projecting those cash flows for the duration of the Concession term and discounting them to a present value.

35. There is a valuable sense-check confirming the correctness of Secretariat's use of the DCF method to value Lusad's rights under the Concession. As stated above, just weeks prior to the government's indefinite suspension of the Concession, Goldman Sachs delivered to Lusad a valuation in connection with Lusad's plan to attract an additional minority investor. Goldman Sachs is not only one of the world's foremost leading investment banking firms, but it also has top expertise in technology transactions and technology-enabled transportation transactions. Can therefore provide highly credible input not only on valuation results, but also on the appropriate valuation methodology that the market would use to determine the monetary value of Lusad's rights under the Concession. Therefore, Goldman Sachs's analysis confirms the correctness of Secretariat's use of the DCF valuation method, as well as the conservative nature of Secretariat's pre-interest valuation of USD $1.747 billion (compared to Goldman Sachs's valuation of USD

$2.43 billion).[39] There can be no better indication of the method that the market would use to value Lusad's business than a valuation, close in time to the valuation date, from one of the world's most qualified market participants.

36. Mexico focuses its attention in its Counter-Memorial on the valuation date and the valuation methodology, but misses the mark on both.

37. On the valuation date, Mexico contends that Claimants' valuation date of 27 October 2018 is incorrect because it disregards the value-depressing effects that the COVID-19 pandemic would have had. Mexico contends that the Tribunal should compute damages as of the date of the award so that Claimants are not over-compensated. Mexico's position is unsupported by international law. Aside from Mexico not having quantitatively established the effect of the COVID-19 pandemic on Mexico City's taxi industry, the pandemic was not at all foreseeable as of the indefinite suspension of the Concession in October 2018 when Claimants suffered their loss. It is Mexico and not Claimants that bear the risk of changed market conditions that negatively affect the value of an investment after it is expropriated, and Mexico cannot point to a single case or legal authority to support its position that Claimants' damages should be reduced in the way that Mexico suggests. Mexico also plainly does not believe in its own submission on the correct valuation date because it did not even instruct its valuation experts at Credibility International ("Credibility") to use the date of the award for valuation purposes. Mexico's arguments on valuation date cannot be taken seriously.

38. As for valuation methodology, Mexico and Credibility argue against the DCF method simply because Lusad had not yet begun collecting revenue. Mexico and Credibility revert to the default position so commonly taken by States: they argue that Claimants should be compensated for no more than a portion of the investment costs associated with Lusad and the L1bre enterprise. On that basis, Mexico and Credibility contend that Claimants should be compensated no more than USD $ 70 million. However, in reflexively arguing against the DCF method, Mexico and Credibility avoid engaging at all with the facts showing that Lusad was fully ready to begin collecting revenue and that, but for the unlawful suspension of the Concession, Lusad would have launched revenue-producing operations by installing the L1bre System in Mexico's taxis pursuant to the government's universal installation mandate. Most importantly, Mexico and Credibility ignore the high degree of confidence with which Lusad's cash flows can be estimated. Mexico and Credibility also disregard without reason the most reliable evidence that exists that shows how the market would value Lusad's rights under the Concession: the Goldman Sachs valuation of October 2018.

39. Mexico and Credibility, however, do proceed to provide observations on the inputs that Secretariat uses in its DCF valuation, with a view to providing "sensitivities." In doing so, Mexico and Credibility take erroneous positions at every turn. This starts with the very first input: the number of registered taxis in Mexico City, which corresponds to the number of taxis that would have had the L1bre System installed but-for Mexico's unlawful conduct. The Concession itself, as well as Mexico's own Declaration of Necessity published in Mexico City's Official Gazette,

[39] **Exhibit C-0079-ENG**, pp. 14–15, 18–20 (Goldman Sachs Report, Pre-Marketing Recap and Potential Next Steps, dated 4 October 2018).

states that Mexico City had 138,000 taxis,[40] and numerous sources, including government sources, support that figure (or a higher one).[41] Ignoring this evidence and in an attempt to drive down the computation of Lusad's foregone cashflows, Mexico contends that the "real" number is much lower. Mexico's position is undermined by a number of documents, including the government's own statistics. Mexico's arguments on the other inputs to Secretariat's DCF valuation are not any more credible. They all lack in substance and evidentiary support, as explained further in this Reply Memorial.

40. Secretariat has closely reviewed and considered all of Mexico and Credibility's observations and does not consider the need to make any further adjustments to its already conservative valuation.

D. Reservation of Rights Arising from Mr. Zayas's Pre-Trial Detention

41. Claimants note that, as a consequence of Mexico's actions, this Reply Memorial is being filed without the support and without further witness testimony from Claimants' fact witness and representative Mr. Zayas, which has prejudiced Claimants' ability to fully present their case.

42. As explained in his witness statement submitted with Claimants' Claim Memorial, Mr. Zayas was involved from the outset in building Claimants' business in Mexico.[42] It is evident from his witness statement and the Claim Memorial that he is of great importance to Claimants' case. Mexico has also made Mr. Zayas a central part of its defense, naming him more than 250 times in its Counter-Memorial and accusing him of a litany of wrongful acts.

43. Since December 2021, months before Mexico submitted its Counter-Memorial, Mr. Zayas has been held in pre-trial detention at a prison in Mexico, the *Reclusorio Sur*. Claimants maintain that he is being held there on trumped up charges that are being prosecuted in retaliation for Mr. Zayas's participation in the present arbitration.[43] Concerned about how Mr. Zayas's pre-trial detention would affect the procedural integrity of these proceedings, Claimants sought from the Tribunal provisional measures relating to Mr. Zayas's pre-trial detention. In Procedural Order No. 3, the Tribunal ordered that Mexico was "to take all appropriate steps to ensure that Mr. Eduardo Zayas Dueñas' freedom of movement is not unduly restricted and that he will be able to mee with counsel and render testimony not only in conditions similar to the ones he would have normally experienced, but without any fear that may affect his free testimony."[44] In Procedural

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40 **Exhibit C-0005-SPA** p. 14 (Necessity Declaration issued by Semovi, dated 30 May 2016) ("*En la Ciudad de México existe un importante número de taxis ilegales, adicionales a los registrados. De 1989 a 2015 el número de taxis concesionados oficialmente que operan en la Ciudad de México creció de 55.000 a 138.000*.").

41 *See infra*, Section V.B.2.a.

42 Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021 ¶ 6.

43 Claimants' Application for Provisional Measures, 17 March 2022, ¶¶ 41–63.

44 Procedural Order No. 3, ¶ 156(b).

Order No. 7, the Tribunal "not without some hesitation" credited Mexico's "assurances . . . that it is willing to provide the Claimants with reasonable opportunities to meet with Mr. Zayas."[45]

44. As explained at the procedural hearing held on 25 October 2022, despite Claimants' counsel's best efforts to meet with Mr. Zayas at the *Reclusorio Sur* on 4 October 2022, Mexico failed to comply with Procedural Order Nos. 3 and 7. In particular, Mexico failed to provide Claimants or Mr. Zayas with "conditions similar to the ones [Mr. Zayas] would have normally experienced" for purposes of meeting with counsel.[46] Moreover, as Claimants explained at the 25 October 2022 hearing and as had previously been reported to the Tribunal by letter on 7 October 2022, Mr. Zayas has been the subject of threats to his physical integrity.[47] When concerns over his well-being were reported to the Tribunal, he was then confronted at the prison a few days later, on 11 October 2022, without his attorney present and forced to sign a declaration regarding his well-being. Claimants immediately brought the matter to the Tribunal's attention that same day, but only received a copy of the declaration from Mexico weeks later (and after the 25 October 2022 procedural hearing). It is scribbled on a blank piece of paper and screams of impropriety.[48] The two-sentence, hand-written declaration is addressed to "who it may concern" and states that Mr. Zayas has not had any threats against his physical integrity, directly contradicting what he reported to Claimants' counsel when they met at the *Reclusorio Sur*, and what Claimants' counsel then reported to the Tribunal, the week before:[49]

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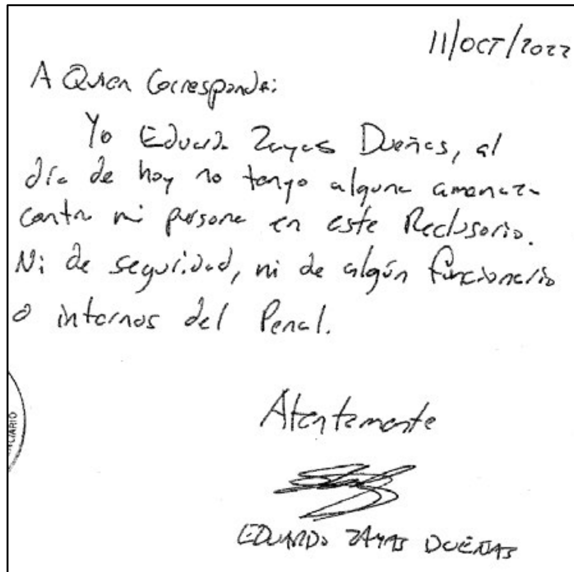
[45] Procedural Order No. 7, ¶ 33.

[46] *See, e.g.*, Procedural Hearing of 25 October 2022, Draft Transcript, 17:4–23:4.

[47] Claimants' Letter to the Tribunal, 7 October 2022 ("During our meeting, Mr. Zayas made a number of additional concerning statements regarding his treatment and ability to speak freely . . . . Mr. Zayas also shared that he recently received threats against his physical integrity"); Procedural Hearing of 25 October 2022, Draft Transcript, 22:14-21 ("And during the conversation that I had with Mr. Zayas while I was there, he confirmed that he did not feel safe, and he confirmed that he had recently received a threat. And what was the threat? That someone was going to find him and that he was going to be doused with boiling hot water and sugar, apparently something that happens with some degree of frequency for prisoners that are less than cooperative.").

[48] Procedural Hearing of 25 October 2022, Draft Transcript, 22:22–23:16; **Exhibit C-0304-SPA** p. 2 (Communication from the *Encargado del Despacho De La Dirreccion Del Reclusorio Preventivo Varonil Sur* dated 31 October 2022, enclosing signed handwritten declaration dated 11 October 2022 from Mr. Zayas).

[49] **Exhibit C-0304-SPA** p. 2 (Communication from the *Encargado del Despacho De La Dirreccion Del Reclusorio Preventivo Varonil Sur* dated 31 October 2022, enclosing signed handwritten declaration dated 11 October 2022 from Mr. Zayas).



11/OCT/2022

A Quien Corresponda:

Yo Eduardo Zayas Dueñas, al día de hoy no tengo alguna amenaza contra mi persona en este Reclusorio. Ni de seguridad, ni de algún funcionario o internos del Penal.

Atentamente

EDUARDO ZAYAS DUEÑAS

45. It is inconceivable that Mr. Zayas decided, of his own volition, to scribble the two-sentence declaration on a blank piece of paper and provide it to a prison representative at the *Reclusorio Sur*. Its mere existence makes clear that Mr. Zayas is not free from threats to his person as he participates as a witness in the present proceedings.

46. Based on the circumstances described above, Claimants submitted a renewed request for the Tribunal to order provisional measures relating to Mr. Zayas's pre-trial detention.[50] Since the ruling on Claimants' request is pending, Claimants reserve the right to seek the Tribunal's permission to supplement this Reply Memorial with additional fact witness testimony and accompanying documentary evidence if and when Claimants are provided appropriate access to Mr. Zayas. Given Mexico's obstruction of Claimants' access to Mr. Zayas, Claimants also ask that the Tribunal make negative inferences against Mexico, crediting Mr. Zayas's first declaration in its entirety and disregarding all of Mexico's allegations regarding Mr. Zayas in its Counter-Memorial. Claimants reserve all rights regarding relief they have sought or may seek in connection with access to Mr. Zayas and his ongoing pre-trial detention and the conditions to which he is being subjected at the *Reclusorio Sur*.

E. The Remaining Structure of This Reply Memorial

47. The remainder of this Reply Memorial is structed as follows. In Section II, Claimants' address the relevant factual background to the dispute, and addresses Mexico's factual contentions. In Section III, Claimants explain why Mexico's jurisdictional objections are unmeritorious and can be dismissed summarily. In Section IV, Claimants address why Mexico's conduct amounts to a breach of NAFTA and addresses Mexico's legal arguments. In Section V, Claimants set out their response to Mexico's arguments on damages. Section VI contains Claimants' Request for Relief.

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[50] Procedural Hearing of 25 October 2022, Draft Transcript, 24:10–22; Claimants' Presentation dated 25 October 2022, *Motion for Reconsideration of Procedural Order No. 3 and No. 7*, slide 24.

48. This Reply Memorial is accompanied by the Second Witness Statement of Santiago León Aveleyra, the Witness Statement of Eduardo Herrera de Juana (Lusad's Manager of Corporate Affairs), the Witness Statement of Agustín Muñana Zúñiga (former Semovi Legal Director), the Second Expert Report of Howard Rosen of Secretariat, the Expert Report of Marco Antonio de la Peña Sánchez (on issues of Mexican law), and the Expert Report of Joshua Mitchell (on Lusad's L1bre application source code). This Reply Memorial is also accompanied by fact exhibits C-0157 to C-0315 and legal authorities CL-0146 to CL-0208.[51]

II. COMMENTS ON THE FACTUAL BACKGROUND

49. Claimants laid out in their Claim Memorial the stark facts of Mexico's unlawful conduct. In May 2018, approximately two years after awarding a Concession to Lusad following a public Declaration of Necessity process, after Lusad had expended tens of millions of dollars performing its obligations under the Concession, and immediately after announcing the start of the mandatory installation period, Mexico temporarily suspended the Concession for the pendency of the ongoing mayoral elections in Mexico City.[52] Later that year, in October 2018, weeks before the new mayoral administration was to take office, Mexico made the suspension permanent due to the "political change" brought about by the election of the new administration. Rather than compensating Lusad, Mexico instead endeavored to "undo" the Concession and harass and intimidate Claimants' representatives.[53]

50. Mexico's defense lacks direction, revealing its struggle to keep its story straight in the face of incontrovertible facts. Mexico alternates between denying the existence of the Concession, acknowledging its existence but challenging its validity, arguing the Concession was modified after the fact, accusing Lusad of failing to comply with the Concession, claiming the Concession was never suspended and is in fact still in force, and arguing the Concession was set aside by Mexican courts. In short, Mexico has flung all possible defenses at the wall in the hope that one will stick.

51. Aside from being internally contradictory, each of Mexico's defenses is also controverted by the plain facts and documentary evidence. There can be no real dispute that the Concession was validly issued and repeatedly recognized by Mexico, that Lusad complied with all conditions of the Concession, and that Mexico suspended the Concession in 2018 for unlawful and politically motivated reasons. Below, Claimants focus on these key facts misrepresented or

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[51] Claimants reserve all rights in connection with their Renewed Emergency Motion for Access to Eduardo Zayas and their Motion to Compel, both of which remain pending as of the date of this filing. To the extent that the Tribunal grants relief in connection with either motion, Claimants reserve their right to supplement this submission accordingly, including with an additional witness statement from Mr. Zayas and any accompanying new factual evidence.

[52] **Exhibit C-0018-SPA** (Oficio No. DGSTPI-965-2018 from Semovi announcing suspension of the Concession, dated 30 May 2018); **Exhibit C-0226-SPA** (Original version of Oficio No. DGSTPI-965-2018 from Semovi announcing suspension of the Concession, dated 30 May 2018).

[53] **Exhibit C-0019-SPA** (Oficio No. DGSTPI-1943-2018 from Semovi announcing indefinite suspension of the Concession, dated 28 October 2018); **Exhibit C-0227-SPA** (Original version of Oficio No. DGSTPI-1943-2018 from Semovi announcing indefinite suspension of the Concession, dated 28 October 2018).

overlooked by Mexico in its Counter-Memorial, which are proved by the contemporaneous documents and the consistent testimony of every witness with actual knowledge of the events.

52. This Section is organized as follows. Subsection A addresses the circumstances surrounding Semovi's granting of the Concession to Lusad. Subsection B addresses Lusad's compliance with the conditions of the Concession and delivery of the L1bre System. Subsection C addresses the circumstances surrounding Mexico's unlawful suspension of the Concession. Subsection D addresses documents upon which Mexico relies that are of suspect provenance. Finally, Subsection E addresses Mexico's attempts to slander and retaliate against Claimants' witnesses.

A. The Concession Was Validly Issued, and Mexico Repeatedly Recognized Its Legality and Binding Nature

53. There can be no credible dispute that an exclusive Concession was awarded to Lusad in June 2016,[54] that this Concession was amended in early 2017[55] and repeatedly recognized by Mexico, and that this Concession was understood to be final, valid, and binding. Mexico's attempt to cast doubt on these facts rests on apparently falsified documents and ignores the mountain of evidence in which Mexico repeatedly and publicly recognized the Concession's validity.

1. The Concession Was Awarded Through a Legal and Transparent Declaration of Necessity Process

54. The Concession was awarded pursuant to a Declaration of Necessity process that was carried out in the open, inviting public commentary and competing bids.[56] It is bizarre, then, to see Mexico argue in its Counter-Memorial that the Concession's validity is clouded by its award process, which Semovi itself predetermined in consultation with its legal advisors.

55. As Claimants described in their Claim Memorial, the initiation of the Declaration of Necessity process was preceded by months of consultation between Lusad's representatives and Semovi officials.[57] During these meetings, Lusad's representatives pitched their proposal, and were able to learn more about the government's needs in the taxi sector as well as the potential legal and economic basis for a proposed public-private partnership.

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[54] **Exhibit C-0053-SPA** (Concession Agreement without amendment, dated 17 June 2016).

[55] **Exhibit C-0007-SPA** (Amended Concession Agreement, as reissued on 21 March 2017).

[56] Claim Memorial, ¶¶ 40 *et seq. See also* **Exhibit C-0005-SPA** (Necessity Declaration issued by Semovi, dated 30 May 2016).

[57] Claim Memorial, ¶¶ 40 *et seq*. *See also* **Exhibit C-0038-SPA** (Oficio No. SEMOVI/OSSM/137-2016 from Semovi confirming interest in the Taxis Llbre project, dated 20 April 2015); Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶¶ 11–19, 23–26; First Witness Statement of Santiago León Aveleyra, dated 14 September 2021,¶ 12.

56. Mexico insinuates in its Counter-Memorial that these meetings were somehow inappropriate or impermissible,[58] yet it cites no authority that prohibits meetings between government employees and representatives of the private sector. As Mr. León explains in his second witness statement, open dialogue between government officials and the private businesses they regulate is an essential aspect of good governance, such meetings are abundantly common in Mexico, particularly in sectors (such as transportation) in which public-private partnerships proliferate.[59] This dialogue is legally permissible, and the government is even required to engage in it under Mexican law, as Claimants' Mexican law expert, Marco Antonio de la Peña Sánchez of the law firm of Cuatrecasas ("Mr. de la Peña") explains.[60]

57. It is also worth recalling that the initial discussions between Lusad and Semovi weighed the possibility of signing a direct, revocable contract between the two parties, outside of any public procurement procedure.[61] Direct-award contracts are of course perfectly permissible under Mexican law, as confirmed in the expert report of Mr. de la Peña, entirely negating Mexico's argument that there was anything wrongful (because of a purported lack of transparency or competition) about the pre-Concession discussions between Semovi and a potential private sector partner as a matter of Mexican law.[62]

58. The discussions between Lusad's lawyers, on the one hand, and Semovi's lawyers, on the other, ultimately led in a different direction.[63] Rather than signing a direct-award contract, Semovi and Lusad decided instead to subject Lusad's proposal to the Declaration of Necessity process, which would allow Semovi to award Lusad a government concession for a public service after opening the proposal up to competing bids.[64]

59. The fact that Semovi and Lusad decided to pursue this public Declaration of Necessity process did not, contrary to what Mexico and its legal expert suggest, suddenly change the ground rules regarding consultations between government officials and private sector representatives. If anything, the strict requirements of the Declaration of Necessity process made such consultations all the more critical.[65]

60. Mr. de la Peña explains in its report that Mexican law strongly encourages the development of public-private partnerships, including through the 2012 Public Private

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58 Counter-Memorial, ¶ 3.

59 Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶ 9.

60 Expert Report of Marco Antonio de la Peña (Cuatrecasas), dated 4 November 2022, ¶ 7.13.

61 Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶¶ 16, 22–23; Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 30.

62 Expert Report of Marco Antonio de la Peña (Cuatrecasas), dated 4 November 2022 ¶¶ 9.4–913; Counter-Memorial, ¶ 8.

63 Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶¶ 16, 22–24.

64 Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 24; Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 31.

65 Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶¶ 8, 10.

Partnerships Law and equivalent laws at the federal district level, such as Article 85 Bis of the Patrimonial Regime Law. As Mr. de la Peña explains, the Declaration of Necessity process requires that a private party requesting a Concession provide detailed economic plans on the feasibility of its proposal and the effects (or lack thereof) on public funds. It also requires that the private party provide the proposed text of the concession it seeks.[66]

61. A private party could not prepare these materials in a vacuum without conducting consultations with the relevant authorities to understand the public need for private investment, the scope of existing government services, the technical and financial considerations that a proposed private investment would need to consider, and the legal and regulatory expectations of the Declaration of Necessity process. There is in fact a duty on the part of the government administration to provide information and guidance to private parties on the legal or technical requirements for such projects, as Mr. de la Peña explains in its report.[67]

62. This is precisely what occurred in early 2016, when Lusad's representatives met repeatedly with Semovi officials to discuss their proposal, to better understand Semovi's needs in the private transportation sector, and to understand the legal regulatory requirements that would have to be met in order for a project as ambitious as the replacement of all taximeters in Mexico City to be approved through a government procurement process.[68] Mr. de la Peña confirms in its report that such discussions are perfectly permissible under Mexican law.[69]

63. Mexico goes to great lengths in its Counter-Memorial to suggest that these entirely permissible communications somehow irreparably tainted the Concession that Mexico City ultimately awarded to Lusad, incorrectly characterizing these early meetings as inappropriate and inconsistent with the Declaration of Necessity process.[70] Mr. de la Peña's report confirms that no law prohibits Mexican government officials from meeting with a potential concessionaire prior to the execution of Declaration of Necessity, negating Mexico's arguments as a matter of law.[71]

64. Mexico then contends, without any evidence, that these pre-Concession meetings might have given Lusad an opportunity to corrupt public officials, citing an anonymous letter that alleged, without proof, that Mr. León "carried out unlawful acts to obtain a concession from the former Minister of Semovi."[72] Notably, Mexico's insinuation and slander of Mr. León is not substantiated by any evidence on the record of such "possible illegal activities," and Mr. León confirms that neither he, nor anyone else at Lusad, has never been questioned by any authority for

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66 Expert Report of Marco Antonio de la Peña (Cuatrecasas), dated 4 November 2022, ¶¶ 7.5, 8.4.

67 Expert Report of Marco Antonio de la Peña (Cuatrecasas), dated 4 November 2022, ¶ 7.4.

68 Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶¶ 22–23; Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 31.

69 Expert Report of Marco Antonio de la Peña (Cuatrecasas), dated 4 November 2022, ¶ 7.13.

70 Counter-Memorial, ¶ 8.

71 Expert Report of Marco Antonio de la Peña (Cuatrecasas), dated 4 November 2022, ¶ 7.13.

72 Counter-Memorial, ¶¶ 3, 30

suspicion of such conduct.[73] To Claimants' knowledge, not a single charge has been brought by the Mexican authorities against any representative of Claimants or Lusad in connection with any alleged wrongdoing in the procurement of the Concession.

65. Mexico's slander of Mr. León is obviously baseless; as demonstrated below, it would have been impossible for the award of the Concession to have been influenced by the corruption of a government official, as this process was carried out in public, validated by dozens of lawyers, and voted on by independently appointed officials from multiple areas of Mexico City's government. Mexico's grave and irresponsible allegations that any corruption could have entered this process would be surprising, were it not for Mexico's demonstrated eagerness to taint the Concession by false accusations of criminal conduct, as has been seen throughout its pleadings and in its pursuit of unrelated criminal charges (concerning matters that have nothing to do with the procurement of the Concession) against Mr. Zayas and Mr. León.

66. These reckless allegations have, however, apparently been sufficient to motivate Mr. León Tovar, the former Secretary of Mobility, to sign a bizarre witness statement denying that he had any contact with Lusad prior to the award of the Concession.[74] Mr. León Tovar's contact with Lusad's representatives were not only entirely permissible, but also well documented. He memorialized those contacts himself in a signed letter dated 20 April 2015 summarizing the discussions he had recently held with Mr. Zayas.[75] Mexico's attempt to cast this letter—which constitutes proof in his own hand of the very interactions Mr. León Tovar now denies—as a possible forgery falls flat. Not only was a copy of the letter given to Lusad at the time, but Semovi itself vouched for the document's authenticity and confirmed that it was present within the Ministry's files.[76] Claimants have located a copy of this letter that bears not only Mr. León Tovar's signature, but also Semovi's official stamp, and which was certified as an authentic version of the document contained in Semovi's files by Rubén Alberto García Cuevas, the *Director General Jurídico y de Regulación* of Semovi. Mr. García's certification of the letter was, in turn, presented for Apostille and certified and stamped by the *Consejería Jurídica y de Servicios Legales* of Mexico City, which included the document in its electronic register of apostilled documents so that third parties could verify its authenticity.[77] The legal effect of these government certifications and Apostilles under Mexican and international law, including Mexico's adherence to the 1961 Apostille Convention, moots Mexico's challenge to this document's authenticity as a matter of law.[78]

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73 Second Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 13.

74 Witness Statement of Rufino H. León Tovar, ¶¶ 5–6.

75 Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 12; **Exhibit C-0038-SPA** (Oficio No. SEMOVI/OSSM/137-2016 from Semovi confirming interest in the Taxis Llbre project, dated 20 April 2015).

76 Counter-Memorial, ¶ 192.

77 **Exhibit C-0228-SPA** (Certified and Apostilled version of Oficio No. SEMOVI/OSSM/137-2016 from Semovi confirming interest in the Taxis Llbre project (C-0038-SPA), dated 20 April 2015).

78 **Exhibit CL-0202-ENG** (Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (HCCH 1961 Apostille Convention), dated 5 October 1961); **Exhibit CL-0203-**

67. This example is typical of the alarms Mexico has raised regarding the authenticity of documents in this arbitration, which reveal in reality nothing more than a panicked attempt by Mexico to conceal documents confirming the validity of the Concession. In its Counter-Memorial, Mexico states that this exhibit (*i.e.*, the 20 April 2015 letter bearing Mr. León Tovar's name), which was **signed, recognized, certified, and recorded** by at least three levels of Mexican government authorities, "raises the most concerns for Respondent given its notorious potential forgery," then suggesting that it was both falsified and erroneously notarized by a certified notary public in the United States.[79] Given Mexico's willingness to conceal and deny the authenticity of documents certified as authentic by the very sovereign authorities Mexico has made responsible for such verifications, it is evident that Mexico's "authenticity" challenges are not made in good faith or with any manner of due diligence behind them.

68. It is equally true that the Declaration of Necessity process, which Mexico asserts in its Counter-Memorial Claimants undertook without sufficient due diligence,[80] was closely overseen by teams of Mexican government lawyers and public servants tasked with the very job of ensuring that the procedure was carried out fairly, transparently, and in accordance with all applicable legal provisions. The reality is that the entire Concession award process, starting from the earliest discussions between Mr. León Tovar and culminating in the award of the Concession, was always closely overseen by Semovi's legal counsel, lawyers from Mexico City, as well as outside independent advisors, who were fully aware of Lusad's involvement in the process and who thoroughly vetted the means by which the public bidding process was carried out.

69. Agustin Muñana, who was the Deputy Legal Director of Semovi starting in August 2015 and who has personal knowledge of Semovi's interactions with Lusad in the Declaration of Necessity process, confirms these facts in his witness statement, describing the efforts he and other public officials undertook to ensure that the award of the Concession was transparent and carried out in accordance with all of the applicable provisions of Mexican law.[81]

70. In his capacity as legal director, Mr. Muñana reviewed drafts of the Declaration of Necessity issued for the replacement of taximeters, as well as other legal documents related to the Concession.[82] Mr. Muñana confirms that he and other government officials at Semovi were fully aware of the fact that Lusad had requested the issuance of the Declaration of Necessity, and personally verified that the conditions for issuing such a Declaration of Necessity were met: namely, that the relevant governmental authorities had the capacity to issue the contemplated Concession for a fundamental aspect of taxi transportation service. Mr. Muñana also testifies that he consulted on multiple occasions with the Office of Legal Advisor of Mexico City (*Consejería*

ENG (Mexico's Responses to Questionnaire of April 2016 from the Special Commission on the practical operation on the Apostille Convention, dated 2016) (designating the website listed in the Apostille affixed to Mr. León Tovar's 20 April 2015 letter as an e-registry for verifying apostilles within the Federal District of Mexico).

79 Counter-Memorial, ¶ 196.

80 Counter-Memorial, ¶ 435.

81 Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶¶ 2, 10.

82 Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶ 6.

Jurídica y de Servicios Legales de la CDMX), a team of legal advisors external to Semovi, to confirm that the proposed concession met all legal requirements.[83] Mr. Muñana recalls that, contrary to what Mexico now argues in this arbitration, "*SEMOVI siempre entendió que estaba dentro de las facultades del Secretario emitir la Declaratoria de Necesidad y otorgar la concesión correspondiente*."[84]

71. The evidence confirms that, consistent with Mr. Muñana's testimony, Semovi fully vetted the legality and merit of Lusad's Request for Concession dated 22 April 2016.[85] On 27 April 2016, the *Director General Jurídico y de Regulación* of Semovi, Mr. García, sent Lusad a request for additional information in connection with its proposal, which Lusad responded to the following day.[86] Mr. García then corresponded with the Secretary of the Economy's *Subsecretaría de Competitividad y Normatividad* to confirm whether Lusad's prototype digital taximeter was indeed technically capable of replacing the existing Mexico City taximeters and performing the same functions; the Secretary of the Economy confirmed on 4 May 2016 that Lusad's prototype taximeter was indeed capable of such functions and had been authorized by that entity.[87]

72. On 10 May 2016, Semovi then admitted Lusad's proposal and formally opened proceedings to evaluate the Request for Concession.[88] After evaluating Lusad's proposal, but before publishing the Declaration of Necessity, Semovi sent the draft Declaration of Necessity to the Office of Legal Advisor of Mexico City (*Consejería Jurídica y de Servicios Legales de la CDMX*) on 27 May 2016.[89] The director of that independent entity, Claudia Luengas, also studied the proposal and the draft text, and confirmed that it complied with all legal requirements.[90]

73. After receiving confirmation from multiple legal advisors both within and external to Semovi that the proposal was unobjectionable under the relevant laws, on 25 May 2016, Semovi presented a draft of the Declaration of Necessity before the Evaluation and Analysis Committee of the Permanent Cabinet of the New Urban Order and Sustainable Development (*Comité de Evaluación y Analisis del Gabinete Permanente de Nuevo Orden Urbano y Desarrollo*

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83 Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶ 10.

84 Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶ 7.

85 **Exhibit C-0004-SPA** (Request for Concession to Semovi, dated 22 April 2016).

86 **Exhibit C-0158-SPA**, p. 1 (Opening of Concession Proceeding No. 001, by the Director General of Transportation, dated 10 May 2016) (part of the Semovi file produced by Mexico).

87 **Exhibit C-0158-SPA**, p. 1 (Opening of Concession Proceeding No. 001, by the Director General of Transportation, dated 10 May 2016) (part of the Semovi file produced by Mexico).

88 **Exhibit C-0158-SPA** (Opening of Concession Proceeding No. 001, by the Director General of Transportation, dated 10 May 2016)(part of the Semovi file produced by Mexico).

89 **Exhibit C-0159-SPA** (Communication from Semovi to Consejería Jurídica y de Servicios Legales del D.F., dated 27 May 2016) (part of the Semovi file produced by Mexico).

90 Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶ 10.

*Sustentabl*e) (the "Evaluation Committee").[91] This independent committee was composed of representatives of Mexico City's Semovi, Secretary of Housing and Urban Development (*Secretario de Desarrollo Urbano y Vivienda*), Secretary of the Environment (*Secretario de Medio Ambiente*), and Secretary of Public Works (*Secretario de Obras y Servicios*), each of whom chose their own representatives. After analyzing the proposed Declaration of Necessity, the Evaluation Committee voted to approve its publication.[92] None of these officials questioned Semovi's powers or authority to do so, or otherwise raised concerns about the legality of the process in which they took part.

74. Throughout this time, neither Semovi, Semovi's lawyers, the Secretary of the Economy, Mexico City's legal advisors, or any of the different government secretaries represented on the Evaluation Committee raised any doubts about the capacity of Semovi to issue such a Declaration of Necessity or the process by which Semovi had consulted with Lusad, as proposed concessionaire, to develop its business proposal and the proposed legal terms. Mexico's unsubstantiated suggestion that Mr. León could have inappropriately "convinced" the Minister of Semovi to award Lusad a Concession in a closed-door meeting is laughable in light of the sheer number of government servants and legal advisors who closely and independently scrutinized the process before signing off on Semovi's authority to publish the Declaration of Necessity.

75. If that were not enough, however, to confirm the validity of the Concession and the integrity of the process by which it was issued, the independent committees that evaluated and awarded the Declaration of Necessity and the Concession subjected the proposed concession to additional scrutiny by considering competing bids from the private sector.

76. Eight private companies submitted proposals in response to the Declaration of Necessity, each one of which was accompanied by technical details as to how the submitting company proposed to implement a solution for the replacement of Mexico City's existing taximeters with digital devices.[93]

77. Mexico's objection to the length of time established for receiving such proposals is of no moment. The time period was set by Semovi itself and approved by the Evaluation Committee. A longer bidding period was not required here given that the Concession could be directly adjudicated, as Mr. de la Peña confirms in his report.[94] Mr. Munaña confirms that the three-day period set for this Declaration of Necessity was consistent with the customary range set

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91 **Exhibit C-0046-SPA** (Minutes of the session of the Evaluation Committee, authorizing the issuance of the Declaration of Necessity, dated 25 May 2016).

92 **Exhibit C-0046-SPA** (Minutes of the session of the Evaluation Committee, authorizing the issuance of the Declaration of Necessity, dated 25 May 2016); **Exhibit C-0172-SPA** (Minutes of the Evaluation Committee, part of the Semovi file produced by Mexico, dated 25 May 2016); Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶ 11.

93 Claim Memorial, ¶ 75; **Exhibit C-0006-SPA**, pp.7–8 (Minutes of the Adjudication Committee for Concessions for Public Transport, dated 17 June 2016)

94 Expert Report of Marco Antonio de la Peña (Cuatrecasas), dated 4 November 2022, ¶¶ 9.1, 9.11.

by Semovi, and that he and other legal advisors who studied the Declaration of Necessity raised no concerns about the length of time established for receiving bids.[95]

78. The seven other bids (besides Lusad's) that the government received in response to the Declaration of Necessity are further confirmation that the period established by Semovi and the Evaluation Committee was sufficient to allow for public comment and robust competition. These proposals were not mere expressions of interest, but contained detailed specifications of the proposed taximeter equipment, intended methods of processing payments, descriptions of how the proposed ride-hailing application would operate, and identifications of intended partners for cellular service and other essential technical features.[96] Reflecting on his own understanding of the extensive efforts required to prepare such a technical proposal, Mr. León explains that these proposals could not have been thrown together just in three days, but would have required significant work and preparation, suggesting that market participants were aware of the impending opportunity to introduce technology into Mexico City's taxi fleet.[97] This work presumably began as soon as the Secretary of Semovi announced his intention to modernize Mexico's taxi system in a press interview months before.[98]

79. Mr. Muñana was in charge of verifying whether the eight competing proposals Semovi received were properly submitted and confirming whether each one complied with the applicable legal requirements.[99] Two bids were excluded on this basis, and the remainder were evaluated on their merits by the Director General of Legal and Regulatory Affairs (*Dirección General Jurídica y de Regulación*), as well as the Director General of Information and Communication Systems (*Dirección de Sistemas de Información y Comunicación*).[100] Both of these agencies prepared written opinions describing their evaluations of each bid.[101]

80. The final decision on which bid to select rested with the Adjudication Committee. This committee was not controlled by any one person, but was made up of the heads of different Mexico City government ministries (or their independently chosen representatives), including the

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95 Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶ 13.

96 Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶ 18; **Exhibit C-0160-SPA** (Report from Director General Jurídico y de Regulación on bids received by Semovi, dated 6 June 2016) (part of the Semovi file produced by Mexico); **Exhibit C-0161-SPA** (Report from Director de Sistemas de Información y Comunicación on bids received by Semovi, dated 6 June 2016) (part of the Semovi file produced by Mexico).

97 Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶ 18.

98 **Exhibit C-0067-SPA** (Press article "*Le crea GDF su Uber' a taxistas*," dated 23 November 2015).

99 Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶ 14.

100 Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶ 14.

101 **Exhibit C-0160-SPA** (Report from Director General Jurídico y de Regulación on bids received by Semovi, dated 6 June 2016) (part of the Semovi file produced by Mexico); **Exhibit C-0161-SPA** (Report from Director de Sistemas de Información y Comunicación on bids received by Semovi, dated 6 June 2016) (part of the Semovi file produced by Mexico).

Secretary of Economic Development, the Secretary of the Environment, and Semovi.[102] Ensuring proper legal oversight, Semovi's internal comptroller was also present at the Adjudication Committee meeting as a representative of the general comptroller of Mexico City, and Semovi's legal director, Mr. Muñana, participated as an observer.[103] The comptroller of Semovi validated the process undertaken by the Adjudication Committee, raising no concerns and noting no irregularity or deviation from applicable laws.[104]

81. The minutes of the Adjudication Committee meeting on 17 June 2016 reflect that each of its members was given a full copy of each of the bids received in response to the Declaration of Necessity, including annexes.[105] The committee members also received a copy of the opinions prepared by each authority that independently evaluated the bids' technical and legal sufficiency.[106] While Mexico now claims in its Counter-Memorial, years after the fact, that Lusad lacked sufficient experience in technology or transportation at the time that it was awarded the Concession,[107] that was not the determination made by the Adjudication Committee or the individuals who evaluated the different competing bids at the time. Rather, as reflected in the opinions prepared by the Director General of Legal and Regulatory Affairs (*Dirección General Jurídica y de Regulación*), as well as the Director General of Information and Communication Systems (*Dirección de Sistemas de Información y Comunicación*), as well as in the minutes of meeting of the Adjudication Committee that decided to select Lusad instead of the other bidders, Lusad was considered to have a more advanced prototype and a sounder technical model than the other competitors. Lusad was accordingly selected as the concessionaire by the Adjudication Committee.[108]

2. The Adjudication Committee Awarded Lusad a Firm Concession, Not a Draft

82. In its Counter-Memorial, Mexico does not dispute that the independent Adjudication Committee met, weighed the merits of each of the bids submitted, and determined that Lusad should be selected as the concessionaire. Mexico submits a strange qualification to these facts, however, arguing that notwithstanding the very purpose of the Declaration of Necessity published by Semovi and the mandate of the Adjudication Committee, this committee decided not

[102] **Exhibit C-0051-SPA** (Minutes of the session of the Adjudication Committee, awarding the concession to Lusad, dated 17 June 2016).

[103] Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶ 16.

[104] Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022,¶ 16; **Exhibit C-0051-SPA** (Minutes of the session of the Adjudication Committee, awarding the concession to Lusad, dated 17 June 2016).

[105] **Exhibit C-0051-SPA** (Minutes of the session of the Adjudication Committee, awarding the concession to Lusad, dated 17 June 2016).

[106] Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶ 15.

[107] Counter-Memorial, ¶ 27.

[108] **Exhibit C-0051-SPA** (Minutes of the session of the Adjudication Committee, awarding the concession to Lusad, dated 17 June 2016); **Exhibit C-0006-SPA** (Minutes of the Adjudication Committee for Concessions for Public Transport, dated 17 June 2016).

to award a concession to Lusad, but only to award a "Draft" concession, with a definitive title to be awarded only upon Lusad's satisfactory completion with further tests and other requirements.[109] This argument implies that after the publication of a Declaration of Necessity declaring Semovi's determination that "***[s]e declara la necesidad de otorgar una concesión*** *para la sustitución, instalación y mantenimiento de taxímetros*,"[110] the Adjudication Committee convened for this very purpose decided to disregard its mandate and assign itself a different task not contemplated by Mexican law.

83. In support of this assertion, Mexico submits a competing document that it claims is the Adjudication Committee minutes.[111] A similar, although not identical, document was produced by Mexico in the arbitration as part of Semovi's files related to the Concession.[112] While these competing documents correctly reflect that the Adjudication Committee was convened to "*otorgar la concesión*," or award the Concession, they suggest that the Adjudication Committee, entirely disregarded its mission, deciding instead to award merely a "*proyecto de concesión*," or draft concession, with a definitive concession only to be awarded after Lusad's fulfillment of additional conditions.

84. This document is immediately suspect. Not only would such a decision have been contrary to the Adjudication Committee's stated purpose and agenda for that day, but the only page reflecting this supposed rogue decision bears signs that it was not part of the original file. Every other page in the document matches precisely the version of the Adjudication Committee's minutes in Claimants' files, referring to a "*Procedimiento de* ***otorgamiento*** *de la Concesión*" and the Committee's "*Aprobación* ***para Otorgar*** *la Concesión*"; those pages also contain a consistent footer in the bottom-right corner containing Semovi's logo, address, and website. On page 13, however—the only page of the minutes that refers to a decision to award a "*proyecto de concesión*," or draft concession—the footer is different, and does not match the remainder of the document. This discrepancy suggests that the page referring to a draft concession was added after the fact and was not part of the original document.

[109] Counter-Memorial, ¶ 97.

[110] **Exhibit C-0005-SPA** (Necessity Declaration issued by Semovi, dated 30 May 2016).

[111] **Exhibit R-0068-SPA** (Version of the Adjudication Committee Minutes submitted by Mexico in the arbitration, dated 17 June 2016).

[112] **Exhibit C-0162-SPA** (So-called Amended Adjudication Committee Minutes produced by Mexico from Semovi's files, dated 17 June 2016).

<table>
<tr>
<td>R-0068-SPA, p. 9 (<u>MATCHES</u> Claimants' version, states the Adjudication Committee is to "OTORGAR LA CONCESIÓN," contains consistent footer matching remainder of document)</td>
<td>R-0068-SPA, p. 13 (<u>DIFFERENT</u> from Lusad's version, refers to a draft concession subject to additional trials, contains different footer from remainder of document)</td>
</tr>
<tr>
<td>COMITÉ ADJUDICADOR DE CONCESIONES PARA
LA PRESTACIÓN DEL SERVICIO PÚBLICO LOCAL DE TRANSPORTE
DE PASAJEROS O DE CARGA
SESIÓN "TAXÍMETROS" 2016 | CIUDAD DE MÉXICO A 17 DE JUNIO DE 2016.

3.- APROBACIÓN PARA OTORGAR LA CONCESIÓN PARA LA SUSTITUCIÓN, INSTALACIÓN Y MANTENIMIENTO DE TAXIMETROS DEL SERVICIO DE TRANSPORTE DE PASAJEROS PÚBLICO INDIVIDUAL TAXI DE LA CIUDAD DE MÉXICO, CON SISTEMA DE GEOLOCALIZACIÓN SATELITAL; ASÍ COMO DEL DISEÑO, OPERACIÓN Y EXPLOTACIÓN DE LA APLICACIÓN DE CONTRATACIÓN REMOTA DEL TAXI, EN LA CIUDAD DE MÉXICO.

PROCEDIMIENTO DE OTORGAMIENTO DE LA CONCESIÓN
En el presente punto se anexa el Procedimiento de Otorgamiento de la Concesión, mismo que se encuentras sustentado en las publicaciones en la Gaceta Oficial del Distrito Federal, que a continuación se detalla:

a. ACUERDO POR EL QUE SE ESTABLECE EL COMITÉ ADJUDICADOR DE CONCESIONES PARA LA PRESTACIÓN DEL SERVICIO PÚBLICO LOCAL DE TRANSPORTE DE PASAJEROS O DE CARGA, PUBLICADO EN LA GACETA OFICIAL DEL DISTRITO FEDERAL EL 15 DE FEBRERO DE 2000. (ANEXO UNO)

b. PUBLICACIÓN DE LA DECLARATORIA DE NECESIDAD DE LA CONCESIÓN PARA LA SUSTITUCIÓN, INSTALACIÓN Y MANTENIMIENTO DE TAXIMETROS DEL SERVICIO DE TRANSPORTE DE PASAJEROS PÚBLICO INDIVIDUAL TAXI DE LA CIUDAD DE MÉXICO, CON SISTEMA DE GEOLOCALIZACIÓN SATELITAL; ASÍ COMO DEL DISEÑO, OPERACIÓN Y EXPLOTACIÓN DE LA APLICACIÓN DE CONTRATACIÓN REMOTA DEL TAXI, EN LA CIUDAD DE MÉXICO, PUBLICADA EN LA GACETA OFICIAL DE LA CIUDAD DE MÉXICO EL DÍA TREINTA DE MAYO DE DOS MIL DIECISÉIS Y ANEXO TÉCNICO. (ANEXO DOS)

c. ANÁLISIS Y DISCUSIÓN SOBRE LA MEJOR PROPUESTA DE LAS SIGUIENTES:
<table>
<tr><td>Solicitante</td><td>Empresa</td><td>Fecha de Ingreso</td><td>Observaciones</td></tr>
<tr><td>Jeanny Itzel Cimas León Representante Legal</td><td>Q' Tecnología y Servicios aplicados a Logística Quetzal S.A de C.V</td><td>01 de junio de 2016</td><td>Contiene 70 hojas entre escrito y anexos</td></tr>
<tr><td>Ing. Raúl Solis Ramirez Representante Legal</td><td>Compactax, S.A de C.V</td><td>01 de junio de 2016</td><td>Contiene 50 hojas entre escrito y anexos</td></tr>
<tr><td>Sergio Walberto del Valle y Gutiérrez</td><td>Alsesm Asesores en Sistemas Avanzados, S.A de C.V</td><td>02 de junio de 2016</td><td>Escrito en engargolado y anexos, contienes un CD</td></tr>
<tr><td>José Rogelio Ángeles Mondragón Representante Legal</td><td>Alianza de Sitios de Taxis en Terminales de Autobuses Foráneas A.C.</td><td>02 de junio de 2016</td><td>Contiene 49 hojas, que incluye escrito y anexos.</td></tr>
</table>
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Secretaría de Movilidad</td>
<td>COMITÉ ADJUDICADOR DE CONCESIONES PARA
LA PRESTACIÓN DEL SERVICIO PÚBLICO LOCAL DE TRANSPORTE
DE PASAJEROS O DE CARGA
SESIÓN "TAXÍMETROS" 2016 | CIUDAD DE MÉXICO A 17 DE JUNIO DE 2016.

ACUERDO COMITÉ ADJUDICADOR DE CONCESIONES/003/SESION "TAXÍMETROS" /2016
Este Comité Adjudicador de Concesiones para la Prestación del Servicio Público Local de Transporte de Pasajeros o de Carga, con fundamento en el artículo 3, 12 fracción XXII, 92 de la Ley de Movilidad, 15 fracción IX, 31 de la Ley Orgánica de la Administración Pública del Distrito Federal; y Artículo Primero y Tercero Fracción I del "Acuerdo por el que se establece el Comité Adjudicador de Concesiones para la prestación del Servicio Público Local de Transporte de Pasajeros o de Carga", publicado en la Gaceta Oficial del Distrito Federal el 15 de febrero de 2000"; considera que la empresa Servicios Digitales Lusad, S. de R.L satisface la Necesidad para la Sustitución, Instalación y Mantenimiento de Taximetros del Servicio de Transporte de Pasajeros Público Individual (Taxi) de la Ciudad de México, con Sistema de geolocalización satelital; así como del diseño, operación y explotación de la aplicación de contratación remota del Taxi, en la Ciudad de México, publicada en la Gaceta Oficial de la Ciudad de México número 82 del día 30 de mayo de 2016, adicionalmente que presentó su proyecto con los requerimientos establecidos en el artículo 85 Bis de la Ley del Régimen Patrimonial y del Servicio Público, por lo que este Comité autoriza otorgar a la empresa "SERVICIOS DIGITALES LUSAD SOCIEDAD DE RESPONSABILIDAD LIMITADA DE CAPITAL VARIABLE.", LA CONCESIÓN PARA LA SUSTITUCIÓN, INSTALACIÓN Y MANTENIMIENTO DE TAXIMETROS DEL SERVICIO DE TRANSPORTE DE PASAJEROS PÚBLICO INDIVIDUAL TAXI DE LA CIUDAD DE MÉXICO, CON SISTEMA DE GEOLOCALIZACIÓN SATELITAL; ASÍ COMO DEL DISEÑO, OPERACIÓN Y EXPLOTACIÓN DE LA APLICACIÓN DE CONTRATACIÓN REMOTA DEL TAXI, EN LA CIUDAD DE MÉXICO, con derecho a la explotación de la aplicación para la contratación remota del servicio desarrollada por la empresa y se declara procedente una contraprestación por dicho servicio por un importe de 12 pesos por viaje realizado, únicamente cuando el usuario haga uso del servicio mediante la contratación remota, utilizando la aplicación diseñada al efecto; aclarando que en todos los demás casos, la tarifa será cobrada de conformidad al monto autorizado por el Jefe de Gobierno en términos de la Ley de Movilidad del Distrito Federal, siendo causa de revocación inmediata el hecho de que el concesionario pretenda cobrar o cobre cualquier importe adicional a lo aquí aprobado. Por otro lado, tomando en cuenta que la Secretaría necesita garantizar las mejores condiciones a la Administración Pública del Distrito Federal, hoy Ciudad de México y que se debe asegurar el óptimo funcionamiento de los equipos y su conectividad previo a la implementación de un nuevo sistema de medición en el parque vehicular del Servicio de Transporte Público Individual de Pasajeros (taxímetros digitales), se concede un periodo de prueba por el término que establezca la Secretaría y una vez superadas las pruebas y demás requerimientos que le formule dicha dependencia, se suscribirá el Título Definitivo. Mientras tanto, elabórase el proyecto de concesión y dígase al interesado que la expedición y suscripción del Título Definitivo se hará siempre y cuando cumpla satisfactoriamente las pruebas y demás requerimientos que aseguren la mejoría del servicio de transporte público individual de pasajeros "taxi".

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85. Mr. Muñana's testimony confirms that the document relied on by Mexico is inauthentic, as he states that he was there in the room when the Adjudication Committee met to deliberate, and is confident the Adjudication Committee awarded Lusad a definitive concession and not simply a draft.[113] Mr. Muñana—the only witness in this arbitration who was actually present at the Adjudication Committee meeting on 17 June 2016—studied the different versions of the minutes presented by each party, and concludes that the version submitted by Claimants is consistent with his own recollection, while the version presented by Mexico is unfamiliar to him and inexplicable.[114]

86. The altered minutes of the Adjudication Committee that Mexico relies on are also inexplicable in light of the other documents Mexico has produced from government files. In fact, the Concession file Mexico produced in document production from the *Secretaría de Desarrollo* contains a copy of the Adjudication Committee minutes that is consistent with the versions

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[113] Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶¶ 21–25.

[114] Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶¶ 24, 26.

exhibited by Lusad, referring to the decision to "*otorgar la concesión*" and not to any draft concession subject to the fulfillment of additional conditions.[115] In short, all documentary and witness evidence suggests that Mexico has based its legal position on a doctored version of the Adjudication Committee minutes.

87. Following the decision of the Adjudication Committee, Semovi and Lusad signed a Concession dated 17 June 2016—not a draft, but a definitive document.[116] Mr. Zayas appeared personally at Semovi to sign this Concession, signing an appearance that reflected the true decision of the Adjudication Committee, that is, to grant Lusad a definitive Concession and not merely a draft.[117] Notably, although Mexico claimed in its Counter-Memorial that it had identified "inconsistencies" in this document, going so far as to accuse Claimants of fraud or forgery in connection this file,[118] Mexico later produced the archives of Semovi to Claimants in document production, which contain **an identical copy of the very document Mexico accused Claimants of forging**.

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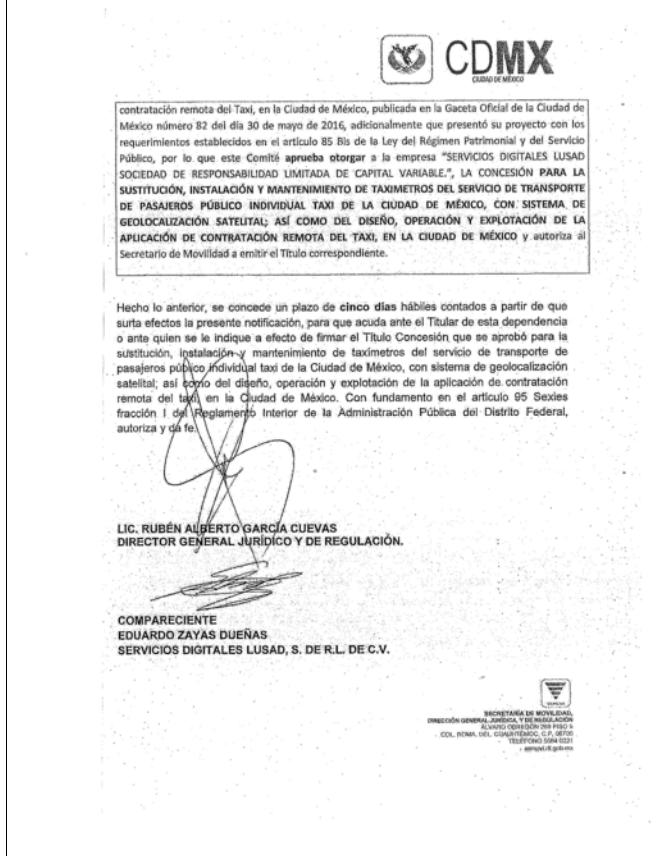
[115] **Exhibit C-0229-SPA** (Minutes of the Adjudication Committee contained in the files of the Secretaría de Desarrollo, as produced by Mexico, dated 17 June 2016).

[116] **Exhibit C-0053-SPA** (Concession Agreement without amendment, dated 17 June 2016).

[117] **Exhibit C-0051-SPA** (Minutes of the session of the Adjudication Committee, awarding the concession to Lusad, dated 7 June 2016) (including appearance of Eduardo Zayas to receive the Concession on 6 July 2016).

[118] Counter-Memorial, ¶¶ 98, 197.

Exhibit C-0051 (which Mexico claimed was nonexistent in Semovi's files, and accused Claimants of forging)	**Exhibit C-0168-SPA** (Expediente from Semovi as produced by Mexico)



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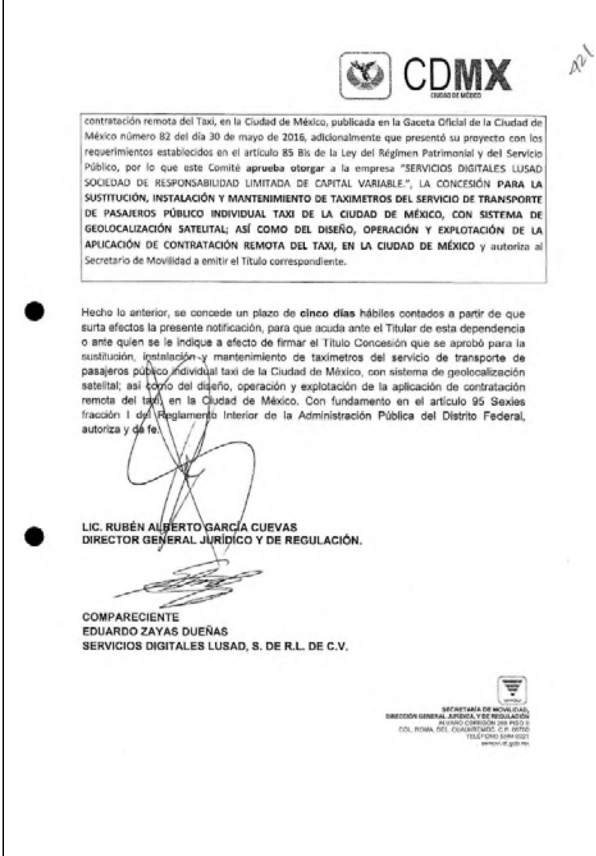
contratación remota del Taxi, en la Ciudad de México, publicada en la Gaceta Oficial de la Ciudad de México número 82 del día 30 de mayo de 2016, adicionalmente que presentó su proyecto con los requerimientos establecidos en el artículo 85 Bis de la Ley del Régimen Patrimonial y del Servicio Público, por lo que este Comité **aprueba otorgar** a la empresa "SERVICIOS DIGITALES LUSAD SOCIEDAD DE RESPONSABILIDAD LIMITADA DE CAPITAL VARIABLE.", LA CONCESIÓN **PARA LA SUSTITUCIÓN, INSTALACIÓN Y MANTENIMIENTO DE TAXIMETROS DEL SERVICIO DE TRANSPORTE DE PASAJEROS PÚBLICO INDIVIDUAL TAXI DE LA CIUDAD DE MÉXICO, CON SISTEMA DE GEOLOCALIZACIÓN SATELITAL; ASÍ COMO DEL DISEÑO, OPERACIÓN Y EXPLOTACIÓN DE LA APLICACIÓN DE CONTRATACIÓN REMOTA DEL TAXI, EN LA CIUDAD DE MÉXICO** y autoriza al Secretario de Movilidad a emitir el Título correspondiente.

Hecho lo anterior, se concede un plazo de **cinco días** hábiles contados a partir de que surta efectos la presente notificación, para que acuda ante el Titular de esta dependencia o ante quien se le indique a efecto de firmar el Título Concesión que se aprobó para la sustitución, instalación y mantenimiento de taximetros del servicio de transporte de pasajeros público individual taxi de la Ciudad de México, con sistema de geolocalización satelital; así como del diseño, operación y explotación de la aplicación de contratación remota del taxi, en la Ciudad de México. Con fundamento en el artículo 95 Sexies fracción I del Reglamento Interior de la Administración Pública del Distrito Federal, autoriza y da fe.

LIC. RUBÉN ALBERTO GARCÍA CUEVAS
DIRECTOR GENERAL JURÍDICO Y DE REGULACIÓN.

COMPARECIENTE
EDUARDO ZAYAS DUEÑAS
SERVICIOS DIGITALES LUSAD, S. DE R.L. DE C.V.

SECRETARÍA DE MOVILIDAD
DIRECCIÓN GENERAL JURÍDICA Y DE REGULACIÓN



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88. Plainly, Mexico's attempt to deny the existence of the Concession—based solely on its assertions that it cannot find the relevant documents in Semovi's files—cannot be trusted.[119] The document above from Semovi's own records is but one of many that directly contradicts Mexico's assertion that "no concession was concluded in June 2016"[120] and consequently "Lusad did not have a definitive concession in 2016."[121]

89. The extensive, contemporaneous paper trail of documents confirming the issuance of a definitive concession title in June 2016 includes:

- **Exhibit C-0230-SPA** (Oficio No. DO-1458-2016 from Semovi to Lusad, dated 11 July 2016), in which Alejandra Balandrán Olmedo, the Operational Director of Semovi's *Dirección General de Servicio de Transporte Público Individual de*

[119] Counter-Memorial, ¶¶ 99, 197.

[120] Counter-Memorial, ¶ 453.

[121] Counter-Memorial, ¶ 436.

Pasajeros, referred to the Concession title ("*Titulo de Concesión*") granted to Lusad and to the Semovi's supervision of that Concession;

- **Exhibit C-0231-SPA** (Oficio No. DGJR-1400-2016 from Semovi to Lusad, dated 20 July 2016), in which Rubén Alberto García Cuevas, Semovi's Director General Jurídico y de Regulación, referred to the "*Concesión para la sustitución, instalación y mantenimiento de taxímetros del Servicio de Transporte de Pasajeros Público Individual (taxi) de la Ciudad de México, con sistema de geolocalización satelital; así como del diseño, operación y explotación de la aplicación de contratación remota del Taxi, en la Ciudad de México, **<u>otorgada a su representada</u>***" and asked for a progress report on Lusad's implementations of its obligations ("*obligaciones a su cargo*") under that Concession;

- **Exhibit C-0232-SPA** (Oficio No. DESIC-0209-2016 from Semovi to Lusad, dated 27 July 2016), in which Horacio Sanchez Tinoco, the Executive Director of Semovi's Department of Information Systems and Communication, referred to the "*Concesión para la sustitución, instalación y mantenimiento de taxímetros del Servicio de Transporte de Pasajeros Público Individual (taxi) de la Ciudad de México, con sistema de geolocalización satelital; así como del diseño, operación y explotación de la aplicación de contratación remota del Taxi, en la Ciudad de México, **<u>otorgada a su representada</u>***" and asked for technical documents to confirm the correct functioning of the L1bre mobile application and Lusad's compliance with the Concession's requirements:

  > "*En virtud de lo anterior, y en mi carácter de revisor del área informática y de desarrollo de software, en relación a la funcionabilidad de la tableta que se habilitó para la autorización como taxímetro, y de la app móvil de Usuario, **<u>acorde al a concesión que se le otorgó</u>**, es que requiero se entregue en vía de informe los siguientes requerimientos que se enlistan de manera enunciativa más no limitativa, quedando facultada esta dependencia a requerir anta documentación o pruebas se requieran, a efecto de acreditar el correcto funcionamiento y cumplimiento con las obligaciones contraídas en **<u>la concesión administrativa otorgada</u>***."

- **Exhibit C-0233-SPA** (Oficio No. DO-3220-2016 from Semovi to Lusad, dated 26 September 2016), in which Alejandra Balandrán Olmedo of Semovi referred to the "*Concesión Administrativa SEMOVI/DGSTPI/001/2016 **<u>otorgada a la empresa</u>***," and asked Lusad to provide information to Toyota so that the new hybrid taxis manufactured by Toyota and being introduced in Mexico City could be installed with the L1bre System;

- **Exhibit C-0234-SPA** (Oficio No. DESIC-0181-2016 from Semovi to Lusad, dated 28 September 2016), in which Horacio Sanchez Tinoco convened a working group meeting in Semovi's offices to discuss and coordinate the implementation of Lusad's obligations deriving from the Concession ("*en el cumplimiento de las*

obligaciones derivadas de la Concesión Administratión Administrativa SM/DM/DGSTPI/001/2016"); and

- **Exhibit C-0235-SPA** (Oficio No. DO-010-2017 from Semovi to Lusad, dated 3 January 2017), in which Alejandra Balandrán Olmedo referred to the Concession "***otorgada*** *por la Secretaría de Movilidad a Servicios Digitales Lusad, S. de R.L. de C.V.*" and asked Lusad to provide specific information relating to the vehicles in which the L1bre System was installed during the trial period.

90. Mexico has also had the opportunity to inspect in the context of the document production exercise in this arbitration many of these original files relating to the Concession, even if they have now "disappeared," as Mexico alleges, from Semovi's files.

91. In another failed cover-up, Semovi has repeatedly convened transparency committees for the purpose of classifying documents relating to the Concession as "reserved" so that they would be exempt from the requirements of public disclosure. But each of these documents in fact only confirms that the Concession was awarded in 2016 and was present in Semovi's files at the time, contrary to what Mexico now represents to this Tribunal.

92. In February 2018, after an individual requested a copy of the Concession, Semovi attempted to "reserve" or classify the document as exempt from public disclosure in light of the OIC audit, but nonetheless gave a copy of the "Concesión SEMOVI/DGSTPI/001/2016" to the *Dirección de Asuntos Jurídicos del Instituto de Transparencia* of Mexico City—entirely contradicting Mexico's attempt to argue that the Concession was not awarded in 2016 or was unknown to Semovi and absent from Semovi's files when Mr. Lajous first arrived at the ministry in December 2018.[122] The National Institute of Transparency overruled Semovi's objections, noting that the ongoing OIC audit would not affect the fact that **the Concession had already been awarded to Lusad and was present in Semovi's files**.[123]

122 **Exhibit C-0236-SPA** (Oficio DGST-PI-430-2018 from Semovi to the Instituto Nacional de Transparencia, Accesso a la Información y Protección de Datos Personales, dated 26 February 2018); Witness Statement of Andrés Lajous Laoeza, ¶ 19.

123 **Exhibit C-0237-SPA** (Expediente RAA 0020/18 from the Instituto Nacional de Transparencia, Accesso a la Información y Protección de Datos Personales, regarding public access to the Concession, dated 2018), p. 37; **Exhibit C-0238-SPA** (Minutes of the Pleno del Instituto Nacional de Transparencia, Acceso a la Información y Protección de Datos Personales, dated 30 May 2018), pp. 34 *et seq.*

Expediente: RAA 0020/18
Sujeto Obligado: Secretaria de Movilidad
Folio de la solicitud: 0106500019818
Organismo garante local que emitió la resolución: Instituto de Transparencia, Acceso a la Información Pública, Protección de Datos Personales y Rendición de Cuentas de la Ciudad de México.
Comisionado Ponente: Carlos Alberto Bonnin Erales

De esta manera, no es posible identificar una vinculación directa entre la verificación hecha por el Órgano Interno de Control y el título de concesión el cual, ya fue otorgado por el sujeto obligado y obra en sus archivos.

la causal de clasificación prevista por la fracción II, del artículo 183 de la Ley de Transparencia, Acceso a la Información Pública y Rendición de Cuentas de la Ciudad de México.

Por otra parte, no se omite señalar que la Ley de Transparencia, Acceso a la Información Pública y Rendición de Cuentas de la Ciudad de México, establece lo siguiente:

> *"Artículo 121. Los sujetos obligados, deberán mantener impresa para consulta directa de los particulares, difundir y mantener actualizada a través de los respectivos medios electrónicos, de sus sitios de internet y de la Plataforma Nacional de Transparencia, la información, por lo menos, de los temas, documentos y políticas siguientes según les corresponda:*
> *[...]*
>
> *XXIX. Las concesiones, contratos, convenios, permisos, licencias o autorizaciones otorgados, especificando los titulares de aquéllos, debiendo publicarse su objeto, nombre o razón social del titular, vigencia, tipo, términos, condiciones, monto y modificaciones, así como si el procedimiento involucra el aprovechamiento de bienes, servicios y/o recursos públicos;*
> *[...]"*

De conformidad con lo dispuesto en el artículo en cita, se tiene que los sujetos obligados, deberán mantener impresa para consulta directa de los particulares, difundir y mantener actualizada a través de los respectivos medios electrónicos de sus sitios de internet y de la Plataforma Nacional de Transparencia, entre otras, las concesiones otorgadas a personas físicas o morales, debiendo especificar, su objeto, nombre o razón social del titular, vigencia, tipo, términos, condiciones, monto y modificaciones.

93. In 2019, Semovi again attempted to "reserve" documents related to the Concession from public disclosure. These documents refer to the "*Concessión SEMOVI/DGSTPI/001/2016 otorgada a Servicios Digitales Lusad, S de R.L. de C.V.*", once again reflecting Semovi's recognition that a definitive Concession had in fact been issued to Lusad in 2016.[124]

94. Mr. Lajous, one of Mexico's fact witnesses who joined Semovi for the first time in December 2018, claims that he and others at Semovi were unaware of the existence of an " alleged"

[124] **Exhibit C-0239-SPA** (Minutes of the Comité de Transparencia, dated 15 November 2019); **Exhibit C-0240-SPA** (Minutes of the Comité de Transparencia, 13 June 2019).

Concession granted to Lusad in 2016, until he spoke to Lusad's representatives shortly after his arrival in office.[125] This assertions is impossible to credit, given Mayor Sheinbaum's campaign statements about the Concession and the fact that, as Mexico acknowledges, the Concession's existence was widely reported in the media in 2016.[126]

95. As recalled by all of the relevant fact witnesses who, unlike Mr. Lajous, had knowledge of the dealings between Lusad and Semovi at the time, it was always Lusad's understanding, as well as Semovi's, that a definitive Concession had been issued in June 2016. Mr. Muñana, Semovi's legal director at the time, states in no uncertain terms that "*Resulto que la decisión del Comité fue otorgar directamente el Título de Concesión, no un borrador o proyecto. . . . Es decir, tras la aprobación del Comité, Lusad contaba con una Concesión en firme*."[127]

96. Mr. León confirms in his testimony that the suggestion in Mexico's Counter-Memorial, of a draft or test Concession, is in contradiction to what Lusad understood at the time. "It was my understanding that the Concession came into effect right after it was executed, and was not subject to further conditions. It was not a 'draft' agreement, as I see Mexico is now arguing. The Concession was signed shortly after the Adjudication Committee's decision, and both Semovi and Lusad immediately started working on implementing it." Mr. León also confirms that Semovi shared this understanding, as reflected through their conduct, explaining that "In our dealings with Semovi, they repeatedly recognized this Concession, performed according to it, and expected Lusad to do the same."[128]

97. Finally, Mr. Herrera, who interacted with Semovi officials on a weekly basis from the award of the Concession in June 2016 up until its suspension, confirms that Semovi officials at all times treated the Concession as a done deal, and made clear that they expected all of its terms to be binding from the time it was signed in June 2016 onwards. Mr. Herrera states that "*Los funcionarios de SEMOVI tampoco manifestaron que la instalación y evaluación satisfactoria de los taxímetros en el periodo de prueba era una condición para que Lusad obtuviera el título definitivo de la Concesión. Todo lo contrario, dado que Lusad ya contaba con la Concesión,*

[125] Witness Statement of Andrés Lajous Laoeza, ¶¶ 18–19.

[126] Counter-Memorial, ¶ 135 ("*Muchas personas en la Ciudad de México dieron cuenta en las redes sociales, del rechazo que dicho proyecto tenía y no solo a partir del 17 de abril de 2018 sino desde el 2016 cuando se dio a conocer este proyecto*."); **Exhibit C-0241-SPA** (Press article, "*Se Implementarán taxímetros con GPS y app móvil en Ciudad de México, pero los taxistas protestan*," Xataka, dated 28 July 2016); **Exhibit C-0242-SPA** (Press article, "*Sheinbaum presenta la primera etapa de la aplicación digital 'Mi Taxi'*," Proceso, dated 5 September 2019) ("*Desde antes de que tomara posesión como jefa de gobierno, Claudia Sheinbaum manifestó su desacuerdo con la operación de la tecnología que manejaba la empresa L1BRE, **a la que en 2016 el gobierno de Miguel Ángel Mancera, mediante la Semovi, entonces dirigida por Héctor Serrano, le dio una concesión de 10 años**. El propósito: desarrollar una aplicación digital y dar tablets a miles de taxistas para competir con Uber y Cabify*.").

[127] Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶ 21.

[128] Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶¶ 22–23.

SEMOVI tenía la intención que se pusiera en marcha en su totalidad la Concesión, y así lo comunicaron en múltiples ocasiones."[129]

98. Notably, none of Mexico's fact witnesses has personal knowledge of the Evaluation Committee or Adjudication Committee decisions or of the signature of the Concession. Mexico's inability to muster any fact witness to support its "draft concession" argument, beyond an official who did not take office until December 2018 and simply testifies that he could not find the original signed version in a drawer, speaks volumes as to the weakness of its arguments.

3. Mexico Validated and Recognized the Concession's Amendment in January 2017

99. As described in detail in Claimants' Claim Memorial, the Concession was later amended and reissued in January 2017, with amendments that included, *inter alia*, giving Lusad the right to charge passengers a recuperation fee of up to MXN $12 on each ride, regardless of how the taxi was hailed.[130] This amendment was permissible under Mexico's Patrimonial Regime Law as well as under the terms of the original Concession, as Mr. de la Peña explains in his report.[131] Claimants have put forward ample evidence of this amendment through the statements of multiple fact witnesses,[132] communications between Lusad and Semovi requesting the amendment of the Concession,[133] the minutes of the Extraordinary Internal Committee that approved the amendment,[134] the appearance of Mr. Zayas to sign the Amended Concession,[135] the signed amendment itself,[136] the signed, reissued Concession incorporating the amendment,[137] and the official letter from the Secretary of Semovi reissuing the Amended Concession.[138]

100. Mexico's attempt to ignore the existence of the Amended Concession, by contrast, lacks any factual support.[139] Once again, these arguments amount to no more than a bare assertion

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129 Witness Statement of Eduardo Herrera de Juana, dated 25 October 2022, ¶ 11.

130 Claim Memorial, ¶¶ 86 *et seq.*

131 Expert Report of Marco Antonio de la Peña (Cuatrecasas), dated 4 November 2022, ¶¶ 11.9–11.10.

132 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 43–46; Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶¶ 45–49.

133 **Exhibit C-0243-SPA** (Oficio No. DNRM-1943-2016 from Semovi to Lusad, dated 6 September 2016)

134 **Exhibit C-0054-SPA** (Minutes of Extraordinary Internal Committee Session, approving amendment to add Recuperation Fee, dated 3 October 2016).

135 **Exhibit C-0055-SPA** (Appearance of Eduardo Zayas before Semovi to receive Concession Agreement as amended, dated 15 March 2017).

136 **Exhibit C-0008-SPA** (Amendment to Concession agreement to incorporate the Recuperation Fee, dated 9 January 2017).

137 **Exhibit C-0007-SPA** (Amended Concession Agreement, as reissued on 21 March 2017).

138 **Exhibit C-0010-SPA** (Oficio No. DNRM-0626-2017 from Semovi reissuing Concession agreement, dated 21 March 2017).

139 Counter-Memorial, ¶¶ 99, 197.

that Semovi "does not have in its records" a copy of the amended Concession, accompanied by a notable lack of any fact witness testimony whatsoever from persons with personal knowledge of the relevant time period.[140]

101. Mexico's reliance on the alleged inadequacy of its own record-keeping is negated, however, by its admission that it did locate in Semovi's files a copy of Exhibit C-0010-SPA, the 21 March 2017 communication in which Mr. Rosendo Gómez reissued the Concession to Lusad as amended.[141] Mexico's response to this news was not to admit the obvious fact that the Concession did exist and had been amended, but [redacted] .[142] The Respondent's decision to treat persons with first-hand knowledge of the facts as criminal defendants rather than as fact witnesses leaves it, unsurprisingly, with no adequate record to support its arguments in this arbitration.

102. Claimants' witnesses, on the other hand, do have first-hand knowledge of the Concession's amendment, and have universally confirmed its existence and Mexico's recognition of its validity.

103. Mr. León testified that the amendment was important to Lusad's business model, that it offered certainty both for investors at Semovi, and that "Semovi understood the need for this fee structure and agreed to [Lusad's] request" to amend the Concession.[143]

104. Mr. Muñana, for his part, is able to definitively rebut Mexico's assertions that Semovi does not have a valid copy of the Amended Concession in its records. He states "*considero que las alegaciones sobre la supuesta inexistencia del título de Concesión y su modificación, son inconsistentes con los hechos que yo mismo viví. Yo estuve presente cuando el Comité Adjudicador otorgó el Título de Concesión, [y] vi con mis proprios ojos el original del Título de la Concesión que incluía la cuota de recuperación, el cual estaba debidamente firmado.*"[144]

105. As Mr. Muñana's testimony lays out, Mexico's attempts to bury this document or prosecute it out of existence have, in fact, only further confirmed that Mexico has known all along that this document existed and would bind it. For example, Mexico relies on a 2017 audit carried out by Semovi's Internal Comptroller at the request of then-Secretary Hector Serrano, claiming that this audit "*sostiene que el Proyecto de Concesión no fue entregado ni en 2016 ni tampoco en 2017.*"[145]

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[140] Counter-Memorial, ¶¶ 99, 197.

[141] Counter-Memorial, ¶ 197.

[142] Counter-Memorial, ¶ 251 *et seq.*; **Exhibit C-0133-SPA** pp. 8, 15–16, 52–54 (Excerpts from Case No. [redacted], opened 22 November 2018) [redacted].

[143] Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 44; Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶ 46.

[144] Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶ 39.

[145] Counter-Memorial, ¶ 111.

106. Contradicting this, Mr. Muñana explains that during the first meeting he had with Mr. Serrano and other Semovi officials in August 2017 to discuss the audit, the original Concession was produced and presented to all in attendance. Mr. Muñana testifies that:

> "*el Sr. Rosendo Gómez, Director de Normatividad, nos mostró una carpeta blanca que tenía el Título de Concesión original, que inclusive estaba marcada con la letra "O" señalando que era la versión original. . . . Al revisar la versión de la Concesión entregada por el Sr. Gómez, me percaté que ésta incluía una cuota de recuperación por mantenimiento lo cual yo no recordaba que estuviera incluida en el título otorgado en el 2016. El Sr. Gómez nos informa que la cuota de recuperación había sido debidamente aprobada por la oficina del Secretario. En ese sentido, puedo confirmar que el ejemplar de la Concesión que recibí en agosto de 2017, y que reposaba en las oficinas de SEMOVI, es la Concesión con modificaciones*."[146]

107. Mr. Muñana was responsible for gathering documents for the Internal Comptroller, and further confirms that the Internal Comptroller was given a copy of the Amended Concession containing the recuperation fee.[147] The report of the Internal Comptroller, dated 8 November 2017, references the recuperation fee in its conclusions and quotes directly from this provision of the Amended Concession, reflecting that this was indeed the version of the Concession the Internal Comptroller considered in its analysis.[148]

108. Semovi's recognition of the Amended Concession that included the recuperation fee was also manifested by its actions as it worked with Lusad to implement the Concession. As Mr. Herrera confirms, Semovi officials acted in full knowledge that the Concession had been amended in January 2017 to include the collection of a recuperation fee by Lusad.[149] Semovi never questioned Lusad's right to charge this fee, and discussed on many occasions that it would be charged to users, not drivers.[150] As discussed in more detail below, Semovi officials even saw the calculation of this recuperation fee charge first-hand during test-runs of the system in March 2018. Although they gave comments at the time on the way this charge was displayed on the tablets at the final summary screen, these officials never disputed that the Amended Concession entitled Lusad to charge this fee.[151]

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[146] Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶¶ 28–29.

[147] Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶¶ 30, 36.

[148] **Exhibit R-0076-SPA** (Conclusions of OIC Audit, 8 November 2017); **Exhibit C-0163-SPA** (Recommendations of the OIC, dated 8 November 2017) (as contained in Semovi's files produced by Mexico).

[149] Witness Statement of Eduardo Herrera de Juana, dated 25 October, 2022, ¶ 5.

[150] Witness Statement of Eduardo Herrera de Juana, dated 25 October, 2022, ¶ 33–36.

[151] Witness Statement of Eduardo Herrera de Juana, dated 25 October, 2022, ¶ 32.

109. This factual evidence leaves no room for doubt that Semovi validly awarded the Concession to Lusad in 2016, amended it in 2017, and recognized at all times that it had done so.

4. Mexico's Repeated Confirmation of the Concession's Continued Validity

110. Having failed to rebut the evidence that the Concession was validly issued and amended, and was recognized by Semovi, Mexico tries a second challenge: that Mexican courts later ruled the Concession to be illegal, preventing Semovi from upholding it.[152] This argument misrepresents the facts of the amparo cases, applicable Mexican law, and Semovi's repeated representations disavowing such a position throughout the term of the Concession.

111. Amparo actions, which allow citizens to challenge the constitutionality of government actions before the courts, are exceedingly common under Mexican law. As a government action that affected a large of people, the Concession was unsurprisingly the subject of multiple amparo lawsuits, as Mexico notes in its Counter-Memorial. Ironically, however, Mexico fails to consider that the existence of amparo lawsuits challenging the issuance of the Concession as far back as June 2016 further contradicts its attempts to argue that the Concession was not issued that year.[153]

112. The majority of these amparo lawsuits have been rejected by Mexican courts.[154] Mr. Muñana, who became the Director de Normatividad at Semovi in June 2018 and was responsible, in that role, for preparing Semovi's responses to amparo actions involving the Concession and the Mandatory Installation Notice, recalls that Semovi received favorable judgments in at least 13 amparo actions.[155] Mexico's representation in its Counter-Memorial that different amparo proceedings have resulted in "a uniform determination by the Mexican courts regarding the illegality of the Declaration of Necessity and its consequences, including the granting of the Lusad concession" is a blatant misrepresentation of the facts.[156]

113. Mexico's focus on only three of these amparo cases—only one of which was granted[157]—neither creates a consensus nor threatens the validity and applicability of the Concession. As Mr. de la Peña explains, a key feature of the amparo trial under Mexican law is that any successful challenge applies only to the individual plaintiff, and does not affect the legality

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[152] Counter-Memorial, ¶ 7.

[153] Counter-Memorial, ¶ 205 (noting that the Neotax amparo claim was filed on 20 June 2016); **Exhibit R-0100** (Judgment in Amparo case 1135/2016).

[154] Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶ 56(h); **Exhibit C-0244-SPA** (Final Ruling in Amparo case 373/2016, Auxilar 33/2017, dated 2 May 2017); **Exhibit C-0245-SPA** (Final Ruling in Amparo case 627/2018, dated 13 July 2018); **Exhibit C-0246-SPA** (Final Ruling in Amparo case 633/2018-II, dated 5 November 2018).

[155] Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶¶ 40, 56(h).

[156] Counter-Memorial, ¶ 203.

[157] Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶ 56(h).

of the government act vis-à-vis other parties.[158] The amparo judgments cited by Mexico therefore only apply in the context of those individual parties, and do not affect the broader applicability of the Concession to other drivers or impacted entities. Notably, Lusad was not a party to any of the amparo actions Mexico cites in its Counter-Memorial, with the impact that these cases cannot affect the legitimate legal expectations of Lusad under the Concession and other government acts.[159]

114. This fundamental legal principle has been repeatedly recognized by Semovi in its filings in the amparo cases, including in the Neotax amparo case mentioned in Mexico's Counter-Memorial, in which Semovi confirmed to the court its understanding that the challenge would have legal effect only vis-à-vis the individual plaintiffs, and would not affect the legality or applicability of the Concession in any other sense.[160] Semovi also issued legal opinions to Lusad in April and June 2017, again reflecting this understand and reconfirming Semovi's view that the Concession remained valid and enforceable notwithstanding any amparo.[161] Mexico has attempted in its Counter-Memorial to deny the authenticity of these documents—again, it must be noted, without introducing any testimony from the person whose signature appears on the documents, Mr. Gómez, or from any other person with first-hand knowledge of Semovi's affairs during the 2017 time period.[162] Mr. Muñana, who worked as Semovi's Deputy Legal Director and later as Semovi's advisor in charge of responding to the amparo proceedings, confirms that he has full knowledge of the documents and recalls that they were contained within Semovi's files related to the Concession.[163]

115. Mexico's argument that the amparo proceedings invalidated the Concession are also belied by Semovi's conduct at the time. If, as Mexico argues in its Counter-Memorial, the rulings in a minority of amparo cases prohibited Semovi from allowing the installation of the L1bre System,[164] one would expect that Semovi would have immediately issued public statements to this effect, disavowing any further pursuit of the project. Instead, Semovi told the courts that it would still recognize the Concession as to non-parties, and told Lusad that it still considered the Concession to be valid.[165] Semovi then proceeded to implement the Concession, including by

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158 Expert Report of Marco Antonio de la Peña (Cuatrecasas), dated 4 November 2022, ¶ 15.1.

159 Expert Report of Marco Antonio de la Peña (Cuatrecasas), dated 4 November 2022, ¶¶ 15.12, 15.21.

160 **Exhibit C-0247-SPA** (Filing from Semovi in Amparo Case 1135/2016, dated 26 June 2017); **Exhibit C-0057-SPA** (Oficio No. DNRM-1460-2017 from Semovi confirming the validity of the Concession Agreement, dated 19 June 2017).

161 **Exhibit C-0056-SPA** (Oficio No. DNRM-0673-2017 from SEMOVI confirming the validity of the Concession Agreement, dated 4 April 2017); **Exhibit C-0057-SPA** (Oficio No. DNRM-1460-2017 from Semovi confirming the validity of the Concession Agreement, dated 19 June 2017).

162 Counter-Memorial, ¶ 197.

163 Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶ 56(h).

164 Counter-Memorial, ¶ 234.

165 **Exhibit C-0247-SPA** (Filing from Semovi in Amparo Case 1135/2016, dated 26 June 2017); **Exhibit C-0057-SPA** (Oficio No. DNRM-1460-2017 from Semovi confirming the validity of the Concession Agreement, dated 19 June 2017).

publishing the Mandatory Installation Notice in April 2018 (*i.e.*, after the adverse amparo rulings on which Mexico relies).[166] Plainly, Semovi did not share the view of Mexico's arbitration counsel regarding the amparo's effect.

116. Mexico's attempt to collaterally attack the Concession's validity based on a technical opinion from Cofece, a competition authority, is similarly deficient. The Cofece opinion dates from May 2021, over a two and a half years **after** Semovi had indefinitely suspended the Concession.[167] It thus has no bearing on Semovi's obligations nor on any legitimate expectations that were formed in the years prior based on the government's conduct, as explained below.[168] In any case, the Cofece opinion does not support any of Mexico's misrepresentations of the facts. The Cofece opinion recognized that the existence of "*la concesión para la sustitución, instalación y mantenimiento de taxímetros del servicio de transporte de pasajeros público individual taxi de la Ciudad de México,* ***de junio de 2016***," *i.e.*, the June 2016 Concession that Mexico claims it could not locate, as well as "*la Concesión otorgada a Servicios Lusad* ***en 2017***," *i.e.*, the Amended Concession that Mexico claims was also missing from Semovi's files.[169] In other words, the opinion establishes that Mexico's authenticity challenges are unfounded, since these "missing" documents were evidently available to government authorities as recently as May 2021.

117. The Cofece opinion also contradicts any attempt by Mexico to argue that the Concession is illegal or unenforceable. While Cofece recommended changes to Semovi's processes that "would have been preferable" to better promote competition in the award of public service concessions, these changes were only suggested as a means for improving future bidding processes within the government agency. Notably, Cofece did not conclude that the Concession was issued impermissibly, and it did not order Semovi to suspend or disregard it.[170]

118. Perhaps most tellingly, when Mayor Claudia Sheinbaum and Mr. Lajous announced, in June 2019, their plans to replace Lusad's L1bre System with Mexico's own application, Mi Taxi, they did not advance any of the excuses that Mexico trots out in its Counter-Memorial. Mayor Sheinbaum and Mr. Lajous did not deny knowledge of a Concession granted to Lusad in 2016, did not argue that the Concession was only a draft subject to further approvals, and did not argue that it had been "declared illegal" by Mexican courts. Instead, they voiced their political opposition to the Concession and stated that "*estamos en el proceso legal, trabajando con la Consejería Júridica en términos de la situación de esa concesión*."[171]

119. The evidence in the record firmly establishes in all regards that the Concession was validly issued in June 2016 and amended in January 2017, that Semovi was in possession of these

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166 *See infra,* Section II.C.

167 **Exhibit R-0078-SPA** (Technical Note from Cofece, dated 11 May 2021).

168 *See infra*, Section IV.

169 **Exhibit R-0078-SPA** (Technical Note from Cofece, dated 11 May 2021), fn. 10.

170 **Exhibit R-0078-SPA** (Technical Note from Cofece, dated 11 May 2021), p. 10.

171 **Exhibit C-0248-SPA** (Press article, *Usarán aportaciones de Uber y Didi para la sustitución de taxis antiguos*, Proceso, dated 13 June 2019).

documents and repeatedly recognized their validity, and that Mexico's so-called authenticity challenges are unsubstantiated and contrary to the Respondent's own government records.

B. Lusad Complied with All Conditions of the Concession, and Mexico Recognized That the L1bre System Was Ready to Launch

120. Mexico's third line of defense, and further distortion of the facts, is to argue that Lusad did not comply with the terms of the Concession (the Concession Mexico denied, in its first and second lines of defense, was never really granted or not legally valid).[172] This argument is rebutted in large part by the mountain of evidence already in the record of Lusad's performance of the Concession and Semovi's recognition of the Concession's success.[173] For two years, Semovi and Lusad worked hand-in-hand to implement the Concession, conducting weekly working group meetings, focus groups, and verifying at all steps that the Concession was executed consistent with its terms.[174] Below, Claimants recall the documentary evidence of such compliance, as substantiated by the testimony of Claimants' four fact witnesses, all of whom were intimately involved with the implementation of the Concession by Semovi and Lusad during the 2016 to 2018 period.

121. Mexico's argument also fails because of what is not on the record: Mexico has not put forward a single fact witness who worked at Semovi at any time between June 2016 and October 2018 or who could offer any testimony about the performance (or alleged non-performance) of the Concession during that period. And despite having access to the full documentary record of every government agency at its fingertips, Mexico cannot point to a single notice of breach Semovi sent to Lusad, or a single communication in which Semovi threatened to terminate the Concession for cause, pursuant to the legal procedures that would have applied to such a termination.[175] What Semovi actually said, in its communications suspending the Concession, was that Lusad "*ha cumplido a capabilidad con las obligaciones y derechos que derivan del título que detenta*."[176]

122. Mexico's assertions and distortions regarding the performance of the Concession may be numerous, but the overwhelming weight of the evidence regarding Lusad's compliance with the Concession speaks for itself.

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172 Counter-Memorial, ¶ 151.

173 Claim Memorial, ¶¶ 93 *et seq.*

174 Witness Statement of Eduardo Herrera de Juana, dated 25 October 2022, ¶ 6.

175 Expert Report of Marco Antonio de la Peña (Cuatrecasas), dated 4 November 2022, ¶¶ 16.2–16.5 (explaining that a concession may only be terminated after notice and hearing of formal revocation proceedings).

176 **Exhibit C-0018-SPA** (Oficio No. DGSTPI-965-2018 from Semovi announcing suspension of the Concession, dated 30 May 2018).

1. Lusad Complied with the Concession's Requirements Regarding Insurance and Bond Policies

123. Lusad obtained bond and insurance policies as required by the Concession, which were validated by Semovi. Mexico's arguments to the contrary rely on its attempt to modify the Concession as well as to deny the existence of already-validated documents.[177]

124. Under the original June 2016 Concession, Lusad was to present a bond equivalent to 20% of the value of the contract.[178] Mexico concedes that Lusad submitted a bond exceeding the required amount, issued by Afianzadora Sofimex, S.A., and that Semovi received and validated that bond on 11 August 2016, in confirmation that it was consistent with the Concession's requirements.[179]

125. Semovi amended the Concession on 9 January 2017.[180] The Amended Concession modified the bond requirements, both as to their amount and timing. Under the Amended Concession, Lusad was required to have a 4% bond on file during the first three months of installations, an 8% bond for months four to six, a 12% bond for months seven to nine, a 16% bond for months ten to twelve, and a 20% bond at all times thereafter, once the mandatory installation period had been completed.[181] No bond was required under the Amended Concession before the mandatory installation period began.

126. Consistent with these revised terms, Semovi cancelled the bond presented by Lusad under the Original Concession on 31 January 2017.[182] Although the mandatory installation period never began due to Semovi's disavowal of the Concession in 2018, Lusad had arrangements in place with banks to provide this bond.[183] Mr. Muñana confirms that he and others at Semovi verified Lusad's compliance with the bond requirements under the amended Concession, both at the time of the January 2017 amendment and during the August 2017 audit of the Concession.[184]

127. Both the Original and Amended Concessions required Lusad to maintain an insurance policy prior to the start of full operations, in order to cover any damages to users,

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[177] Counter-Memorial, ¶ 158.

[178] **Exhibit C-0053-SPA** (Concession Agreement without amendment, dated 17 June 2016), Clause 9.1.

[179] Counter-Memorial, ¶ 156; **Exhibit C-0130-SPA** (Communication from Lusad to Semovi proving the issuance of a performance bond from Sofimex, dated 29 July 2016); **Exhibit C-0131-SPA** (Act of Jesús Alberto Roberto Cárdenas, verifying and validating the issuance of the Sofimex performance bond); **Exhibit R-0087-SPA** (Communication from Mr. Zayas to present the Bond Policy 2012179, version submitted by Mexico).

[180] **Exhibit C-0007-SPA** (Amended Concession Agreement, as reissued on 21 March 2017).

[181] **Exhibit C-0007-SPA** (Amended Concession Agreement, as reissued on 21 March 2017), Clause 9.1.

[182] **Exhibit R-0027-SPA** (Oficio No. DNRM-000226-2017 addressed to Sofimex, dated 31 January 2017).

[183] **Exhibit C-0249-SPA** (Communication from AON regarding bond).

[184] Witness Statement of Agustin Muñana Zúñiga, dated 28 September, 2022 ¶¶ 33, 56(d)

pedestrians, drivers, and third parties or their property.[185] These requirement took effect only "*al inicio de operaciones*," *i.e.*, at the start of operations when Lusad's L1bre System was to be installed in the taxis during the mandatory installation period.[186] Lusad obtained the required insurance policy in April 2018, coinciding with the publication of the Mandatory Installation Notice, satisfying its requirements under the Concession.[187]

128. Mexico now argues that the insurance policy was required at the start of the test period rather than at the start of revenue-producing operations.[188] This is not what the Concession says, and Mexico is able to offer no fact witness testimony or documentary evidence to support such an interpretation. Mr. Muñana confirms that Semovi conducted an audit of Lusad's compliance with the Concession requirements in 2017, in which Mr. Muñana personally participated.[189] Unsurprisingly, Semovi's own audit did not raise any concerns regarding Lusad's compliance with insurance requirements, undercutting Mexico's arguments in this regard in its Counter-Memorial.

2. Lusad Complied with All Requirements as to Its Shareholding

129. Mexico next argues that Lusad breached Clause 11.2(d) of the Concession, which required Lusad to maintain the same shareholders and number of shares for three years after the signature of the Concession, unless otherwise authorized by Semovi.[190]

130. Lusad's shareholders are L1bre Holding LLC and L1bre LLC.[191] Mexico's commentary on changes to the shareholding of Espiritu Santo Technologies LLC—changes that Semovi was fully aware of at the time—have no impact on the shareholding requirements of Lusad,

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[185] **Exhibit C-0053-SPA** (Concession Agreement without amendment, dated 17 June 2016), Clause 10.1; **Exhibit C-0007-SPA** (Amended Concession Agreement, as reissued on 21 March 2017), Clause 10.1.

[186] *See* **Exhibit C-0191-SPA** (Oficio No. DNRM-3180-2017 from Semovi to Lusad, dated 20 December 2017) (stating that the "*funciones de operación*" would begin following Semovi's publication of the mandatory installation notice).

[187] **Exhibit HR-0097-SPA** (Endorsement No. 5 to the Insurance Policy No. 0701-016105-00, issued by Seguros Afirme S.A. de C.V., Afirme Grupo Financiero, related to an electronic equipment insurance amount increase, dated 19 April 2018); **Exhibit HR-0098-SPA** (Insurance Policy No. 0701-016105-00, issued by Seguros Afirme S.A. de C.V., Afirme Grupo Financiero, related to an electronic equipment insurance, dated 4 April 2018). Mexico also argues that this insurance policy would have been inadequate because it was held by Lusad's subsidiary, Servicios Administrativos Lusad S. de R.L. de CV. *See* Counter-Memorial, ¶ 164. This argument is moot because the insurance requirement never came into force, but in any case, Semovi was fully aware that the insurance policy would be held by Lusad's subsidiary due to the structure of Lusad's corporate operations. *See* **Exhibit C-0069-SPA** (Lusad's Corporate Structure since November 2017).

[188] Counter-Memorial, ¶ 162.

[189] Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶ 33.

[190] **Exhibit C-0007-SPA** (Amended Concession Agreement, , as reissued on 21 March 2017), Clause 11.2(d).

[191] **Exhibit C-0069-SPA** (Lusad's Corporate Structure since November 2017); **Exhibit C-126-SPA** (Servicios Digitales Lusad S. de R.L. de C.V. Partner Register).

as concessionaire.[192] In any case, ES Holdings has held 100% of ES Technologies at all relevant times, as described in detail below and as confirmed in the Consent Award issued in the ICC Arbitration between ES Holdings and L1bero Partners.[193]

3. Lusad Obtained All Permits for the Operation of the L1bre System

131. As set out in Claimants' Claim Memorial, Lusad obtained all required permits for the operation of the L1bre System, after submitting its systems to government testing and approval.[194] Mexico does not dispute that these authorizations were in fact granted; instead, it claims that Lusad was required to obtain a separate authorization from Semovi to operate as a taximeter before the Concession could be signed.[195] No such requirement is contained in the Concession. Neither the Evaluation Committee, the Adjudication Committee, Semovi's auditors, or any of the other Semovi officials who closely scrutinized the permits and approvals given to Lusad's technology and verified Lusad's compliance with the Concession and relevant laws, ever instructed Lusad to seek such an authorization or raised concerns that Lusad lacked such an authorization. Mexico's attempt to invent a new authorization requirement never imposed by Semovi, years after the fact, is unsupported by any evidence.

4. Lusad's Technology Satisfied the Requirements of the Concession

132. Lusad's key asset was its technology, which it spent millions of dollars developing. The L1bre System was much more than a taximeter; it consisted of ride-hailing and taximeter technology installed in a driver tablet to be installed in the front of each taxi; passenger-side technology that featured GPS tracking and advertising to run on a passenger tablet in the back of each taxi; a mobile ride-hailing application in both Android and iOS format, which included an e-wallet and panic button; and back-end software to integrate all of these programs together.[196]

133. This technology was revolutionary and custom-made, and would have transformed Mexico City's taxis. Although Mexico's unlawful acts have prevented the public from ever enjoying the benefits of this technology, its functionality can be confirmed through the testing and

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192 Counter-Memorial, ¶ 167; **Exhibit C-0251-SPA** (Letter from Fabio Covarrubias Piffer to Claudia Sheinbaum, dated 23 July 2018).

193 Claim Memorial, ¶ 106; *see infra*, Section III.A.

194 **Exhibit C-0009-SPA** (Oficio No. DGJR-001291-2016 from Semovi authorizing advertising, dated 29 June 2016); **Exhibit C-0011-SPA** (Oficio No. DGN.312.01.2016.1534 from the Secretaría de Economía, authorizing Lusad's digital taximeter, dated 18 April 2016); **Exhibit C-0012-SPA** (Certificate of Registration as taxi-hailing application provider, No. 6D6C61F32327F227C-1651180691531691, dated 1 June 2016); **Exhibit C-0060-SPA** (Measurement Report from the Centro Nacional de Metrología, dated 13 September 2018); **Exhibit C-0063-SPA** (Verification Report from the Centro Nacional de Metrología, dated 26 September 2018); **Exhibit C-0064-SPA** (Certification from the Dirección General de Normas, dated 28 September 2018).

195 Counter-Memorial, ¶¶ 175–178.

196 Claim Memorial, ¶ 89; Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶¶ 26, 37.

certifications made at the time, through video demonstrations of the application, and through the surviving source code that attests to the software's complexity and professional development.[197]

134. Semovi and other government authorities verified these facts themselves. The L1bre System software and hardware were subjected to numerous tests by the Secretary of the Economy, *Cenam*, the *Dirección General de Normas*, the *Dirección General de Technologías*, C5, and Semovi, and the system passed all verifications.[198] The L1bre System was also put through live testing conditions during the trial period, ensuring that it was adapted to real-world conditions.[199] Mexico's suggestion that Lusad's technology failed at any time to meet the necessary technical specifications ignores the weight of all evidence.[200]

135. Nonetheless, in light of the comments made in Mexico's Counter-Memorial, Claimants engaged Joshua Mitchell from Kroll's software forensics team to reconstitute and analyze the L1bre System mobile application source code. Mr. Mitchell concluded that the L1bre application source code contained all hallmarks of a mature and complex software application: it was programmed using Java, the preferred coding language for Android applications, and contained elements reflecting sophisticated engineering and programming practices, including class abstraction and inheritance, appropriate usage of public and private methods, descriptive naming conventions, data models, error handling, and version control.[201] In short, Mr. Mitchell determined that the L1bre software was a professionally developed application developed in accordance with common software development principles.[202]

136. Mr. Mitchell also confirmed that this application contained each of the nine-features outlined in the Concession, including real-time tracking information; login data; online storage of travel history; relevant information on passengers, drivers, and units; real-time route generation with traffic filtering; monitoring, security, and alerts by the Mexico City command center; pricing of trips based on the official fares set for taxis in Mexico City; specifying the origin

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197 **Exhibit C-0062-SPA** (Video Demonstration of Platform).

198 **Exhibit C-0065-SPA** (L1bre software technical specifications from NullData, dated 11 January 2016); **Exhibit C-0011-SPA** (Oficio No. DGN.312.01.2016.1534 from the Secretaría de Economía, authorizing Lusad's digital taximeter, dated 18 April 2016); **Exhibit C-0012-SPA** (Certificate of Registration as taxi-hailing application provider, No. 6D6C61F32327F227C-1651180691531691, dated 1 June 2016); **Exhibit C-0015-SPA** (Oficio No. C5/CG/DGT/132/2018 from the Dirección General de Technologías acknowledging proper functioning of the panic button, dated 28 February 2018); **Exhibit C-0060-SPA** (Measurement Report from the Centro Nacional de Metrología, dated 13 September 2018); **Exhibit C-0063-SPA** (Verification Report from the Centro Nacional de Metrología, dated 26 September 2018); **Exhibit C-0064-SPA** (Certification from the Dirección General de Normas, dated 28 September 2018); **Exhibit C-182-SPA** (Verification from Semovi on the functioning of the panic button, dated 18 August 2017); **Exhibit C-182-SPA** (Email from Victor Orlado to Eduardo Herrera confirming the operation of the panic button, dated 18 August 2017); Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶ 54.

199 *See infra*, Section II.B.5.

200 Counter-Memorial, ¶ 318.

201 Expert Report of Joshua Mitchell (Kroll), dated 3 November 2022, ¶ 45.

202 Expert Report of Joshua Mitchell (Kroll), dated 3 November 2022, ¶ 45.

and destination of a trip; and payment using credit and debit cards or cash.[203] Kroll not only confirmed that these features were present, but mapped out their functionality and features. This analysis confirms not only the sophistication of the L1bre application, but also the close coordination between Lusad and Mexico City authorities in order to implement the application. In the case of the "panic button," for example, Mr. Mitchell explains that:

> From my review of the code, I observed that the "panic button" can be activated by either a driver or a passenger. Upon activation, a package of data would be sent to government security services, including driver and passenger names, photos, and GPS location/address. I also identified additional functionality that would upload video recordings to emergency services, as well as the ability to establish a chat or audio communication channel with emergency services. This type of functionality would likely have required coordination with the Government of Mexico City to implement because the software developers would have required information regarding the government security services' servers to which the package of data should have been sent.[204]

137. As the source code confirms, and as the government itself certified at the time, the L1bre application was developed in close coordination with the government, met all of the requirements of the Concession, and was completed to the government's satisfaction.[205]

5. Lusad Completed the Trial Period to Semovi's Satisfaction

138. Finally, Mexico's allegation that Lusad failed to complete the Trial Period set out in the Concession reflects its disregard of the facts.[206] As described in the Claim Memorial, Lusad completed an initial installation of the L1bre System in 100 taxis by 9 August 2016, and then in an additional 1,000 taxis by 7 November 2016, which it confirmed in two communications to Semovi.[207] While Mexico claims to have no record of the second communication, that document is stamped by Semovi with the date and time at which it was received by that agency.[208] Mr. Muñana, who personally corroborated Lusad's start-up of the project as part of a comptroller's

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[203] Expert Report of Joshua Mitchell (Kroll), dated 3 November 2022, Section 4.2.

[204] Expert Report of Joshua Mitchell (Kroll), dated 3 November 2022, ¶ 36.

[205] **Exhibit C-0015-SPA** (Oficio No. C5/CG/DGT/132/2018 from the Dirección General de Technologías acknowledging proper functioning of the panic button, dated 28 February 2018).

[206] Counter-Memorial, ¶ 398.

[207] **Exhibit C-0013-SPA** (Communication from Lusad to Semovi confirming the installation of the L1bre System in 100 Taxis, dated 9 August 2016); **Exhibit C-0014-SPA** (Communication from Lusad to Semovi confirming installation of the L1bre System in 1,000 Taxis, dated 7 November 2016).

[208] Counter-Memorial, ¶ 197.

audit,[209] confirms in his witness statement that he is "fully aware" of this document and recalls that it was in Semovi's official file related to the Concession.[210]

139. Semovi was, in any case, fully aware of the installation period. Mr. Herrera, who was the Corporate Affairs Manager of L1bre LLC and the main point of contact between Lusad and Semovi from October 2016 to December 2018, explained the detailed coordination that took place between these two entities during the test period.[211] He explained that Lusad and Semovi met at least once or twice a week starting in November or December 2016, conducting meetings and working groups in which they verified the taxis that installed the L1bre System during the trial period, reviewed the status of installations and the creation of installation centers, and coordinated the activation of the panic button.[212]

140. Lusad sent Semovi regular reports on the progress of the installation period during this time, reporting the number of taxis that had been part of the first trials as well as their identifying information.[213] Semovi determined which taxis should be part of the initial installations, asking Lusad to prioritize test installations in certain hybrid taxis in particular.[214]

141. In the context of the amendment of the Concession in January 2017, Semovi requested additional information on the 1,100 installations Lusad had conducted to date in the context of the trial period.[215] Mexico's claim that Lusad failed to respond to this request for information is false.[216] As Mr. León notes in his second witness declaration, Lusad responded to Semovi's request on 19 January 2017, providing full information in electronic and hard copy regarding the installations conducted to date.[217] This document was stamped by Semovi to confirm its receipt.

142. The additional test period information Lusad provided in response to Semovi's requests allowed Semovi to conclude, when it reissued the Concession as amended in March 2017,

209 Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶¶ 38–39.

210 Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶¶ 56(f).

211 Witness Statement of Eduardo Herrera de Juana, dated 25 October 2022, ¶ 2.

212 Witness Statement of Eduardo Herrera de Juana, dated 25 October 2022, ¶¶ 2, 9.

213 **Exhibit C-0224-SPA** (Email from Luis Elechiguerra to Alejandra Balandrán, dated 4 November 2016).

214 **Exhibit C-0233-SPA** (Oficio No. DO-3220-2016 from Semovi to Lusad, dated 26 September 2016).

215 **Exhibit R-0071-SPA** (Letter from Semovi to Lusad, dated 3 January 2017, requesting information on the installations conducted during the trial period).

216 Counter-Memorial, ¶ 105.

217 **Exhibit C-0200-SPA** (Oficio No. DO-4982-2016, from Lusad to Semovi, Re: Request for Information, dated 19 January 2017).

that Lusad had "*encontrándose resultados favorables y satisfactorios respecto la supervision ejercida*."[218]

143. In May 2017, Lusad and Semovi decided to update the installations of the 1,100 taxis that had already been installed with the L1bre System in order to implement improvements developed over the course of the trial period, including updates to the application and the addition of a second, passenger tablet.[219] In minutes of a working group meeting recording that decision, Semovi announced the plan for Semovi representatives to visit and inspect the four installation centers that Lusad had built up for this purpose, and well as to coordinate the schedule for the replacement and updating of existing installations in the 1,100 taxis that had been part of the first, successful trial period the previous year.[220]

144. Mexico's insinuation that this these additional installations were not conducted to Semovi's satisfaction is also incorrect.[221] In fact, Semovi closely supervised these additional installations, and Lusad gave Semovi regular reports on its progress. Mr. Herrera testifies that he personally sent Semovi regular reports on the installation of tablets during the trial period, which are exhibited on the record.[222] Mr. Muñana also confirms that he was aware Lusad was carrying out additional test installations during the second half of 2017.[223] Mr. Muñana testifies that Lusad produced five boxes of documentation on the registry of cab drivers used during this period, in response to requests for information from the Comptroller's office.[224]

145. Semovi insisted on testing and inspecting the tablets, was invited to do so, and raised no concerns with their functionality. On 1 June 2017, Semovi asked to receive one of the new tablets that would be installed so that it could directly test the device itself.[225] Mr. Herrera delivered a test tablet to Alexandra Balandrán and Horacio Sánchez Tinoco the same day, with

218 **Exhibit C-0010-SPA** (Oficio No. DNRM-0626-2017 from Semovi reissuing Concession agreement, dated 21 March 2017).

219 **Exhibit R-0073-SPA** (Minutes of Working Meeting between Semovi and Lusad, 12 May 2017); **Exhibit C-0173-SPA** (Minutes of Working Meeting between Semovi and Lusad, dated 12 May 2017); Witness Statement of Eduardo Herrera de Juana, dated 25 October 2022, ¶ 10.

220 **Exhibit R-0073-SPA** (Minutes of Working Meeting between Semovi and Lusad, 12 May 2017); **Exhibit C-0173-SPA** (Minutes of Working Meeting between Semovi and Lusad, dated 12 May 2017).

221 Counter-Memorial, ¶ 108; **Exhibit R-0074-SPA** (Officio from Semovi to the Director de Normatividad y Regulación de la Movilidad, dated 22 May 2017).

222 Witness Statement of Eduardo Herrera de Juana, dated 25 October 2022, ¶ 21; **Exhibit C-180-SPA** (Compendium of communications between Lusad and Semovi between 2016 and 2018 regarding the process of installation of tablets).

223 Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶ 31.

224 Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶ 33.

225 **Exhibit C-0175-SPA** (Email from Jesús Robledo to Eduardo Herrera, dated 12 May 2017).

both officials signing to confirm they had received it.[226] Four days later, Semovi designated Jesús Robledo López as responsible for verifying the stock of tablets ready to be installed.[227] Mr. Herrera then went with Mr. Robledo on 5 June 2017, to visit the warehouses where the tablets were stored, as well as to visit the installation centers where the kits of tablets to be installed each week were kept.[228]

146. On 14 July 2017, Semovi and Lusad held another working group meeting to discuss the installation of the taximeters. During this meeting, the participants confirmed that the upgrading of tablets had been completed, with few exceptions, and Lusad provided Semovi with a presentation on the data it had obtained during the trial period, including usage, number of trips, average time and distance per trip, and working hours.[229] The working group's focus then turned to preparations for the mandatory installation period, discussing Lusad's existing ability to install the L1bre System in up to 10,800 taxis per month using its four installation centers. In response, Semovi asked Lusad to set up additional installation centers to further ramp up for maximum installation capacity under the mandatory installation period. The implication of all of these discussions, Mr. Herrera explained, was that the parties understood the Concession was in force and that the start of the mandatory installation period was imminent.[230]

147. Later that year, Semovi confirmed that the supplemental test period had been completed satisfactorily.[231] Semovi promised that the mandatory installation notice would be published imminently, as soon as early 2018.

6. Semovi Acknowledged That the L1bre System Was, In All Senses, Ready to Launch

148. After all of Semovi's verifications and audits of the test period had been completed, by early 2018, Semovi was finally ready to launch the mandatory installation period.[232] The L1bre System and the Concession had been known to the public for some time, following announcements by Semovi and Lusad, and a series of high-profile events in which taxis installed with the L1bre System during the test period had been launched at public events attended by high-level government officials in Mexico City's Zocalo.[233] Mexico's attempt to downplay these public pre-

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226 **Exhibit C-0176-SPA** (Note from Horacio Sánchez Tinoco to Alejandra Balandrán Olmedo, confirming the receipt of tablet from Lusad, dated 1 June 2017); Witness Statement of Eduardo Herrera de Juana, dated 25 October 2022, ¶ 14.

227 **Exhibit C-0174-SPA** (Oficio No. DO-1516-2017 from Semovi to Lusad, dated 1 June 2017).

228 Witness Statement of Eduardo Herrera de Juana, dated 25 October 2022, ¶ 13.

229 **Exhibit C-0177-SPA** (Minutes of Meeting between Semovi and Lusad, 14 July 2017).

230 Witness Statement of Eduardo Herrera de Juana, dated 25 October 2022, ¶ 19.

231 **Exhibit C-0191-SPA** (Oficio No. DNRM-3180-2017 from Semovi to Lusad, 20 December 2017).

232 Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶¶ 33, 38.

233 Second Witness Statement of Santiago León, dated 3 November 2022, ¶¶ 41–44.

launches as unrelated events for hybrid taxis is a distortion.[234] Mr. León was at some of these events, and confirms that the launch of the L1bre System was a key feature of the public announcements. The L1bre trademark was emblazoned on the hybrid taxis launched by Mexico, as shown below,[235] and press reports announced that Mexico City was launching new taxis with tablets, free WiFi, and ride-hailing abilities.[236]

149. With the mandatory installation period drawing near, the government once again assembled the media at the Zocalo to present a fleet of L1bre System-equipped taxis for the public.

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[234] Counter-Memorial, ¶ 139.

[235] **Exhibit C-0203-SPA** (Photo from September 2017 L1bre event, dated 14 September 2017).

[236] **Exhibit C-0206-SPA** (Press article, *Los Taxis en Mexico ahora tendrán WiFi gratis y tabletas*, FayerWayer, dated 14 June 2018); **Exhibit C-0207-ENG** (Press article, *Mexico's new hybrid taxis have a 'panic' button*, Engadget, dated 31 January 2017); **Exhibit C-0208-SPA** (Press article, *Desde hoy circulan 100 taxis híbridos en la CDMX*, Excelsior, dated 31 January 2017); **Exhibit C-0209-SPA** (Press article, *Mancera da banderazo de salida a 100 taxis híbridos*, El Financiero, dated 30 January 2017); **Exhibit C-0210-SPA** (Press article, *Miguel Ángel Mancera da banderazo de salida a 100 taxis híbridos*, El Universal, dated 30 January 2017); **Exhibit C-0211-SPA** (Press article, *Llega nueva flotilla de taxis híbridos a la Ciudad de Mexico*, Unocero, 2 February 2017); **Exhibit C-0212-SPA** (Press article, *Toyota incorpora 200 taxis híbridos en CDMX*, El Universal, dated 27 September 2017); **Exhibit C-0213-SPA** (Video from L1bre launch in February 2018); Second Witness Statement of Santiago León, dated 3 November 2022, ¶ 44; **Exhibit C-0204-SPA** (Tweet from Héctor Serrano showing L1bre trademark, dated 14 September 2017); **Exhibit C-0202-SPA** (Video from L1bre launch in September 2017, dated 14 September 2017).

Immediately following the event, Mayor Miguel Mancera tweeted a video showing the L1bre System's functioning in each taxi launched during the event.[237]

150. In parallel, Lusad prepared its installation centers for a massive roll-out of installation efforts. Based on Semovi's requirements, Lusad created manuals for the installation centers, which were shared with Semovi.[238] Lusad also continued purchasing tablets and other hardware for the installations, amassing an inventory of over 85,000 two-tablet kits over the course of 2018 to cover the initial phase of the mandatory installations. Both the installation centers and tablet inventories were verified by Semovi officials, who confirmed that Lusad had undertaken adequate preparations to commence the mandatory installation period.[239]

151. On 23 March 2018, Semovi officials conducted a series of final test rides, in which they tested the L1bre System first-hand and took photos of the ride summaries and charges, including the recuperation fee authorized under the Amended Concession.[240] Lusad summarized these final test rides in a report, reporting that the Semovi officials had confirmed that the system complied with their expectations.[241]

152. Mr. Herrera led the final tests from the Lusad side and participated in meetings in which Semovi prepared the text of the mandatory installation notice to be published the following month.[242] As Mr. Herrera explains, Semovi did not discuss the need to approve a "definitive title" of the Concession in these final meetings; this is confirmed by the notes of a working group meeting on 13 March 2018, which mention no such invented requirement.[243] At the conclusion of these final tests, Semovi gave Lusad the "*padron*" containing the details of the 138,000 active taxis in Mexico City that would be called to participate in the mandatory installation period.[244]

153. The extensive documentation of these tests, and the testimony of Claimants' fact witnesses who observed and participated in these verifications both from the Lusad side and the Semovi side, all confirm that Semovi recognized and publicly proclaimed that the L1bre System

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[237] **Exhibit C-0214-SPA** (Tweet from Miguel Mancera, dated 29 March 2018); **Exhibit C-0213-SPA** (Video from L1bre launch in February 2018).

[238] Witness Statement of Eduardo Herrera de Juana, dated 25 October 2022, ¶ 10; **Exhibit C-0073-SPA** (Llbre installation centers operations manual, dated 24 August 2018); **Exhibit C-0074-SPA** (Physical requirements for L1bre installation centers, dated May 2018).

[239] Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶ 33; Witness Statement of Eduardo Herrera de Juana, dated 25 October 2022, ¶ 28; **Exhibit C-0185-SPA** (Tablet Kit Inventory Review Minutes, dated 20 March 2018); **Exhibit C-0184-SPA** (Minutes of the working meeting between Semovi and Lusad, dated 13 March 2018).

[240] Witness Statement of Eduardo Herrera de Juana, dated 25 October 2022, ¶ 32; **Exhibit C-0187-SPA** (Tablet photo with trip summary identifying recuperation fee charge, dated 23 March 2018).

[241] **Exhibit C-0186-SPA** (Report on field tests carried out with Semovi, dated 23 March 2018).

[242] Witness Statement of Eduardo Herrera de Juana, dated 25 October 2022, ¶¶ 25, 35.

[243] **Exhibit C-0184-SPA** (Minutes of the working meeting between Semovi and Lusad, dated 13 March 2018).

[244] Witness Statement of Eduardo Herrera de Juana, dated 25 October 2022, ¶ 34

was ready to launch. Mexico does not deny in its Counter-Memorial that these verifications took place and were completed to Semovi's satisfaction. Because none of Mexico's fact witnesses was involved in the implementation of the Concession, they do not and cannot offer any contrary testimony. Mexico's sole support for its argument that Lusad failed to successfully complete the trial period is an audit report prepared in late 2018, **after** the indefinite and politically motivated suspension of the Concession, in which the auditor noted minor problems with the passenger tablets of seven taxis that had been installed with the L1bre System a year earlier.[245] The minor tablet issues identified in the audit report after the indefinite suspension of the Concession halted Lusad's operations have no bearing whatsoever on whether Lusad was ready to launch the mandatory installation period in April 2018. The record shows that during the operations and trial installations, Lusad completed all verifications to Semovi's satisfaction.

154. On 17 April 2018, Semovi published in the Official Gazette a Mandatory Installation Notice requiring all taxis to install the L1bre System in their vehicles.[246] Mexico does not dispute the fact of this public notice or its content in its Counter-Memorial, which reflect Semovi's confirmation that Lusad had completed the trial period to its satisfaction, "*mostrando resultados satisfactorios*," and was prepared to immediately install its system in each of Mexico City's 138,000 taxis.

C. Mexico Unlawfully Suspends the Concession

155. After spending most of its Counter-Memorial denying that the Concession ever existed, Mexico switches to a completely different defense: that the Concession was never suspended and remains valid.[247] Calling the suspension "a fabricated story for this arbitration,"[248] Mexico alleges that it continued to comply with the Concession after May 2018, but that Lusad simply, inexplicably abandoned the billion-plus dollar project. As explained below, this could not be further from the truth: Semovi willfully chose to disregard the Concession for political reasons, ignoring Lusad's pleas to abide by its contractual obligations.

1. Mexico Failed to Make Installation Appointments Available During the Mandatory Installation Period

156. In the Mandatory Installation Notice published in the Official Gazette of Mexico City on 17 April 2018, Semovi committed to take three immediate steps: first, to make an appointment system available on Semovi's website, www.semovi.cdmx.gob.mx, within 30 working days of the publication of the Mandatory Installation Notice; second, to supervise and facilitate the mandatory installation of the L1bre System; and third, to sanction drivers who failed

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[245] **Exhibit R-0088-SPA** (Audit Report of ASCM); Counter-Memorial, ¶ 173.

[246] **Exhibit C-0016-SPA** (Mandatory Installation Notice mandating the installation of the taximeters, published in the Gaceta Oficial de la Ciudad de México, dated 17 April 2018); **Exhibit C-0250-SPA** (Semovi Press Release on Mandatory Installation Period, dated 24 April 2018).

[247] Counter-Memorial, ¶ 7 ("There is no record in the files of the competent authorities regarding the suspension alleged by the Claimants."); ¶ 401 ("In clear terms, Semovi has not suspended the Lusad Concession.").

[248] Counter-Memorial, ¶ 148.

to comply with the Mandatory Installation Notice through the *Instituto de Verificación Administrativa*.[249] Mexico failed to do each of these things.

157. Mr. Herrera worked with Horacio Sánchez Tinoco, Semovi's director of technology, to set up the appointments website.[250] Lusad prepared and provided a server to Semovi in early May 2018, exclusively for use in verifying the taxis and installation centers that would be used during the Mandatory Installation period.[251] Lusad also leveraged its technical and programming expertise, setting up the entire web-based scheduling system to be used.[252]

158. On 30 May 2018, Mr. Sánchez wrote to Ms. Balandrán, confirming that all of these steps had taken place. He further confirmed that his office had tested Lusad's website system and confirmed its technical and operational functionality, and attached to his letter screenshots showing the portal in use.[253] All that was left, Mr. Sánchez wrote in his letter, was for Semovi to activate this system by placing a banner and a link on the Semovi website to this appointments website for the drivers to use.[254]

159. Semovi did not, however, take this final step to activate the portal and link to it on its website. Mr. Herrera recalls that this link was never activated at the time, notwithstanding his many attempts to contact Ms. Balandrán to urge Semovi to complete this step:

> "*Luego de la publicación del Aviso de Instalación el 17 de abril de 2018, a pesar de que la página web de SEMOVI para agendar las citas de instalación ya había sido diseñada (por Lusad y el Ing. Sánchez), SEMOVI nunca activó la página web. De hecho, puedo asegurar que el link que aparece hoy en la página web de SEMOVI (https://citas.l1bre.com) no fue activado durante el año 2018, y fue por eso que la puesta en marcha de la operación de la Concesión no pudo llevarse a cabo. Intenté contactar varias veces a la Lic. Balandrán al respecto, y le pedí el Lic. Robledo que agendara una reunión con el equipo de SEMOVI, pero no obtuve respuesta alguna. SEMOVI simplemente ignoró mis peticiones*."[255]

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[249] **Exhibit C-0016-SPA** (Mandatory Installation Notice mandating the installation of the taximeters, published in the Gaceta Oficial de la Ciudad de México, dated 17 April 2018).

[250] Witness Statement of Eduardo Herrera de Juana, dated 25 October 2022, ¶ 41.

[251] **Exhibit C-0189-SPA** (Ingram invoice for Server and acknowledgement of receipt by Semovi, dated 11 May 2018); Witness Statement of Eduardo Herrera de Juana, dated 25 October 2022, ¶ 41.

[252] Witness Statement of Eduardo Herrera de Juana, dated 25 October 2022, ¶¶ 41-42.

[253] **Exhibit C-0188-SPA** (Communication from Horacio Sanchez Tinoco to Alejandra Balandrán, regarding the system to schedule appointments for the installation of taximeters, dated 30 May 2018).

[254] **Exhibit C-0188-SPA** (Communication from Horacio Sanchez Tinoco to Alejandra Balandrán, regarding the system to schedule appointments for the installation of taximeters, dated 30 May 2018); Witness Statement of Eduardo Herrera de Juana, dated 25 October 2022, ¶ 41.

[255] Witness Statement of Eduardo Herrera de Juana, dated 25 October 2022, ¶¶ 41, 46.

160. Mr. León also confirms in his declaration that Semovi failed to activate the portal, preventing the commencement of the mandatory installation period.[256]

161. In its Counter-Memorial, Mexico describes a different (and distorted) reality, claiming Semovi placed the requisite link on its website and was waiting on Lusad to activate the portal.[257] Mexico is unable to cite any witness testimony to support this alternate version of events, or to contradict the testimony of Claimants' witnesses on this point, of course, because none of its fact witnesses were employed by Semovi in May 2018 when the appointments site was supposed to be activated. Instead, Mexico's only proof for this proposition is a screenshot of the Semovi webpage today, in 2022, showing that it includes a link to citas.l1bre.com.[258]

162. Kroll has analyzed the Semovi website using internet forensics resources, and their analysis shows that Mexico has misrepresented the date on which the aforementioned appointments link was made available on Semovi's website. As explained in Kroll's report, the screenshot of the Semovi website that Mexico introduced as a factual exhibit in this arbitration does not correspond to the Semovi website that existed in May 2018, which was of a completely different design. Using resources that allowed it to access archived snapshots of the Semovi website as it actually existed in 2018, Kroll concludes that the link to citas.l1bre.com was not present on the Semovi website as Mexico has claimed, and was confirmed to be present only in August 2020, after the Request for Arbitration was filed in this case. Moreover, the webpage on which Mexico alleges that it added the link to the appointments page did not even exist on Semovi's site until January 2020.[259] Once again, Mexico's only "evidence" in support of its position is no more than an after-the-fact document fabrication.

163. Had Semovi upheld its end of the bargain and facilitated the installations of the L1bre System, as required by the Mandatory Installation Notice, there is no question that Lusad would have launched immediately into revenue-generating operations.[260] Mexico implies that the taxi drivers would have resisted the obligatory installation of the L1bre System or somehow circumvented it, but the evidence shows that drivers who tested the system during the trial period were overwhelmingly happy with its operation. Even before the mandatory installation period, Mr. Herrera explained, taxi drivers had reached out to Semovi seeking to install the L1bre System in their vehicles voluntarily.[261] These positive reactions to the planned launch confirmed the results of market studies conducted by Lusad throughout the previous two years, which confirmed that the system offered economic benefits to drivers, as well as a superior service for passengers,

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[256] Second Witness Statement of Santiago León Aveleyra, dated 3 November, 2022, ¶ 56.

[257] Counter-Memorial, ¶ 440.

[258] Counter-Memorial, ¶¶ 146–147; **Exhibit R-0085-SPA** (Screenshot of Semovi website and instructions to access appointments portal, 13 May 2022).

[259] Expert Report of Joshua Mitchell (Kroll), dated 3 November 2022, Appendix A.

[260] Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶ 62.

[261] Witness Statement of Eduardo Herrera de Juana, 25 October 2022, ¶ 19; **Exhibit C-0178-SPA** (E-mail from Eduardo Herrera to Jesús Romero and Alejandra Balandrán, dated 24 May 2017); **Exhibit C-0179-SPA** (Email from Eduardo Herrera to Jesus Robledo and Alejandra Balandrán, dated 23 October 2017).

for which they were more than willing to pay the small recuperation fee of up to MXN 12, or USD $0.60, on a full-fee ride.[262]

164. Similarly, Mexico's argument that the Mandatory Installation Period was untenable because "there are simply not enough police officers in Mexico City . . . [to] verify that taxis in fact used the L1bre System" is an invention and a distraction.[263] Once the system was installed, Mr. León explained, the technology was self-enforcing, with the inability to disable or alter the taximeter constituting one of the main advantages of the L1bre System over Mexico City's existing, outdated physical taximeters.[264] All that was required under the Mandatory Installation Notice was for Semovi to verify installations through the Instituto de Verificación Administrativa, in the same way as it verifies other requirements for taxi concessionaires, such as the obligation to maintain a valid driver's license.[265] In the case of Mexico's own application, Mi Taxi, Semovi has shown itself more than willing to use this process to impose administrative sanctions on taxis who fail to register their information on the government's application.[266]

2. Mexico Suspended the Concession for Political Reasons

165. The reality is that Semovi decided not to implement the Concession for political reasons. It notified Lusad of the suspension of the Concession in May 2018 and then again in October 2018, noting each time in its official communications of the suspension that the decision was not attributable to Lusad, which had complied in all respects with the Concession granted to it.[267]

166. Mexico accuses Claimants of fabricating both the fact of the suspension and the two suspension notices, claiming that the Concession was never suspended simply because there is "no record in the files of the competent authorities of the alleged suspension."[268] Once again, this version of events is not supported by testimony from any fact witness.

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262 Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶¶ 46, 60–63.

263 Counter-Memorial, fn. 556; Witness Statement of Andrés Lajous Laoeza, ¶ 27.

264 Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶ 61; **Exhibit C-0252-SPA** (Video from Excelsior TV, dated 29 April 2018) (explaining that the taxis installed with the L1bre System are self-regulating and cannot be altered)

265 **Exhibit C-0016-SPA** (Mandatory Installation Notice mandating the installation of the taximeters, published in the Gaceta Oficial de la Ciudad de México, dated 17 April 2018).

266 **Exhibit C-0253-SPA** (Press article, "*Mi Taxi: está es la aplicación del gobierno de CDMX para identificar a conductores de taxis y así funciona*," Xataka, dated 5 September 2019).

267 **Exhibit C-0018-SPA** (Oficio No. DGSTPI-965-2018 from Semovi announcing suspension of the Concession, dated 30 May 2018); **Exhibit C-0226-SPA** (Original version of Oficio No. DGSTPI-965-2018 from Semovi announcing suspension of the Concession, dated 30 May 2018); **Exhibit C-0019-SPA** (Oficio No. DGSTPI-1943-2018 from Semovi announcing indefinite suspension of the Concession, dated 28 October 2018); **Exhibit C-0227-SPA** (Original version of Oficio No. DGSTPI-1943-2018 from Semovi announcing indefinite suspension of the Concession, dated 28 October 2018).

268 Counter-Memorial, ¶¶ 7; 197.

167. In addition to the suspension notices themselves, the suspension is supported by evidence from Mr. Zayas and Mr. León, who described their receipt of the suspension notices and their discussions with Semovi regarding the decisions.[269] Mr. Herrera similarly corroborates the suspensions, testifying that Mr. Zayas contemporaneously told him of the decisions to suspend the Concession due to the electoral process and that Semovi cut off all contact with Lusad relating to the Concession's implementation as a result of the suspension.[270] Mr. Muñana, who is familiar both with Semovi's operations at the time and with Semovi's files relating to the Concession, recalls Semovi's decision to suspend the Concession and Semovi's internal reasoning that it was preferable to temporarily suspend the Concession until after the election.[271] Mr. Muñana also confirms that the suspension notices reflect the reality of the facts and that the signature on those documents corresponds to Ms. Balandrán's usual signature.[272] Finally, Mr. Muñana testifies that he recalls meeting with Mr. Zayas at the time to explain the suspension, which was expected to be temporary.[273]

168. The suspension is also confirmed by the contemporaneous statements of Mexico's own witnesses. Mr. Lajous, who joined Semovi in December 2018 as an appointee of the new administration, confirms that he met with Mr. León and Mr. Zayas at Mayor Sheinbaum's offices in February 2019, that he disclaimed the existence of the Concession at that time, and that he disavowed Semovi's obligation, under the Concession and the Mandatory Installation Notice, to facilitate the obligatory installation of the L1bre System in all of the taxis of Mexico City.[274] Mr. Clark also made statements against Mexico's own case, stating in a radio interview in September 2019 that in his opinion, the Concession "*ya no tiene efectos*" and would be replaced with the Mi Taxi application.[275] These statements all echo the public statements of Mayor Sheinbaum in 2018, who told the press that she would "tear down the program" to install the L1bre System and make the tablets system "disappear" from the capital's taxis, as her own party had lobbied for, as well as Mayor Sheinbaum's comments in 2019 that Semovi's own Mi Taxi system would replace the L1bre System.[276]

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269 Witness Statement of Santiago León Aveleyra, dated 14 Septmeber 2021, ¶ 79; Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶¶ 56-57.

270 Witness Statement of Eduardo Herrera de Juana, 25 October 2022, ¶¶ 47–48.

271 Witness Statement of Agustin Muñana Zúñiga, 28 September 2022, ¶ 41.

272 Witness Statement of Agustin Muñana Zúñiga, 28 September 2022, ¶ 56(j).

273 Witness Statement of Agustin Muñana Zúñiga, 28 September 2022, ¶ 41.

274 Witness Statement of Andrés Lajous Laoeza, ¶ 40.

275 **Exhibit C-0023-SPA** (Interview with Eduardo Clark, General Director of the Center of Technological Development of the Digital Agency of Public Innovation of the Government of Mexico City, dated 6 September 2019).

276 **Exhibit C-0254-SPA** (Press article, *Plantean bajar tabletas para taxis*, El Universal, dated 19 July 2018); **Exhibit C-0255-SPA** (Press article, *Sheinbaum desaparecerá tabletas electrónicas para taxis y regulará Uber*, El Financiero, dated 26 July 2018); **Exhibit C-0256-SPA** (Press article, *La próxima jefa de Gobierno de Ciudad de México se compromete a eliminar 'las tablets' de los taxy y regular Uber y Cabify*, Xataka, dated 31 October 2018); **Exhibit C-0257-SPA** (Video of Mayor Sheinbaum's comments against the L1bre

169. In sum, Claimants have corroborated the suspension of the Concession through documentary evidence and the testimony of four fact witnesses, as well as the statements of Mexico's own witnesses. Mexico's rebuttal of these facts, on the other hand, consists merely of a witness statement declaring that Semovi's files are poorly maintained.

170. Mexico's argument that it did not suspend the Concession cannot be reconciled with its public acts. If it is true, as Mexico now argues, that "Semovi has not suspended the Lusad concession," yet "Lusad failed to fulfill a number of obligations set out in the Lusad concession,"[277] where is the notice of breach? Where is the termination for cause? Mexico has not produced any such document from the files of any government entity.

171. The reality is that Lusad complied with its obligations under the Concession, as Semovi recognized in the two suspension notices it sent at the time. Even after the suspension, Lusad kept pushing for the Concession's success, ensuring its installation centers and technology remained ready, and even preparing plans to ramp up quickly if and when Semovi determined to lift the suspension.[278] Semovi, on the other hand, turned a cold shoulder.[279]

3. Mexico Stole Claimants' Idea and Relaunched It as Mi Taxi

172. Mexico's September 2019 launch of Mi Taxi, a low-quality rip-off of the L1bre System, represented a final nail in the coffin for Lusad's Concession.[280] As Mr. Clark described in an interview that month, Mi Taxi was a taxi application designed by the government and intended to **replace** Lusad's cancelled L1bre System.[281]

173. In its Counter-Memorial, Mexico argues that the Mi Taxi application was developed "from scratch" and "completely independent" of the L1bre System, claiming that the government agency that developed Mi Taxi, ADIP, did not even have access to the L1bre app source code.[282] Mexico did have access to the L1bre app source code, however, which was filed with the government in 2016;[283] Mexico also had access to servers, provided by Lusad in the

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System, dated 7 September 2019); **Exhibit C-0259-SPA** (Press article, *Frenan instalación de taxímetros digitales en la CDMX*, Capital México, dated 30 May 2018).

277 Counter-Memorial, ¶ 401.

278 Witness Statement of Eduardo Herrera de Juana, 25 October 2022, ¶¶ 49–50; **Exhibit C-0190-SPA** (Llbre scaling plan, dated 6 August 2018); Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶80, 82.

279 Witness Statement of Eduardo Herrera de Juana, 25 October 2022, ¶¶ 49–51.

280 Claim Memorial, ¶¶ 134 *et seq.*

281 **Exhibit C-0023-SPA** (Interview with Eduardo Clark, General Director of the Center of Technological Development of the Digital Agency of Public Innovation of the Government of Mexico City, dated 6 September 2019).

282 Counter-Memorial, ¶¶ 9, 333, 344; Witness Statement of Eduardo Clark Garcia, ¶ 18.

283 **Exhibit C-0199-SPA** (Proof of registration of Source Code with INDAUTOR, dated 18 March 2016).

context of preparations for the mandatory installation period, which ran proprietary Lusad software and which were integrated to function with the L1bre app.[284]

174. Regardless of whether Mexico directly copied lines from the L1bre application source code, it is clear that Mexico's intention was to replicate the L1bre System and that it achieved this goal.[285] Mexico advertises the Mi Taxi app as containing the following features, all of which were present in the L1bre application and required of Lusad under the Concession:

- Recording and sharing of user and driver data;
- Rating options for drivers and users;
- Remote hailing of taxis;
- A panic button connected directly to C5;
- Live GPS tracking of ride progress and location;
- Free WiFi;
- Payment options by cash, credit, or debit card; and
- Trip sharing with a third party.[286]

175. The fact that Mexico felt the need to immediately create its own copy-cat version of the L1bre application proves both the need for and feasibility of the L1bre System, contradicting Mexico's arguments that the public would have rejected Lusad's technology and that Lusad's expropriated Concession had no value from a damages perspective. In announcements, Semovi emphasized that Mi Taxi was designed to address the very same security and trust concerns targeted by the L1bre System, and that it would allow taxi drivers to compete with applications like Uber and Didi.[287] As seen even by the unverified figures below from Mr. Lajous's declaration, the number of taxis registered in Mexico City dropped precipitously the year that Mexico abruptly suspended the Concession rather than implementing the mandatory installation period; registrations stabilized only after Mexico launched its rip-off application, Mi Taxi, to fill the same need.[288]

[284] Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶ 38.

[285] Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶ 84.

[286] Counter-Memorial, ¶¶ 337, 340–341; **Exhibit C-0022-SPA** (Press article *"Launch of 'Mi Taxi' app that Includes a Panic Button*," dated 5 September 2019); **Exhibit C-0028-SPA** (Press article "*Sheinbaum Presents First Phase of Digital Application 'Mi Taxi,'*" dated 5 September 2019); **Exhibit C-0082-SPA** (Press article "*Así funciona la app del gobierno de Ciudad de Mexico para mujeres en los taxis*," dated 5 September 2019); **Exhibit C-0104-SPA** (Press article "*Presentan app Mi taxi para garantizar seguridad y calidad en taxis de la CDMX*," dated 5 September 2019); **Exhibit C-0223-SPA** (Tweet of Claudia Sheinbaum, dated 9 August 2022); **Exhibit C-0258-SPA** (Mi Taxi application manual); **Exhibit C-0262-SPA** (Video tutorial of Mi Taxi application); **Exhibit C-0260-SPA** (Press article, *¿Sufres el aumento de tarifas en CDMX? Mi Taxi, la app para que tu bolsillo no sufra*, El Sol de México, dated 29 December 2021)

[287] **Exhibit C-0261-SPA** (Press article, *CDMX recomienda usar el módulo de "Mi Taxi" como alternativa de transporte en la capital*, Infobae, dated 19 December 2021).

[288] Witness Statement of Andrés Lajous Laoeza, ¶ 9.

Concesiones de Taxi registradas ante la Semovi (2016-2022)

	2016	2017	2018	2019	2020	2021	2022
Concesiones de Taxi con título vigente -dentro del periodo 10 años-[i]	140,558	140,555	123,453	105,875	103,059	103,059	103,059
Nuevas concesiones emitidas[i]	0	0	0	0	0	0	0
Unidades que se dieron de baja[i]	7,070	9,181	10,384	4,610	2,704	4,567	1,488
Líneas de captura emitidas por la revista anual de taxi[ii]	111,376	161,275*	100,766	102,599	86,661**	101,252	N/A
Concesiones de Taxi que pasaron la revista anual[i]	N/D	N/D	N/D	61,536	21,190	26,317	N/A
Concesiones de Taxi que pasaron la revista anual y usan Mi Taxi[i]	N/A	N/A	N/A	N/A	N/A	2,365	N/A

D. Mexico Attempts to Cover Its Tracks by Falsifying Documentary Evidence

176. After failing to uphold its obligation to implement the mandatory installation period, and instead indefinitely suspending the Concession, the government of Mexico City attempted to escape the consequences of its unlawful actions by falsifying evidence and attempting to rewrite the facts. These efforts began just weeks after Mexico announced the indefinite suspension of the Concession in October 2018, and have continued in this arbitration, as seen in Mexico's Counter-Memorial.

1. Semovi Attempts to Modify the Concession in November 2018 Without Lusad's Consent

177. In early November 2018, only a few days after notifying Lusad of the indefinite suspension of the installation period on 28 October 2018, senior government officials attempted to dupe Lusad's representatives into signing a back-dated and amended version of the Concession to amend *post hoc* Lusad's rights as concessionaire.[289] Semovi summoned Lusad's representatives, including Mr. Zayas, to its offices on 6 November 2018, under false pretenses, and asked Mr. Zayas to sign documents, including a new concession that they told him was identical to the one already awarded to Lusad.

178. In fact, the concession Semovi tricked Mr. Zayas into signing was in fact a new document, with different terms than the Concession Mexico had suspended just the week before. Notably, it removed Lusad's preferential right to install and maintain digital taximeters in Mexico City, reduced the length of the trial period, eliminated the Recuperation Fee, eliminated Lusad's right to charge for advertising displayed in the taxis, eliminated Lusad's right to charge for the use

[289] Claim Memorial, ¶¶ 127.

of WiFi, and purported to modify Lusad's obligations to maintain a performance bond and insurance.[290]

179. Mr. Muñana was at the meeting between Lusad and Semovi on 7 November 2018, and corroborates Mr. Zayas's testimony regarding these events. Mr. Muñana explains that Semovi officials were concerned by the conclusions of the recent comptroller's audit and wanted to modify the Concession to shield themselves from any political criticism on these points after the arrival of the new administration.[291] Because they understood that the Concession could not be modified without Lusad's consent, they lured Mr. Zayas to Semovi under false pretenses, told him he was signing a new copy of the existing Concession but gave him no opportunity to review it, and procured his signature on this and other documents by telling Mr. Zayas that their signature would protect the Concession under the hostile new administration.[292]

2. Mexico Relies on Altered or Falsified Documents in This Arbitration

180. In isolation, Mexico's attempts to trick Lusad into modifying a Concession that had already been suspended may have seemed minimally effective, if perplexing: Semovi never reactivated the Concession, and so there was never an opportunity for Lusad and Semovi to reconfirm the Concession's prevailing terms.

181. In the context of this arbitration, however, the full scope of Mexico's cover-up attempts and reliance on altered documents has become clear. Mexico claims to have lost the true Concession, and relies instead on the version Semovi tricked Mr. Zayas into signing on 6 November 2018, claiming that Lusad was given a concession for the first and only time on 13 April 2018.[293]

182. The documents Mexico relies on for this argument are "highly questionable" and "do not reflect reality," to use Mr. Muñana's words. The documents with Mr. Zayas's signature and Mr. Muñana's signature—which Mexico claims date from April 2018—were in fact all signed during the ambush meeting on 6 November 2018, as Mr. Muñana confirms in his testimony.[294]

183. Practically speaking, Mexico's argument that Lusad had no concession until this version was signed on 13 April 2018 is entirely inconsistent with the many, earlier documents and public statements from Semovi confirming the existence of a 2016 Concession and 2017 Amendment; with the evidence of Lusad's performance of, and reliance on that Concession; with the publication of the Mandatory Installation Notice days before Mexico alleges that the

[290] Compare **Exhibit C-0007-SPA** (Amended Concession Agreement, as reissued on 21 March 2017) with **Exhibit C-0020-SPA** (Forged Concession Agreement signed in November 2018, dated 13 April 2018).

[291] Witness Statement of Agustin Muñana Zúñiga, 28 September 2022, ¶ 42.

[292] Witness Statement of Agustin Muñana Zúñiga, 28 September 2022, ¶¶ 44, 50.

[293] Counter-Memorial, ¶¶ 119 *et seq.*

[294] Witness Statement of Agustin Muñana Zúñiga, 28 September 2022, ¶ 49.

Concession was signed; and even with Mr. Zayas's whereabouts on the day this forged concession is claimed to be issued. [295]

184. In its Counter-Memorial, Mexico claims that it has "no record" of the real Concession or the many documents referring to it, which are mysteriously absent from the files Mexico has submitted in this case, despite existing in both original and electronic form throughout Lusad's and Claimants' records. These documents were undeniable real, as each of Claimants' witnesses can corroborate; they held them in their hands, relied on them, and for two years worked with Semovi to implement them.

[295] Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶¶ 50–54.

Santiago
6/20/16, 9:37 PM

Santiago León, holding Appearance of Eduardo Zayas before Semovi to sign the Concession Agreement on 20 June 2016, Exhibit C-0052-SPA[296]

185. Mexico has not dared to present fact witness testimony from any Semovi official who actually worked at the agency at the time on the implementation of the Concession and who would surely confirm the correct documents and the true facts, as Mr. Muñana has done. Instead,

[296] **Exhibit C-0195-SPA** (Photo in front of L1bre headquarters, dated 20 June 2016).

Mexico relies on witness statements from officials who did not work at Semovi during any relevant time, and puts forward a string of so-called factual exhibits that are inconsistent with the original records Semovi kept of the Concession.

186. There are serious concerns regarding the files Mexico has submitted and relied on in this arbitration. Mexico's exhibits, for example, do not match the Semovi file relating to the Concession that Mexico was ordered to produce in the context of document production, and Mexico has refused to produce the Concession files held by each of the different administrative units within Semovi, despite clearly having access to them in order to cherry-pick documents for its proofs in this arbitration.[297] Claimants have filed a request asking the Tribunal to compel Mexico to produce the full records that it has cherry-picked documents from. This request remains pending as of the date of this filing, and Claimants reserve their rights to supplement this submission as necessary should additional documents become available as a result of the Tribunal's ruling on that issue.

187. The one administrative unit file Mexico did produce in document production, from the *Dirección General del Licencias y Operación de Transporte Vehicular*, is patently incomplete. Mr. Muñana notes that the 455-page file Mexico produced from this entity is suspiciously short and omits many documents that Mr. Muñana remembers reviewing during his tenure at Semovi.[298] Mr. Muñana notes that the files are not maintained in any usual, chronological order; that many lack customary markings used within Semovi to confirm their receipt; and that documents appear in the file bearing his initials even though he is sure that he did not prepare or review them.[299] Even within individual documents, there are indicia of alterations, such as pages with mis-matched headings.[300] Given the lack of safeguards over Semovi's files that Mr. Muñana recalls encountering during his tenure at Semovi, it is clear that there were many opportunities for Mexico to effectuate these document alterations.[301]

188. Even by Mexico's own account, the records it obtained from Semovi, which it now submits as proofs in this arbitration, reflect, at best, a massive failure of record-keeping within the agency. Mexico identifies multiple cases in which two or more documents share a single registration number, or where Semovi's files contain a different version of a letter than the one

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[297] *See* **Exhibit R-0027** (extracted from the files held by the *Dirección de Normatividad y Regulación de la Movilidad*); **Exhibit R-0071, Exhibit R-0072, Exhibit R-0073, Exhibit R-0074, Exhibit R-0075, Exhibit R-0076, Exhibit R-0077, Exhibit R-0079, Exhibit R-0080, Exhibit R-0081, Exhibit DLG-030, and Exhibit DLG-041** (extracted from the files held by the *Dirección General del Servicio de Transporte Público Individual*).

[298] Witness Statement of Agustin Muñana Zúñiga, 28 September 2022, ¶¶ 53–56 (mentioning the notable omissions of **Exhibit C-0053-SPA**, **Exhibit C-0052-SPA**, **Exhibit C-0009-SPA**, **Exhibit C-0130-SPA**, **Exhibit C-0131-SPA**, **Exhibit C-0014-SPA**, and **Exhibit C-0007-SPA**, among other documents).

[299] Witness Statement of Agustin Muñana Zúñiga, 28 September 2022, ¶ 53.

[300] *See supra*, Section II.A.2.

[301] Witness Statement of Agustin Muñana Zúñiga, 28 September 2022, ¶ 54.

that was actually sent.[302] Mexico has proven, if nothing more, that its record-keeping is abysmal and untrustworthy. Given Mexico's reliance on altered and falsified documents and its lack of any testimony from any relevant fact witness, this is the only conclusion that the Tribunal can draw from Mexico's authenticity challenges to contemporaneous documents.

E. Mexico's Slander and Criminal Retaliation Against Claimants' Witnesses

189. In the absence of any real evidence to support its case, Mexico resorts to slander and criminal retaliation against Claimants' witnesses and former Semovi officials. Mexico's conduct crosses far beyond mud-slinging in its Counter-Memorial, revealing instead a pervasive retaliation campaign aimed at intimidating witnesses to try to criminalize the past. In light of these abusive tactics, it is unsurprising that Mexico "anticipated" in its Counter-Memorial that Claimants would complain of retaliation.[303]

190. Mexico's retaliation campaign includes the concerted political and criminal prosecution [REDACTED] [REDACTED][304] Notably (and perhaps explaining the dearth of witness support for Mexico's position), [REDACTED], are not Mexico's fact witnesses in this arbitration, but instead find themselves prosecuted as criminal defendants in one of the many indictments that Mexico's special political prosecutor has launched following the suspension of the Concession.[305]

191. Mexico has also imprisoned one of Claimants' key witnesses, Mr. Zayas, for nearly a year on legally unsustainable charges that are entirely unrelated to the Concession. In fact, these charges arise out of a civil dispute in which the complainant has withdrawn all of her allegations.[306] The case against Mr. Zayas is now [REDACTED] [REDACTED], and Mr. Zayas has been imprisoned since December 2021 in pre-trial detention, despite being convicted of no crime.[307] While in the custody of the Mexican penal system, Mr. Zayas has been subjected to threats against his physical integrity, has been threatened with reprisals, and has

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[302] Counter-Memorial, ¶ 197 (agreeing that **Exhibit C-0010-SPA** is present in Semovi's file, but noting that another document exists (**Exhibit R-0094-SPA**) containing an identical registration number; agreeing that Semovi's files contain a copy of **Exhibit C-0130-SPA** (recorded as **Exhibit R-0087-SPA**) that differs in minor regards from the version signed by Mr. Zayas and submitted by Claimants).

[303] Counter-Memorial, ¶ 6.

[304] **Exhibit C-0135-SPA**, pp [REDACTED] [REDACTED] Claimants' Application for Provisional Measures, ¶ 51.

[305] **Exhibit C-0135-SPA**, pp [REDACTED] [REDACTED]); Claimants' Application for Provisional Measures, ¶ 51.

[306] Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶¶ 78–79; **Exhibit C-0222-SPA** (Notification of withdrawal of claims in Patricia Perez case, dated 19 May 2022).

[307] Claimants' Emergency Motion; Claimants' Renewed Emergency Motion.

been forced to sign coerced confessions.[308] He has also been cut off from this arbitration, as Mexican officials have blocked any attempt by Claimants' counsel to meaningfully consult with their client in the prison in which he is being held.[309]

192. Mexico continues this pattern fills much of its Counter-Memorial with allegations of all manner of improper conduct by Mr. Zayas and Mr. León, attempting to paint Claimants' witnesses as career criminals, stating that they "[redacted]." Yet Mexico cites nothing besides commercial disputes involving Mr. Zayas's and Mr. Leon's businesses in entirely unrelated mining and real estate sectors, even including **commercial disputes that have been resolved in favor of Claimants and their witnesses**.[310]

- For example, Mexico mentions a civil case brought by the company Taxinet against Mr. León over 100 times in its Counter-Memorial, claiming the case proved that Lusad had stolen software from Taxinet to obtain the Concession.[311] Mexico fails to mention, however, that the lawsuit was resolved in Mr. León's favor, with a federal judge granting judgment to Mr. León on all claims.[312]

- Mexico also emphasizes the civil dispute between ES Holdings and L1bero Partners, claiming it "was not a mere civil claim" (it was)[313] and that it proved that Lusad's technology "was deficient" (it did not).[314] In reality, as Mr. León explains, the case involved "purely a partnership dispute" and all allegations have been withdrawn on both sides.[315]

- Mexico also claims that a civil case brought by Moises Cosío Espinosa against Inigo Domenech—which it mentions over two dozen times in its Counter-Memorial—somehow demonstrates that Lusad lacked technical experience or that Mr. León made "possible fake representations." But Lusad and Mr. León not even

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308 **Exhibit C-0304-SPA** p. 2 (Communication from the *Encargado del Despacho De La Dirreccion Del Reclusorio Preventivo Varonil Sur* dated 31 October 2022, enclosing signed handwritten declaration dated 11 October 2022 from Mr. Zayas).

309 *See* Claimants' Emergency Motion; Claimants' Renewed Emergency Motion.

310 Counter-Memorial, ¶ 24; Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶¶ 80–82.

311 Counter-Memorial, ¶¶ 280–281.

312 **Exhibit C-0194-ENG** (*Taxinet Corp. v. Santiago León*, Order Granting Defendant's Renewed Motion for Judgment as a Matter of Law, dated 16 June 2022).

313 Counter-Memorial, ¶ 269.

314 Counter-Memorial, ¶ 271.

315 Second Declaration of Santiago León Aveleyra, dated 3 November 2022, ¶ 82.

parties to that case, and no claims were ever made against them in those proceedings, which in any event have been withdrawn entirely and dismissed.[316]

193. Claimants' witnesses have never been convicted of any crimes, and do not face any investigation other than the invented criminal charges Mexico has launched through its Special Political Prosecutor's office. The only reason that Mr. Zayas is in prison today is because he is being held in indefinite pre-trial detention in connection with such a political prosecution, relating to a fundamentally civil dispute that was withdrawn by the original complainant and is now being pursued by Mexican prosecutors *ex officio*, notwithstanding the fact that **the complainant has withdrawn all allegations against Mr. Zayas**.[317]

194. In the more than ten months that he has been imprisoned in connection with this trumped-up *ex officio* charge, without ever being convicted, Mr. Zayas has been subjected to threats and deeply disturbing physical conditions, and has been coerced into signing statements dictated to him by Mexican authorities.[318] The chilling effect of such treatment on Mr. Zayas, and on any other witness who might choose to testify against Mexico, can only possibly be understood as an attempt to influence this arbitration.

195. The documents submitted by Claimants, and the consistent and courageous testimony of each of their four witnesses in face of such retaliation, establish the true story that Mexico has tried to drown out in its Counter-Memorial. As described further below, these incontrovertible facts amply establish Claimants' entitlement to relief under the Treaty.

III. THE CONDITIONS FOR JURISDICTION UNDER THE TREATY HAVE BEEN MET

196. Claimants established in the Claim Memorial and Claim Memorial Addendum that the Tribunal has jurisdiction to resolve this dispute.[319] There are two Claimants—ES Holdings and L1bre Holding. ES Holdings is a limited partnership incorporated under the laws of the province of Alberta, Canada.[320] ES Holdings made investments in Mexico, which qualify for protection under the NAFTA.[321] L1bre Holding is a limited liability corporation incorporated under the laws of Delaware, United States.[322] L1bre Holding also made investments in Mexico,

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[316] Second Declaration of Santiago León Aveleyra, dated 3 November 2022, ¶ 81; **Exhibit R-0121-ENG** (Docket, *Moises Cosio Espinso et al. v. Inigo Domench et al.*, Case No. 2020-004655-CA-01).

[317] Counter-Memorial, ¶ 239; **Exhibit C-0222-SPA** (Notification of withdrawal of claims in Patricia Perez case, dated 19 May 2022).

[318] **Exhibit C-0304-SPA** p. 2 (Communication from the *Encargado del Despacho De La Dirreccion Del Reclusorio Preventivo Varonil Sur* dated 31 October 2022, enclosing signed handwritten declaration dated 11 October 2022 from Mr. Zayas).

[319] Claim Memorial, Section IV; Claim Memorial Addendum, Section II.

[320] Claim Memorial, ¶ 151.

[321] Claim Memorial, ¶ 152.

[322] Claim Memorial Addendum, ¶ 14.

which qualify for protection under NAFTA.[323] Claimants have claimed for the loss of value of their investment in Mexico pursuant to NAFTA Article 1116 as a result of Mexico's breaches of NAFTA, and also on behalf of Lusad (their wholly-owned Mexican subsidiary) for losses that it sustained from those same breaches pursuant to NAFTA Article 1117.[324] Claimants and Mexico have consented to this arbitration and have fulfilled all the requirements of NAFTA—Mexico by virtue of its standing consent pursuant to NAFTA Article 1122(1)[325] and pursuant to USMCA Annex 14-C, and ES Holdings and L1bre Holding by virtue of consenting through their Notices of Intent to Submit Claims to Arbitration and Requests for Arbitration.[326] Claimants have fulfilled all requirements of NAFTA and the ICSID Convention.[327]

197. The Tribunal's jurisdiction to hear this matter is, therefore, indisputable. However, that has not stopped Mexico from pursuing erroneous and baseless jurisdictional objections in an effort to avoid responsibility for its breaches of NAFTA and unnecessarily add additional time and burden to these proceedings.

198. In this submission, Claimants comprehensively address Mexico's jurisdictional objections and show them to be without merit. This section of Claimants' Reply is organized as follows: Section A addresses Mexico's objection that ES Holdings did not own 100% of Lusad at the required times; Section B addresses Mexico's objection that Claimants have not established that there is jurisdiction *ratione personae*; and Section C addresses Mexico's objection that Claimants have not established that there is jurisdiction *ratione materiae*.

A. ES Holdings Owned 100% of Lusad at All Relevant Times

199. Mexico argues that ES Holdings did not own 100% of Lusad at all relevant times and therefore its claims should be "limited to, at most, the impact of the alleged measures on [a] 50% ownership interest."[328] This argument is both irrelevant and incorrect.

200. First of all, Mexico's argument regarding ES Holdings's shareholding history in Lusad is moot because of the presence of the second claimant, L1bre Holding. Mexico has not disputed that L1bre Holding held 100% of Lusad's shares at all relevant times, and may therefore make claims for 100% of the harm suffered at the hands of Mexico's unlawful acts. While L1bre Holding and ES Holdings both suffered damages in the same amount as a result of the same unlawful measures, and given their undertaking not to pursue double recovery, an award of damages to L1bre Holding reflecting its 100% shareholding in Lusad would cover the damages

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323 Claim Memorial Addendum, ¶¶ 12–20.

324 Claim Memorial, ¶¶ 151, 159, 295; Claim Memorial Addendum, ¶¶ 2, 12, 17–20.

325 **Exhibit CL-0001-ENG** (Article 1122, North American Free Trade Agreement, 1 January 1994).

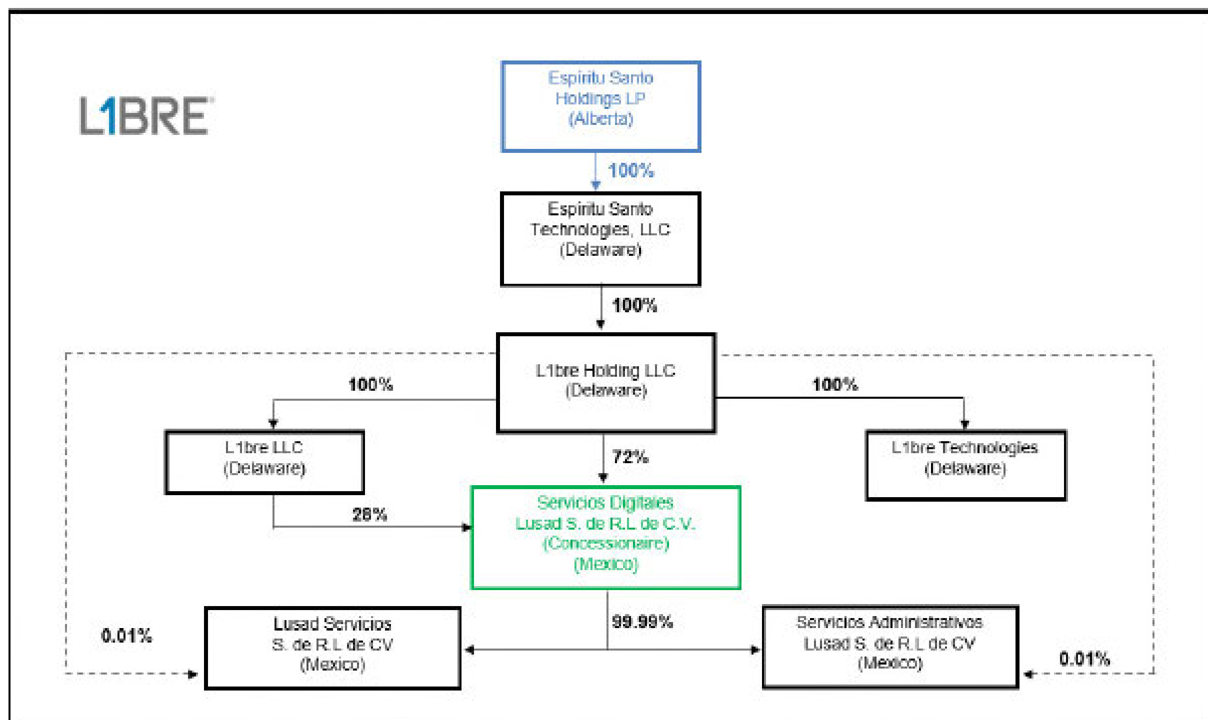
326 **Exhibit C-0024-ENG**, (ES Holdings's Notice of Intent, 30 May 2019); ES Holdings's Request for Arbitration; **Exhibit C-0119-ENG** (Notice of Intent of L1bre Holding, 29 March 2019); L1bre Holding's Request for Arbitration; Claim Memorial, ¶ 155; Claim Memorial Addendum, ¶¶ 21–25.

327 Claim Memorial, Section IV; Claim Memorial Addendum, Section II.

328 Counter-Memorial, ¶ 351.

suffered by both Claimants. In other words, even if Mexico's contentions regarding ES Holdings's ownership interest in Lusad were true (which they are not), Mexico cannot consequently halve its liability, because L1bre Holding's entitlement to 100% of any damages is undisputed.

201. Moreover, Mexico has no factual basis for its argument that ES Holdings's claim should be reduced by half. ES Holdings at all relevant times held 100% ownership of Lusad. As ES Holdings explained in the Claim Memorial, "Claimant has directly owned 100% of ES Technologies and indirectly owned 100% of Lusad since November 2017, prior to Mexico's violations of the Treaty, and Claimant has maintained this ownership interest through the filing of the Request for Arbitration in this dispute."[329] The below chart, which was provided in the Claim Memorial, shows consistent ownership structure of Lusad since 22 November 2017:[330]



202. To create its jurisdictional objection, Mexico refers to an ICC arbitration and related New York federal district court proceeding between ES Holdings and L1bero Partners, contending

329 Claim Memorial, ¶ 153.

330 Claim Memorial, ¶ 106 (citing **Exhibit C-0069-SPA** (Lusad's Corporate Structure since November 2017)). *See also* **Exhibit C-0001-ENG** (Certificate of Good Standing of HS Holdings, dated 21 May 2019); **Exhibit C-0091-ENG** (Assignment and Acceptance of Units between ES Holdings and Eduardo Zayas Dueñas); **Exhibit C-0092-ENG** (Assignment and Acceptance of Units between ES Holdings and Santiago León Aveleyra); **Exhibit C-0066-ENG** (Amended and Restated Limited Liability Company Agreement of L1bre Holding LLC, dated 2 August 2016); **Exhibit C-0026-ENG** (Certificate of Formation of ES Technologies, dated 1 August 2016); **Exhibit C-0042-SPA** (Certificate of Transformation of Servicios Digitales Lusad S. de R.L. de C.V., dated 1 March 2016); **Exhibit C-0089-ENG** (Certificate of Formation of L1bre Holding LLC, dated 7 January 2016); **Exhibit C-0117-ENG** (L1bre LLC Operating Agreement, dated 7 January 2016); **Exhibit C-0088-ENG** (Certificate of Formation of L1bre LLC), dated 22 December 2015); **Exhibit C-0002-SPA** (Deed of Incorporation of Servicios Digitales Lusad, dated 15 October 2015).

that facts purportedly established in those proceedings reflect a different ownership structure than shown in the above chart.[331] In particular, Mexico contends that ES Holdings only owned 50% of Espiritu Santo Technologies, and, in turn, 50% of Lusad, with the other 50% held by L1bero Partners. Mexico skips over important facts that prove its assertion wrong.

203. The proceedings between ES Holdings and L1bero Partners concerned a dispute over the shareholding of one of Lusad's parent companies, ES Technologies—an entity that sits above L1bre Holding (as shown in the chart above). As explained in the Claim Memorial, ES Holdings agreed to sell 50% of the shares of ES Technologies to L1bero Partners.[332] Although L1bero Partners acted as if it had perfected its acquisition of those shares for a period of time, a dispute subsequently arose between ES Holdings and L1bero Partners as to, amongst other things, whether L1bero Partners fulfilled conditions precedent established in the share purchase agreement and in fact acquired the 50% shareholding interest in ES Technologies. That dispute was resolved in the form of a consent award that confirmed that L1bero Partners never lawfully owned any interest in ES Technologies (and, by extension, never held any indirect ownership interest in Lusad). As ES Holdings explained in the Claim Memorial, "the ICC arbitral tribunal confirmed via a consent award that ES Holdings, L1bero Partners, and ES Technologies agreed that '[t]he conditions precedent set forth in Clause 6.2 of the Unit Purchase Agreement between ES Holdings and L1bero were not satisfied' and '[a]s a result, ***ES Holdings is deemed to have been the owner of 100% of the units of ES Technologies at all times since the time of the Unit Purchase Agreement between ES Holdings and L1bero.'*** L1bero Partners thus itself acknowledged that it never held legal rights to shares in ES Technologies."[333] That ES Holdings's Request for Arbitration in this ICSID case (which transparently made reference to the existence of the shareholding dispute) was filed before the final resolution of the dispute between ES Holdings and L1bero Partners is irrelevant—the resolution of the dispute between ES Holdings and L1bero Partners merely confirmed the status quo, which is that L1bero Partners never lawfully held an interest in the L1bre group.[334] There is no longer any disagreement between ES Holdings and L1bero Partners over the fact that ES Holdings at all relevant times held an 100% indirect ownership in Lusad. This matter has been conclusively settled.

204. In sum, Mexico's baseless argument seeking to reduce ES Holdings's 100% ownership of Lusad to 50% is both irrelevant and lacking factual support. The Tribunal should reject Mexico's argument, find that ES Holdings held a 100% indirect interest in Lusad at all times, and conclude in any case that ES Holdings and L1bre Holding are entitled to claim 100% of the damages due from Mexico as a result of its unlawful treatment of Lusad.

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331 Counter-Memorial, ¶¶ 347–350.

332 Claim Memorial, ¶ 105.

333 Claim Memorial, ¶ 106 (emphasis in original).

334 Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶ 82.

B. Mexico's Objection to the Tribunal's Jurisdiction *Ratione Personae* Is Baseless, As Claimants Are "Investors" Under NAFTA

205. Mexico objects to the Tribunal's jurisdiction *ratione personae* on the basis that, in its telling, the two Claimant entities ought not to be considered, respectively, a Canadian national (in the case of ES Holdings) or a U.S. national (in the case of L1bre Holding) for purposes of establishing the Tribunal's jurisdiction under NAFTA. Mexico instead contends that Claimants should be considered "dual nationals . . . with predominant Mexican nationality" under the theory that natural persons with Mexican nationality were involved in the management of or otherwise affiliated with Claimants.[335] Mexico's extraordinary argument is unaccompanied by a shred of support in the NAFTA, under principles of public international law, or by reference to any finding by any investment tribunal. Mexico's objection is a futile attempt to re-write the NAFTA standard for determining whether enterprises qualify for the protections afforded by NAFTA Chapter 11, which requires only that they be "constituted or organized" under the applicable law of a NAFTA Party other than the respondent State.

206. Simply put, Mexico's jurisdictional objection must be dismissed because the nationality of natural persons is irrelevant to determining jurisdiction in this arbitration. Pursuant to NAFTA Articles 1139 and 201, Claimants are "enterprises", not natural persons, under NAFTA's nomenclature. Specifically, Claimants are enterprises of the Party in the location where they are "constituted or organized." In this instance, ES Holdings is undoubtedly an "enterprise of a Party" (Canada) and L1bre Holding is undoubtedly an "enterprise of a Party" (United States). These enterprises do not need to establish that they are "nationals", defined as certain qualifying "natural persons", because the definition of "investor" encompasses both nationals **and enterprises**. Mexico cannot erase half of the definition of "investor" under NAFTA. Mexico's objection to Claimants' jurisdiction *ratione personae* is frivolous and should be dismissed.

1. NAFTA Defines "Investor of a Party" to Include Enterprises Such as ES Holdings and L1bre Holding

207. NAFTA Articles 1116, 1117, 1121, and 1122 provide the jurisdictional framework upon which an "investor of a Party" may submit a claim to ICSID arbitration. ICSID tribunals constituted under NAFTA, such as the present one, may assert jurisdiction *ratione personae* over any claimant who qualifies as an "investor of a Party." NAFTA Articles 1139 and 201 contain the relevant definitions that give effect to the term "investor of a Party."

208. NAFTA Article 1139 defines an "investor of a Party" as:

> a Party or state enterprise thereof, or a national or **an enterprise** of such Party, that seeks to make, is making or has made an investment.[336]

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[335] Counter-Memorial, ¶ 366.

[336] **Exhibit CL-0001-ENG** (Article 1139, North American Free Trade Agreement, 1 January 1994) (emphasis added).

209. NAFTA Article 201 defines "enterprise" and "enterprise of a Party" as follows:

> enterprise means **<u>any entity constituted or organized under applicable law</u>**, whether or not for profit, and whether privately-owned or governmentally-owned, **<u>including any corporation</u>**, trust, **<u>partnership</u>**, sole proprietorship, joint venture **<u>or other association</u>**;
>
> enterprise of a Party means an enterprise constituted or organized under the law of a Party.[337]

210. As Mexico admits in its Counter-Memorial, NAFTA broadly defines "enterprise."[338] It includes "any entity constituted or organized under applicable law." The definition of "enterprise" also expressly includes partnerships. ES Holdings is a limited partnership incorporated under the laws of Alberta, Canada. The definition of "enterprise" also expressly includes any corporation. L1bre Holding is a limited liability corporation incorporated under the laws of Delaware, United States. Entities that are "enterprises", such as Claimants, thus qualify as "investors" for purposes of establishing jurisdiction under NAFTA Chapter 11 so long as they are an "enterprise of a Party" (Article 1139), and they are an "enterprise of a Party" if they are "constituted or organized under the law of a Party" (Article 201). Claimants have put on the record their constitutive documents to show the places where they are "constituted or organized."[339] Mexico does not dispute that L1bre Holding is duly "constituted or organized" in Delaware, USA, or that and ES Holdings is duly "constituted or organized" in Alberta, Canada. That should put an end to Mexico's jurisdictional objection *ratione personae*.

2. Mexico's Objection to Jurisdiction *Ratione Personae* Ignores NAFTA's Plain Text and Lacks Factual Support

211. To manufacture its baseless jurisdictional objection, Mexico disregards the ordinary meaning of NAFTA Articles 1139 and 201 and thus disregards the applicable nationality test under NAFTA for "enterprises."[340] Instead of referring to the plain text of Article 201, which states that the nationality of enterprises is determined by their place of incorporation, Mexico contends that the nationality of enterprises such as Claimants must be established by reference to the nationality of certain Mexican natural persons that are not the Claimants. This argument makes no sense, is contrary to the text of NAFTA, and lacks any factual support.

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337 **Exhibit CL-0001-ENG** (Article 201, North American Free Trade Agreement,1 January 1994) (emphasis added).

338 Counter-Memorial, ¶ 360.

339 **Exhibit C-0001-ENG** (Certificate of Good Standing of ES Holdings, under the laws of Alberta, Canada, dated 21 May 2019); **Exhibit C-0089-ENG** (Certificate of Formation of L1bre Holding LLC, dated 7 January 2016); **Exhibit C-0124-ENG** (Status of L1bre Holding LLC from the State of Delaware Website, dated 26 October 2021).

340 Counter-Memorial, ¶ 360.

a. The Text of NAFTA Does Not Support Mexico's Arguments

212. Mexico builds its jurisdictional objection on a blatant—and apparently knowing—misstatement of NAFTA Article 201. Mexico acknowledges the definition of "enterprise" (quoted above), and that "enterprise" is defined "in broad terms," but then contends that the NAFTA "says nothing about how their nationality is to be determined."[341] Mexico's sidestep ignores the definition of "enterprise of a Party," which provides that an enterprise will be considered to be "of a Party" if it is "constituted or organized under the law of a Party."[342] Mexico's contention is not only wrong on the face of Article 201, but it is also inconsistent with the well-treaded line of NAFTA decisions relying on NAFTA Articles 201 and 1139 for establishing the nationality of investors for jurisdictional purposes.[343] Mexico knows this to be so, because in submissions in other cases, Mexico has itself referred to and acknowledged NAFTA Articles 201 and 1139 as determinative for establishing nationality for jurisdictional purposes.[344]

213. There is no issue concerning dual nationality in this case. Claimants are not "nationals" at all under the definition in NAFTA, which is limited to certain "natural persons." Instead, Claimants are "enterprises" under NAFTA's definition. Mexico's citations to cases

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[341] Counter-Memorial, ¶ 360.

[342] Counter-Memorial, ¶ 360; **Exhibit CL-0001-ENG** (Article 201, North American Free Trade Agreement, 1 January 1994).

[343] *See, e.g.*, **Exhibit CL-0040-ENG**, ¶¶ 81, 85 (*Waste Management Inc. v. United Mexican States II*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004) (referring to NAFTA Articles 201 and 1139 and finding that NAFTA "spells out in detail and with precision the requirements for maintaining a claim" and that as a result "there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law in the field of diplomatic or otherwise"); **Exhibit CL-0045-ENG**, ¶ 79 (*Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002) (finding that NAFTA "Chapter 11 specifically addresses issues of standing and scope of application through a series of detailed provisions, most notably the definitions of 'enterprise', 'investment', 'investment of an investor of a Party' and 'investor of a Party' in Article 1139"); **Exhibit CL-0148-ENG**, ¶¶ 247–248 (*Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016) (referring to NAFTA Articles 201 and 1139 for purposes of determining whether the claimant was a qualifying "investor" for jurisdictional purposes).

[344] *See*, *e.g.*, **Exhibit CL-0149-ENG**, ¶¶ 93, 122, fn. 91 (*Bayview Irrigation District and others v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Mexico's Memorial on Jurisdiction, 19 April 2006) ("it is clear that the protection afforded by Chapter Eleven only covers investments of investors of one Party in the territory of another Party . . . by a U.S. national or **enterprise**") ("In the case at hand, each claimant must show that it is a United States national **or juridical entity**") (Mexico citing to NAFTA Articles 201 and 1139: "Article 201 (Definitions of General Application) provides the following definitions for purposes of the entire agreement: national means a natural person who is a citizen or permanent resident of a Party and any other natural person referred to in Annex 201.1 [which provides definitions specific to Mexico and the United States]: enterprise of a Party means an enterprise constituted or organized under the law of a Party; [and] 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. Article 1139 adds, for purposes of Chapter Eleven exclusively: enterprise means an 'enterprise' as defined in Article 201 (Definitions of General Application), and a branch of an enterprise; enterprise of a Party means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there") (emphases added).

involving dual nationals are inapplicable to the facts of this case. No Mexican national, or dual national, has brought claims against Mexico in this arbitration.

b. Mexico's Arguments Lack Factual Support

214. Mexico contends that Claimants "are not incorporated in [Canada and the United States], in fact, as they are not corporations" but are instead "associations run entirely by Mexican citizens to conduct business exclusively in Mexico."[345] Mexico's contention is incorrect and, in any event, misapplies NAFTA.

215. L1bre Holding is not, as Mexico has put it, an "association."[346] L1bre Holding is incorporated as a limited liability company (an "LLC") and, as attested to by Delaware's Secretary of State, it has been "duly formed under the laws of the State of Delaware" in the United States.[347] This is apparent on the face of L1bre Holding's Certificate of Formation as well as its Certificate of Good Standing.[348] In seeking to characterize L1bre Holding as an "association" or a "partnership," Mexico refers to a smattering of random decisions of U.S. courts together with the New York Partnership Law.[349] Plainly, the New York Partnership Law is irrelevant to L1bre Holding's legal character as a Delaware LLC, which is governed instead by the Delaware General Corporation Law. Pursuant to §106 of that law, "[u]pon the filing with the Secretary of State of the certificate of incorporation, executed and acknowledged in accordance with §103 of this title, the incorporator or incorporators who signed the certificate, and such incorporator's or incorporators' successors and assigns, shall, from the date of such filing, be and constitute a body corporate, by the name set forth in the certificate."[350] Pursuant to §122(2), every corporation created under the Delaware General Corporation Law can participate as a party "in its corporate name."[351] L1bre Holding is a duly formed corporation under Delaware law and is able to act in its corporate name in accordance with its separate and distinct legal personality. Mexico's attempt to characterize a Delaware LLC as being somehow governed by the New York Partnership Law is as wrong as it is confusing.

216. At least one prior dispute under NAFTA Chapter 11 involved claimants that were LLCs (in that case, from Colorado)—*B-Mex, LLC and others v. Mexico*.[352] Mexico does not

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345 Counter-Memorial, ¶ 360.

346 Counter-Memorial, ¶ 362.

347 **Exhibit C-0089-ENG** (Certificate of Formation of L1bre Holding LLC, dated 7 January 2016); **Exhibit C-0124-ENG** (Status of L1bre Holding LLC from the State of Delaware Website, dated 26 October 2021).

348 **Exhibit C-0089-ENG** (Certificate of Formation of L1bre Holding LLC, dated 7 January 2016); **Exhibit C-0124-ENG** (Status of L1bre Holding LLC from the State of Delaware Website, dated 26 October 2021).

349 Counter-Memorial, ¶ 362.

350 **Exhibit CL-0150-ENG** (§106 (Delaware General Corporations Law).

351 **Exhibit CL-0151-ENG** (§122(2) (Delaware General Corporations Law).

352 **Exhibit CL-0152-ENG** (*B-Mex, LLC and others v. Mexico*, ICSID Case No. ARB(AF)/16/3, Partial Award, 6 July 2019).

appear to have argued in that case that the claimants' status as LLCs affected their nationality. It is unclear why Mexico has taken a contrary position in this case to argue that L1bre Holding's status as an LLC excludes it from treatment as an "enterprise" under NAFTA.

217. ES Holdings is a limited partnership formed in Alberta, Canada.[353] Mexico's submission that partnerships like ES Holdings are subject to a different nationality test than corporations is plainly wrong. Article 201 defines the term "enterprise" as encompassing "any entity constituted or organized under applicable law . . . including any corporation, . . . partnership."[354] Article 201 goes on to provide that an "enterprise" is an "enterprise of a Party" if it is "constituted or organized under the law of a Party."[355] Therefore, regardless of whether an enterprise pursuing an ICSID arbitration is formed as a corporation or a partnership (or exists in any other corporate form), the relevant inquiry for nationality purposes is to identify the jurisdiction in which the enterprise has been "constituted or organized."

218. At least one prior dispute under NAFTA Chapter 11 involved a claimant that was a L.P.—*Lion Mexico Consolidated LP v. Mexico*.[356] In that case, Mexico does not appear to have argued that as a limited partnership under Canadian law, the claimant should be treated differently than any other "enterprise."

219. In any event, as Mexico admits,[357] NAFTA's definition of "enterprise" also includes "other association[s]." Even if Mexico was correct on the facts (which it is not), an "association" would still qualify for jurisdiction as an "investor of a Party" under NAFTA.

c. Mexico's References to U.S. Law Are Irrelevant

220. Likely because NAFTA and international law do not support its objection to jurisdiction *ratione personae*, Mexico resorts to citations to the domestic law of the United States to try to establish an objection to jurisdiction under NAFTA. Mexico asserts that "U.S. law provides an important perspective on the nature of entities that are not registered corporations with their own personality. Under U.S. law, unincorporated entities like partnerships or limited liability companies acquire the citizenship of their 'members' for purposes of court jurisdiction."[358] Mexico goes on to further address the extent of L1bre Holding's contacts in the United States and ES Holdings's contacts in Canada.[359] Mexico's assertions are not only fraught with errors in its

[353] **Exhibit C-0001-ENG** (Certificate of Good Standing of ES Holdings, under the laws of Alberta, Canada, dated 21 May 2019).

[354] **Exhibit CL-0001-ENG** (Article 201, North American Free Trade Agreement, 1 January 1994).

[355] **Exhibit CL-0001-ENG** (Article 201, North American Free Trade Agreement, 1 January 1994).

[356] *See* **Exhibit CL-0153-ENG** (*Lion v. Mexico*, ICSID Case No. ARB(AF)/15/2, Decision on Jurisdiction, 30 July 2018).

[357] Counter-Memorial, ¶ 360 ("NAFTA defines 'enterprise' in broad terms as including partnerships and 'other associations'").

[358] Counter-Memorial, ¶ 361.

[359] Counter-Memorial, ¶¶ 363–365.

characterizations of U.S. law (including in its characterization of limited liability companies and the complex subject of U.S. "court jurisdiction"), they are patently irrelevant. U.S. law "for purposes of court jurisdiction" is irrelevant to this Tribunal's jurisdiction under NAFTA and the ICSID Convention. Claimants' contacts in the United States or Canada are irrelevant to determining the Tribunal's jurisdiction *ratione personae* under NAFTA and the ICSID Convention. The only U.S. law that is relevant to the Tribunal's determination on jurisdiction is uncontested by Mexico—that L1bre Holding was duly "constituted or organized" in Delaware, USA.

221. The rubric for making a finding *ratione personae* under NAFTA is well-established and uncontroversial. The Tribunal in *Corn Products v. Mexico* articulated the law to be applied by a tribunal interpreting the NAFTA as follows:

> A second matter on which there is broad agreement between the parties—at least as to the principles involved—concerns the law to be applied by the Tribunal. In accordance with Article 1131(1) of the NAFTA, the Tribunal 'shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law'. The Tribunal considers the applicable rules of international law to include the rules relating to the interpretation of treaties (which it is generally accepted have been authoritatively codified in the Vienna Convention on the Law of Treaties, 1969). The rules on State responsibility (of which, it is accepted, the most authoritative statement is to be found in the ILC Articles) are in principle applicable under the NAFTA save to the extent that they are excluded by provisions of the NAFTA as *lex specialis.*[360]

222. Mexico's invocation of standards extraneous to NAFTA to manufacture its jurisdictional objection fails to give effect to the *lex specialis* of NAFTA. As noted above, NAFTA Articles 1139 and 201 (together with Articles 1116, 1117, 1120, and 1121) provide a comprehensive framework for determining when enterprises have standing to commence a claim under NAFTA. No provision in NAFTA requires the application of additional criteria extraneous to NAFTA to determine which enterprises qualify as "investors" for purposes of protection under NAFTA. That is because NAFTA is *lex specialis* for purposes of establishing the conditions upon which investors are able to access its protections.[361] Indeed, as stated by the tribunal in *Waste*

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[360] **Exhibit CL-0065-ENG**, ¶ 76 (*Corn Products International Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, 15 January 2008). *See also* **Exhibit CL-0013-ENG**, ¶ 119 (*Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007) ("Chapter Eleven of the NAFTA constitutes *lex specialis* in respect of its express content, but customary international law continues to govern all matters not covered by Chapter Eleven.").

[361] *See* **Exhibit CL-0156-ENG**, ¶¶ 52, 63 (*Tokios Tokelés v. Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction, 29 April 2004) (52. "We find no basis in the BIT or the Convention to set aside the Contracting Parties' agreed definition of corporate nationality with respect to investors of either party in favor of a test based on the nationality of the controlling shareholders. While some tribunals have taken a distinctive approach, we do not believe that arbitrators should read into BITs limitations not found in the text nor evident

Management v Mexico II—a case decided under NAFTA in which Mexico also sought unsuccessfully to invoke criteria external to NAFTA in concocting jurisdictional objections—"[w]here a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law . . . or otherwise."[362] There is consensus on this point among investment tribunals, and Mexico cites no authority to the contrary.[363]

d. Natural Persons' Mexican Nationalities are Irrelevant

223. Fixated on the Mexican nationality of certain natural persons that are not the Claimants, Mexico goes on to contend that "Claimants have gone to great lengths to try to conceal the identities of the owners" of those companies and that those individuals, as Mexican nationals,

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from negotiating history sources") (63. "In the present case, as in *Autopista,* 'arguments of an economic nature are irrelevant' where 'the parties have specifically identified' the country of legal establishment 'as the criterion to be applied' and 'have not chosen to subordinate their consent to ICSID arbitration to any other criteria.' This Tribunal . . . is obliged to respect the parties' agreement 'unless it proves unreasonable.' Far from unreasonable, reference to the state of incorporation is the most common method of defining the nationality of business entities under modern BITs and traditional international law"); **Exhibit CL-0024-ENG**, ¶ 481 (*ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No ARB/03/16, Award, 2 October 2006) ("[t]here is general authority for the view that a BIT can be considered as a *lex specialis* whose provisions will prevail over rules of customary international law"); **Exhibit CL-0157-ENG**, ¶ 321 (*Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award,3 November 2015) (finding that contracting parties to a treaty may, by specific provision (lex specialis), limit the application of broader principles of international law); **Exhibit CL-0158-ENG**, ¶ 475 (*Teinver SA, Transportes de Cercanías SA* and Autobuses Urbanos del Sur SA *v. The* Argentine Republic, ICSID Case No ARB/09/01, Award, 21 July 2017) ("The Treaty is *lex specialis* […] as it governs investments made by nationals of one State in the territory of the other. The Treaty forms the legal basis for Claimants' claims against Respondent in this arbitration. Thus, the provisions of the Treaty supersede principles of customary international law unless those principles are general principles of international law in the nature of *jus cogens*"); **Exhibit CL-0159-ENG**, ¶ 273 (*Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021) (rejecting Colombia's argument that the Tribunal had to go beyond the provisions the applicable treaty to establish the nationality of the claimant).

[362] **Exhibit CL-0040-ENG**, ¶ 85 (*Waste Management Inc. v. United Mexican States II*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004).

[363] *See* **Exhibit CL-0156-ENG**, ¶ 30 (*Tokios Tokelés v. Ukraine* (ICSID Case No ARB/02/18) Decision on Jurisdiction, 29 April 2004) (endorsing the principle of *expresio unius est exclusion alterius* in finding that a qualifying investor established in the jurisdiction of the contracting parties to the treaty is defined by the article of the treaty that addresses that issue, and nothing else); **Exhibit CL-0160-ENG**, ¶ 178 (*MNSS BV and Recupero Credito Acciaio NV v. Montenegro*, ICSID Case No ARB(AF)/12/8, Award, 4 May 2016) (noting that as a matter of interpretation the tribunal is limited to the text of the BIT when that text is clear); **Exhibit CL-0161-ENG**, ¶ 128 (*KT Asia Investment Group* BV v. Republic of Kazakhstan, ICSID Case No ARB/09/8, Award, 17 October 2013) (finding no basis for applying a rule of international law when a specific regime created by the treaty addresses the same issue). For completeness, outside of the treaty context, international law establishes place of establishment as the default for determining nationality. *See* **Exhibit CL-0162-ENG**, ¶ 71 (*Barcelona Traction Case* [1970] ICJ Reports 3); **Exhibit CL-0163-ENG**, p. 196 (M Sornarajah, *The Settlement of Foreign Investment Disputes* (1st edn 2000)) ("Overwhelming authority supports the proposition that incorporation is the test of nationality. The most important of them is the judgment of the International Court of Justice in the *Barcelona Traction Case*.").

"are not entitled to bring an international investment claim against Mexico."[364] Mexico's submission here is non-sensical because the Mexican nationals listed by Mexico—Mr. Covarrubias, Mr. Zayas and Mr. León—are not bringing the present claims. These natural persons' Mexican nationalities are irrelevant to the issue of jurisdiction *ratione personae*. Instead, ES Holdings, a Canadian limited partnership, and L1bre Holding, a Delaware limited liability company, are bringing the claims, and these Claimants are the entities that have established jurisdiction.

224. Contrary to Mexico's submission, Claimants have not gone to any "lengths to try to conceal the identities of the[ir] owners"; the ultimate beneficial ownership or management personnel of each Claimant enterprise is simply irrelevant to establishing whether Claimants qualify as "investors" for purposes of establishing the Tribunal's jurisdiction to hear their claims under NAFTA Chapter 11. In fact, in the document production phase, Claimants were forthcoming regarding these natural persons' nationalities.[365] There is nothing to conceal related to this issue, which is irrelevant to the issue of jurisdiction or any other issue in this arbitration.

225. ES Holdings and L1bre Holding are indisputably entities "constituted or organized" under the laws of Canada and the United States of America, respectively, and so they qualify for protection under NAFTA Chapter 11. Mexico cannot dispute their places of incorporation, and so Mexico does not even try. Instead, to manufacture a baseless objection to jurisdiction, Mexico sidesteps the Claimant enterprises' places of constitution/organization, instead arguing that NAFTA Chapter 11's nationality requirements can only be satisfied by determining the nationality of a claimant's ultimate beneficial owners or management personnel. Mexico's position is not supported by any provision in the NAFTA, nor by international law more broadly, nor by any prior tribunal's findings. Indeed, Mexico's objection to jurisdiction *ratione personae* based on the nationality of natural persons connected with claimant enterprises is so plainly incorrect as a matter of law that the Tribunal rejected Mexico's request for documents regarding their nationality on the basis that, *inter alia*, "the Tribunal is not convinced of the relevance of the documents to the outcome of the case."[366] Mexico's jurisdictional objection *ratione personae* must be dismissed.

C. Mexico's Objection to the Tribunal's Jurisdiction *Ratione Materiae* Is Both Factually and Legally Baseless

226. Claimants' investments in Mexico are within the scope of NAFTA Article 1139, and therefore Claimants have established jurisdiction *ratione materiae*. Mexico's arguments to the contrary are both groundless and meritless. As established in Section II, *supra*, Claimants' investments in Mexico were lawful, well-documented, and in good faith. Mexico has failed to evidence any illegalities in Claimants' investments that would call into question the Tribunal's jurisdiction. Additionally, NAFTA does not impose a legality requirement for investments to receive protection under NAFTA. This objection to jurisdiction must be dismissed.

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364 Counter-Memorial, ¶¶ 360, 365.

365 *See* Procedural Order No. 4, pp. 86–88 (stating that the issue of the individuals' Mexican nationalities is "not in dispute between the parties").

366 Procedural Order No. 4, page 86 (denying Mexico's Request No. 9).

227. Claimants address Mexico's argument in two parts. Subsection 1 demonstrates that there is no factual basis for Mexico's objection to jurisdiction *ratione materiae*. Subsection 2 demonstrates that there is no legal basis for Mexico's objection to jurisdiction *ratione materiae*.

1. Mexico's Objection *Ratione Materiae* Has No Factual Basis

228. Claimants and Lusad did not commit illegal acts under Mexican law that could give rise to a valid objection to jurisdiction *ratione materiae*. Claimants' investments were made **in accordance with** Mexican law, not contrary to Mexican law. Mexico's alleged illegalities are false, unproven, and in many instances grounded in suspect documentation introduced by Mexico, as described in full in Section II.D, *supra*. Mexico's objection to jurisdiction *ratione materiae* on the basis of alleged illegality under Mexican law must be dismissed because Claimants' investments in Mexico were lawful, well-documented, and in good faith, as Mexican authorities repeatedly recognized at the time.

229. Mexico's factual allegations underpinning Mexico's arguments on jurisdiction *ratione materiae* largely echo Mexico's arguments in its section on the merits. We further address these contentions and their lack of factual or legal support in Section IV, *infra*. In short, Mexico has not contradicted Claimants' explanation of the lawfulness of their investments and Lusad's Concession as detailed in the Claim Memorial. Mexico City granted a valid and binding Concession to Lusad in a transparent and lawful process, as confirmed by the testimonies of Mr. Muñana, Mr. León, Mr. Zayas, and contemporary documentary evidence.[367] Lusad and its representatives did not engage in any unlawful conduct, much less conduct that would strip Claimants of jurisdiction *ratione materiae* under NAFTA.[368] Mr. Muñana, who as Semovi's legal director at the time was responsible for verifying the Concession's legality, a task he undertook in accordance with advisors from Mexico City and other governmental organs, as well as at external advisors, confirmed that Semovi operated under the consistent understanding that the Concession was lawfully granted and remained valid.[369] The Expert Report provided by Mr. De la Peña further explains in detail that each element of the Concession's issuance was fully compliant with Mexican law, and that Mexico's objections to the Concession's legality are baseless.[370]

230. Mexico's contradictions in its Counter-Memorial on this point reveal the truth. On one hand, Mexico alleges that the Concession was never valid due to illegality under Mexican law, and that Lusad did not comply with the Concession.[371] On the other hand, Mexico argues that the Concession remains valid today under Mexican law and that the suspension notices issued by

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[367] *See, e.g.*, Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶¶ 2–39; Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶¶ 4–23; Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 28–46, Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶¶ 14–41, **Exhibit C-0005-SPA** (Necessity Declaration issued by Semovi); **Exhibit C-0007-SPA** (Amended Concession Agreement, as reissued on 21 March 2017).

[368] *See supra*, Sections II.A–B.

[369] *See* Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶¶ 2–39.

[370] *See* Expert Report of Marco Antonio de la Peña (Cuatrecasas), dated 4 November 2022, ¶¶ 7.1–8.1, 9.1.

[371] *See* Counter-Memorial, Section III.C.

Semovi are false, despite Claimants' documentary proof and firsthand accounts of Mexico City's suspension of the Concession's implementation for political reasons.[372] Specifically, Mexico admits that "[i]n clear terms, Semovi has not suspended the Lusad Concession, regardless of the fact that there are irregularities surrounding its granting to Lusad."[373] If, as Mexico argues, the Concession was never lawful in the first place, or that subsequent *amparo* court actions invalidated the Concession, then it makes no sense that the government to this day has never taken formal action to terminate the Concession or otherwise seek to establish (outside of this arbitration) that Lusad failed to comply with the Concession's terms. In fact, the government did precisely the opposite, consistently telling Lusad, including through formal letters,[374] that the Concession remained valid—until Mexico City politics caused Semovi to change its treatment of Claimants, Lusad, and the Concession. Claimants relied on Mexico City's consistent actions that gave every indication that Lusad held a lawful and valuable Concession that Mexico was working with Lusad to implement. Mexico is wrong when it alleges that "Claimants were aware of and accepted the illegality of the concession and the consequences of said legality"[375]—instead, Claimants relied on Mexico's repeated representations and recognition that the Concession was lawfully granted. Mexico cannot work hand-in-hand with Lusad to implement the Concession for multiple years, then (after suspending it expressly for political reasons) allow the Concession to remain in force under Mexican law for several years more, and then argue that the Concession is somehow suddenly invalid or unlawful for purposes of this arbitration. In the circumstances, Mexico's contention defies credibility.

231. In the face of Claimants' extensive documentary proof of the Concession's legality, Mexico resorts to outlandish allegations that Claimants' documentation is somehow forged.[376] As detailed in the Section II, *supra*, Mexico's allegations are simply false.[377] The authenticity of the documents relied on by Claimants in this case has been verified through the testimony of Mr. León, Mr. Herrera, and Mr. Muñana, who reviewed those documents contemporaneously (unlike any of Mexico's witnesses) and who testify as to their authenticity.[378]

232. Because Mexico has not submitted witness testimony from any individual actually involved in the granting of the Concession or its performance from 2016 to 2018, Mexico's entire argument relies upon the erroneous premise that Claimants have submitted false documents, based merely on the fact that those documents are missing from some of Semovi's files.[379] However, as

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372 *See* Counter-Memorial, ¶ 401; *supra*, Section II.C.

373 *See* **Exhibit C-0056-SPA** (Oficio No. DNRM-0673-2017 from SEMOVI confirming the validity of the Concession Agreement, dated 4 April 2017); **Exhibit C-0057-SPA** (Oficio No. DNRM-1460-2017 from Semovi confirming the validity of the Concession Agreement, dated 19 June 2017).

374 *See* Counter-Memorial, ¶ 401.

375 *See* Counter-Memorial, ¶ 383.

376 *See* Counter-Memorial, ¶¶ 381, 387.

377 *See* Counter-Memorial, ¶¶ 387–388.

378 *See generally* Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022.

379 *See* Counter-Memorial, Section III.C.

explained above, these assertions reveal much more about Mexico's poor record-keeping and failed cover-up attempts than they do about the validity of the documents in question, which is confirmed by extensive contemporaneous documentation and fact witness testimony.

233. Because Mexico has no evidence of any unlawful act, Mexico's case citations to support its argument are of no import. For example, Mexico tries to compare the present case to the facts underlying the tribunals' findings of illegality in concessions in *Churchill* and *Inceysa*, which both involved actual proof of false documents used to obtain concession rights.[380] In *Churchill*, the tribunal pointed to numerous acts of forgery "of a particularly serious nature" which it found amounted to "a large scale fraudulent scheme implemented to obtain four coal mining concession areas."[381] In *Inceysa*, the tribunal determined that the claimant had presented false information as part of the tender for the concession including during the bidding process.[382] Nothing of the sort was committed by Claimants or Lusad in this case. As detailed in Section II.D, *supra*, Mexico's presentation of an incomplete and in some cases falsified record, and Mexico's efforts to obtain Mr. Zayas's signature on a false concession through deceit are evidence to the contrary—that **Mexico is the party responsible for false representations regarding the Concession in this arbitration, not Claimants**.

234. Nor do the *amparo* court cases referenced by Mexico have any impact on this Tribunal's analysis of jurisdiction.[383] As a factual matter, as discussed in detail in Section II.A.4, *supra*, those court cases did not strip Lusad of its rights under the Concession. The majority of the *amparo* lawsuits failed, and those that were successful only applied to those particular litigants—notably, not to Lusad.[384] Following these amparo decisions, Semovi also issued legal opinions to Lusad in April and June 2017, again reflecting this understand and reconfirming Semovi's view that the Concession remained valid and enforceable.[385] Mexico's statement that "Claimants were aware of and accepted the illegality of the concession and the consequences of said illegality" is plainly false—Semovi never disavowed the Concession or gave Lusad or Claimants any notice of any irregularities in the Concession's validity due to these *amparo* cases or otherwise, and instead in fact confirmed its belief that the Concession remained valid. Even as Semovi suspended the implementation of the Concession for political reasons in 2018, it did so in reference to political changes, all the while confirming its recognition of the Concession and its understanding that

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380 *See* Counter-Memorial, ¶ 388.

381 *See* **Exhibit CL-0206-ENG**, ¶¶ 510, 515 (*Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016).

382 *See* **Exhibit CL-0207-ENG**, ¶ 236 (*Inceysa Vallsoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006).

383 *See* Counter-Memorial, ¶ 382.

384 *See supra*, Section II.A.4; Expert Report of Marco Antonio de la Peña (Cuatrecasas), dated 4 November 2022 ¶ 15.1 (explaining that any successful challenge applies only to the individual plaintiff, and does not affect the legality of the government act as it related to non-parties).

385 **Exhibit C-0056-SPA** (Oficio No. DNRM-0673-2017 from SEMOVI confirming the validity of the Concession Agreement, dated 4 April 2017); **Exhibit C-0057-SPA** (Oficio No. DNRM-1460-2017 from Semovi confirming the validity of the Concession Agreement, dated 19 June 2017).

Lusad had complied in all respects with its obligations under that document.[386] Mexico cannot rely *ex post* on court cases interpreting Mexican law to deny jurisdiction to Claimants when Mexico City created a legitimate expectation that the Concession was valid through its statements and actions, Claimants relied on those government representations and actions, and both Lusad and Semovi acted in good faith to implement the Concession until Semovi suspended it for political reasons.

235. For these reasons, Mexico's jurisdictional objection *ratione materiae* must be dismissed, because it has no factual support.

2. Mexico's Objection *Ratione Materiae* Has No Legal Basis

236. In any case, Mexico's unsubstantiated allegations of illegality do not raise any issue that would strip the Tribunal of jurisdiction *ratione materiae*. This is because Mexico's articulated legal standard is inaccurate, incomplete, and not in accordance with the plain language of the NAFTA. This applies in particular to Mexico's attempt to avoid the Tribunal's jurisdiction by contending that, for instance, the authorities who issued the Concession to Lusad in 2016 lacked the competence to do so, or that Semovi did not apply the correct procedure in granting the Concession.

237. First of all, Mexico does not dispute that Claimants invested in Mexico under the definitions contained in NAFTA Article 1139. Claimants have made qualifying investments that grant Claimants and their investments protections under NAFTA Chapter 11. Mexico's sole focus of its objection to jurisdiction *ratione materiae* involves alleged illegality under Mexican law.

238. Unlike some other investment treaties, NAFTA Chapter 11 does not expressly require investments to be made in accordance with the host State's laws to qualify for protection under the treaty.[387] To read such a requirement into NAFTA would not be in accordance with the NAFTA. Mexico has not cited a single NAFTA tribunal's finding that read such a requirement into NAFTA. This Tribunal should not break new ground at Mexico's behest on this issue of law, particularly where there is no factual support for such a finding.

239. In instances where the treaty text contains no such requirement, there is no general presumption of a requirement of legality under domestic law to confer jurisdiction *ratione materiae*. No tribunal's decision applying NAFTA has imposed such a requirement.

240. The tribunal in *Bear Creek Mining v. Peru* interpreted the Canada-Peru free trade agreement on this issue, and found that "there is no jurisdictional requirement that Claimant's

[386] Counter-Memorial, ¶ 383; *See supra*, Section II.A.4.

[387] *Cf.* **Exhibit CL-0204-ENG**, Article 1b (Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Promotion and Protection of Investments, Adopted 14 March 1994, Entered into Force 6 January 1995) ("'investment' means every kind of asset established or acquired, including changes in the form of such investment, in accordance with the national laws of the Contracting Party in whose territory the investment is made . . ."); **Exhibit CL-0205**, Article 1 (Agreement Between the Federal Republic of Germany and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments, Adopted 18 April 1997, Entered into Force 1 February 2000) (serving as the basis for the award cited by Mexico in *Fraport v. Philippines*).

investment was legally constituted under the laws of Peru."[388] The tribunal agreed with the claimant that "under international law, the Tribunal may not import a requirement that limits its jurisdiction when such a limit is not specified by the parties[,]" thereby distinguishing the Canada-Peru FTA from the treaties applicable in other cases including for example the *Inceya* case Mexico cites in its Counter-Memorial which contained express requirements that the investment comply with host state law.[389] The *Bear Creek* tribunal tied its analysis to language contained in the Canada-Peru FTA, which contains very similar text in relevant respects to NAFTA including parallel language to NAFTA Article 1111. Specifically, that tribunal found: "Nothing in Article 1102 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with the establishment of covered investments, such as a requirement that investments be legally constituted under the laws or regulations of the Party."[390] The *Bear Creek* tribunal further dismissed arguments that the alleged good faith of the investor should be a condition for jurisdiction.[391] All in all, the findings of the *Bear Creek* tribunal indicate that the Tribunal, interpreting similar treaty language under NAFTA, should dismiss Mexico's efforts to read text into NAFTA that does not exist.

241. Several other tribunals have taken a similar approach, finding that where no legality under domestic law requirement exists in a treaty, or even in cases where there is a legality requirement that is not tied to the definition of investment in a treaty, then a legality requirement should not be a condition of the tribunals' jurisdiction.[392] Furthermore, tribunals have found that

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388 *See* **Exhibit CL-0030-ENG**, ¶ 319 (*Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, 30 November 2017).

389 *See* **Exhibit CL-0030-ENG**, ¶ 320 (*Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, 30 November 2017) (Mexico cites *Inceysa* when arguing that legality under domestic law should be a jurisdictional requirement under NAFTA and that lack of legality and good faith related to obtaining a concession would be a basis for an objection to jurisdiction. *See* Counter-Memorial at fn. 456, ¶¶ 391-2).

390 *Compare* **Exhibit CL-0030-ENG**, ¶ 319 (*Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, 30 November 2017) *with* NAFTA Article 1111.

391 *See* **Exhibit CL-0030-ENG**, ¶ 321 (*Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, 30 November 2017).

392 *See, e g.*, **Exhibit CL-0165-ENG**, ¶ 5.1.11.5 (*Yukos Universal Limited (Isle of Man) v. The Russian Federation*, Judgment of the Hague Court of Appeal, PCA Case No. 2005-04/AA227) ("the Russian Federation has not sufficiently demonstrated that there is a generally accepted principle of law which implies that an arbitral tribunal must (always) decline jurisdiction where it concerns the making of an 'illegal' investment[ ]" when interpreting the Energy Charter Treaty); **Exhibit CL-0166-ENG**, ¶ 204 (*Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016); **Exhibit CL-0167-ENG**, ¶ 127 (*Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013); **Exhibit CL-0168-SPA**, ¶ 386 *et seq.* (*Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Final Award, 21 May 2013); **Exhibit CL-0169-ENG**, ¶ 226 (*Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012); **Exhibit CL-0170-ENG**, ¶ 114 (*Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010); **Exhibit CL-0171-ENG**, ¶ 46 (*Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001).

legality under domestic law does not relate to the definition of "investment" provided in Article 25(1) of the ICSID Convention, which is neutral on this issue.[393]

242. Even tribunals that have imposed a legality requirement will typically limit such a requirement to only certain types of serious violations of host State laws. The tribunal in *Kim v. Uzbekistan* articulated a proportionality principle for violations of domestic law, weighing the importance of the law breached, the seriousness of the breach, the significance of the State's compromised interest, and the proportionality of the sanction.[394] The tribunal in *Hochteif v. Argentina* emphasized that even where the treaty contains an express requirement of legality, "[b]ut not every technical infraction of a State's regulations associated with an investment will operate so as to deprive that investment of the protection of a Treaty that contains such a provision."[395] In *Mamidoil v. Albania*, the tribunal found that "not every trivial, minor contravention of the law should lead to a refusal of jurisdiction," finding that illegality "must be serious, or manifest . . ." to affect jurisdiction.[396] Even a tribunal that made a finding of illegality on the basis of unclean hands in *Alvarez y Marin v. Panama* emphasized that only severe breaches of the legal system of a State can rise to the level of the severe punishment of losing protections of a treaty.[397]

243. Some tribunals have found that the host State's contemporaneous endorsement of alleged illegality may also be considered when assessing the context of any issue of domestic illegality. For example, in *RDC v. Guatemala* (interpreting the CAFTA-DR Free Trade Agreement which contains similar language to NAFTA, in a dispute brought by a U.S. claimant), the tribunal stated that even if claimant violated domestic law, the government should be prevented from raising "violations of its own law as a jurisdictional defense when [it] knowingly overlooked them and [effectively] endorsed an investment which was not in compliance with its law."[398] In *Stati v.*

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[393] *See, e g.*, **Exhibit CL-0170-ENG**, ¶ 114 (*Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010); **Exhibit CL-0167-ENG**, ¶ 127 (*Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013).

[394] *See* **Exhibit CL-0172-ENG**, ¶¶ 408 *et seq.* (*Vladislav Kim and others v. Republic of Uzbekistan,* ICSID Case No ARB/13/6, Decision on Jurisdiction, 8 March 2017). *See also* discussion in **Exhibit RL-0076**, p. 87 (Caline Mouawad and Jessica Beess Chrostin, "*The illegality objection in investor-state arbitration",* Arbitration International, 2021).

[395] *See* **Exhibit CL-0173-ENG**, ¶ 199 (*HOCHTIEF Aktiengesellschaft v. Argentine Republic,* ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014).

[396] *See* **Exhibit CL-0174-ENG**, ¶¶ 483 (*Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania,* ICSID Case No ARB/11/24, Award, 30 March 2015).

[397] *See* **Exhibit CL-0175-SPA**, ¶ 156 (*Mr. Cornelis Willem van Noordenne, Mr. Bartus van Noordenne, Stichting Administratiekantoor Anbadi, Estudios Tributarios AP S.A. and Álvarez y Marín Corporación S.A. v. Republic of Panama,* ICSID Case No. ARB/15/14, Award, 12 October 2018) ("Ahora bien, no toda ilegalidad puede conllevar la pérdida de protección ius-internacional, pues éste es un castigo severo y no modulable, que solo se debe imponer si constituye una respuesta proporcional ante un inversor que al invertir haya incumplido gravemente el ordenamiento jurídico del Estado receptor. Y la gravedad se medirá determinando la relevancia de la normativa infringida y la intención del inversor.").

[398] *See* **Exhibit CL-0176-ENG**, ¶ 146 (*Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010) (citing to **Exhibit**

Kazakhstan, the tribunal noted that the treaty did not contain a requirement of the investment's legality, and even if there were such a requirement, the respondent State's inspecting and monitoring of the investment but failure to allege illegality or impropriety must be taken into account.[399] In *Karkey Karadeniz v. Pakistan*, the tribunal found that "a host State cannot avoid jurisdiction under the BIT by invoking its own failure to comply with domestic law" when the alleged breaches of State procurement laws were "duly agreed by the contracting parties."[400] The tribunal in *Gavrilovic v. Croatia* also found that the State's complicity in illegality prohibited the State from invoking illegality as a jurisdictional objection.[401]

244. Moreover, a State's actions that create legitimate expectations of protection of the investment, including *ultra vires* acts, can defeat an illegality objection. If a State turns a blind eye to illegality, it accepts the investment and is estopped from invoking a legality objection. For example, the tribunal in *Fraport I* articulated that "[p]rinciples of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law."[402] In *Kardassopoulos v. Georgia*, the tribunal found that a State's endorsement of the investor's investment through signing of concession documents estopped the State from objecting to jurisdiction on the basis of illegality, despite any possible findings of domestic courts under the theory that State entities exceeded their authority related to the concession.[403] Because the State had created a legitimate expectation that the investment was made in accordance with domestic law, the State was estopped from using purported illegality to avoid jurisdiction under the treaty. Similar facts exist in *Arif v. Moldova*, where the tribunal found that the parties acted in good faith on the basis of their shared understanding of the legality of the investment and concession, and so the State could not later rely on domestic law and domestic court decisions to deny jurisdiction related to agreements relied upon by the State and the investor.[404] The tribunal in *Convial Callao v. Peru* came to similar conclusions.[405] These findings are particularly relevant here, in light of Mr. Muñana's testimony that Semovi and other government agencies closely

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CL-0177, ¶ 346 (*Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (I)*, ICSID Case No. ARB/03/25, Award, 16 August 2007)).

399 *See* **Exhibit CL-0178-ENG**, ¶ 812 (*Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan (I),* SCC Case No. 116/2010, Award, 19 December 2013).

400 *See* **Exhibit CL-0179-ENG**, ¶ 624 (*Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017).

401 *See* **Exhibit CL-0180-ENG**, ¶ 384 (*Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No ARB/12/39, Award, 26 July 2018).

402 *See* **Exhibit CL-0177-ENG**, ¶ 346 (*Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No ARB/03/25, Award, 16 August 2007).

403 *See* **Exhibit CL-0181-ENG**, ¶ 152 *et seq.* (*Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007).

404 *See* **Exhibit CL-0182-ENG**, ¶¶ 374-46 (*Mr Franck Charles Arif v. Republic of Moldova,* ICSID Case No ARB/11/23, Award, 8 April 2013).

405 *See* **Exhibit CL-0168-SPA**, ¶ 410 (*Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Final Award, 21 May 2013).

reviewed and oversaw the award of the Concession and signed off on its legality at many steps, and in light of Semovi's contemporaneous, formalized assurances to Lusad that it continued to view the Concession as valid.

245. In conclusion, Mexico has failed to articulate a legal basis for a finding of no jurisdiction *ratione materiae* on the basis of illegality under Mexican law. This objection must be dismissed.

IV. MEXICO HAS NOT REBUTTED CLAIMANTS' DEMONSTRATION OF MEXICO'S SEVERAL BREACHES OF NAFTA AND INTERNATIONAL LAW

246. The Claim Memorial demonstrates that Mexico's harmful actions towards Claimants and their investments in Mexico, including Lusad and L1bre, violated NAFTA Articles 1110 (Expropriation), 1105 (Minimum Standard of Treatment including Fair and Equitable Treatment ("FET")), and 1102 (National Treatment).

247. Mexico has offered a sparse defense in its Counter-Memorial to rebut the legal standards and claims detailed in the Claim Memorial.[406] That is not altogether surprising. The facts giving rise to the present dispute, on their face, scream out that Mexico has committed a breach of NAFTA, and there is little that Mexico can say to defend its unlawful conduct. Claimants' subsidiary, Lusad, was granted an exclusive Concession in June 2016, which was then lawfully modified in 2017. During 2016, 2017, and the first few months of 2018, the Mexico City government supported Lusad as it performed its obligations under the Concession and prepared to implement the L1bre System across all of Mexico City's taxis. Lusad had received all required approvals, completed all testing of the L1bre System in over 1,000 taxis, and as a result Semovi issued a mandatory installation notice that required installation of the L1bre System in every one of Mexico City's 138,000 taxis.

248. Then, for reasons of political expediency coinciding with the agenda of a new regime, Lusad's Concession fell out of favor. Semovi reversed course, refusing to facilitate implementation of the mandatory installation notice, and sent Lusad a letter notifying that it was temporarily suspending application of the Concession pending the election. This culminated, after the election, in Mexico City sending Lusad a letter on 28 October 2018 informing Lusad that the Concession would be indefinitely suspended because of the "political change" that had taken place. Not a single other reason was provided to Lusad at that time, nor at any other time since. In 2019, Mexico City launched a service to replace Lusad, branded Mi Taxi, which boasted many of the features that Lusad was providing with its L1bre System. While the damage had already been done, Mi Taxi was the proverbial "nail in the coffin" for Lusad's business in Mexico, which had been replaced with a government-run copy-cat.

249. Under these facts, the Claim Memorial established the legal standards under NAFTA governing indirect expropriations (NAFTA Article 1110), the minimum standard of treatment owed to foreign investors under customary international law (NAFTA Article 1105),

[406] *See* Counter-Memorial, ¶¶ 394–472.

and the national treatment standard (NAFTA Article 1102) for discrimination. Mexico's conduct screams of breaches of multiple NAFTA provisions.

250. Section IV of Mexico's Counter-Memorial contains Mexico's attempt to argue otherwise. Mexico's arguments are, however, legally flawed beyond repair and factually misguided. For instance, Mexico does not engage in the legal standard for expropriation, likely because the facts clearly demonstrate a breach of NAFTA Article 1110. For another example, under the stark facts of the government's harmful treatment of Claimants and their investments in this case, there really is no purpose in rehashing the classic respondent-State argument that the minimum standard of treatment under customary international law (enshrined in NAFTA Article 1105) is materially different from the autonomous FET standard enshrined in certain other treaties. Although Claimants' make clear that the standard articulated in the Claim Memorial is the right one, under any reasonable interpretation of the NAFTA standards, Mexico's conduct is abhorrent and a breach of its international law obligations.

251. Claimants address Mexico's rebuttal below in three parts. Section A addresses Mexico's rebuttal to Claimants' Expropriation claim under NAFTA Article 1110. Section B addresses Mexico's rebuttal to Claimants' claim that Mexico breached the FET standard enshrined in NAFTA Article 1105. Section C addresses Mexico's rebuttal to Claimants' claim that Mexico breached the National Treatment standard under NAFTA Article 1102.

A. Mexico Expropriated Claimants' Investments in Mexico

252. The Claim Memorial demonstrates that Mexico committed an unlawful indirect expropriation by destroying the entire value of Claimants' investments in a manner that was lacking a public purpose, was discriminatory, was without due process of law, and that lacked prompt and adequate (in fact, zero) compensation.[407]

253. Mexico does not engage at all with Claimants' arguments on the merits of the expropriation claim. In its silence, Mexico does not even attempt to deny that Mexico City acted in a manner that destroyed Claimants' investment in its entirety. Mexico only denies that Claimants had any rights subject to NAFTA Article 1110 in the first place. Mexico relies upon three main arguments: (1) that Claimants' investments were not made in accordance with Mexican law, (2) that Lusad failed to perform under the Concession in certain aspects, and (3) that the procedure by which Mexico granted Claimants the Concession has been deemed by domestic courts to have been invalid.[408] By ignoring the other elements of Claimants' expropriation claim, Mexico effectively admits that if Claimants' investments were subject to Mexico's commitments under NAFTA Article 1110, then Mexico has committed an unlawful expropriation. If the Tribunal finds that Claimants had such rights, then the only logical conclusion is that Mexico has breached NAFTA Article 1110. Mexico is wrong, and thus Claimants have proven a breach of NAFTA Article 1110.

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[407] *See* Claim Memorial, ¶¶ 164–204.

[408] *See* Counter-Memorial, ¶¶ 394–409.

254. As addressed in the Section II, *supra*, Mexico's attempts to prove that Claimants had no rights under NAFTA Article 1110 lack factual support. Claimants through their investment in Lusad and the L1bre System had made investments (and indeed maintain rights to investments) in Mexico that were unlawfully expropriated. Claimants and Lusad met their obligations under the Concession and were ready and able to install the L1bre System in every one of Mexico City's 138,000 taxis at the time that Semovi issued its mandatory installation notice. And even if Lusad committed errors in performing under the Concession (which it did not), this would not erase the expropriation claim. Nor do subsequent Mexican court actions erase Claimant's NAFTA rights. Because Mexico's arguments fail, the case is closed on Claimant's demonstration that Mexico committed an unlawful expropriation.

255. This section is organized as follows. Subsection 1 explains that Mexico unlawfully expropriated Claimants' investments, which were made in accordance with Mexican law. Subsection 2 addresses Mexico's unfounded and novel contention that Lusad's performance under the Concession somehow extinguished Mexico's treaty obligations. Subsection 3 explains that Mexico cannot hide behind alleged *ultra vires* acts to avoid its treaty commitments in light of the government's consistent support and approval of Lusad's implementation of the Concession until the Concession was suspended. Subsection 4 explains why Claimants' investments remain protected by NAFTA notwithstanding the Mexican amparo court cases cited by Mexico.

1. Mexico Committed an Unlawful Expropriation of Claimants' Lawful Investments

256. As discussed in the Section II and Section III.C, *supra*, and thoroughly detailed in the Declarations attached in support of this Reply Memorial, Claimants and Lusad at all times acted in accordance with Mexican law and what was required by Semovi. Respondent has offered no real evidence of any illicit or illegal action by Claimants, Lusad, or their representatives. Respondent has not demonstrated that Claimants, Lusad, or their representatives had any reasonable belief that Mexico City's granting of the Concession to Lusad was illegal. Nor has Respondent demonstrated that any subsequent actions of Claimants, Lusad, or their representatives after the granting of the Concession were unlawful or contrary to what was required under the Concession and the expectations stated by the government throughout Lusad and Semovi's public-private partnership. Mexico's allegations to the contrary in its Counter-Memorial are baseless. In fact, Semovi gave Lusad every indication that it could rely upon the legality of the Concession and the rights granted therein when Lusad continued to invest heavily to perform its obligations under the Concession.

257. Mexico has not rebutted the essential facts underlying Claimants' case. Lusad approached the Mexico City government to seek a public-private partnership to modernize Mexico City's taxi fleet, which was a service that Mexico City desperately needed.[409] Mexico City issued a Declaration of Necessity and request for bids to modernize the taxi fleet.[410] Mexico City awarded Lusad the Concession through a public bid process, and the Concession was properly signed by

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[409] *See supra*, Section II.A.1; Claim Memorial, ¶¶ 77–79.

[410] *See supra*, Section II.A.1; Claim Memorial, ¶¶ 70–74.

Lusad's representative.[411] The Concession granted Lusad the legal and exclusive right to install and maintain technology throughout Mexico City's entire taxi fleet.[412] The Concession was for a period of 10 years, automatically renewable for 10 more years so long as Lusad met minimum conditions (maintaining good standing in the obligations that the Concession specified), and then had the possibility for renewal for yet another 10 years.[413] Those rights are plainly stated in the Concession itself. Any *post hoc* arguments by Respondent that Mexico City should not have issued the Concession, or did so improperly, do not adulterate the issuance of the Concession and the rights granted to Lusad therein.

258. Lusad then complied with the requirements contained in the Concession and under Mexican law.[414] Lusad innovated the technology, created a business structure, developed software, hired experienced employees, purchased hardware, obtained additional government permits, and successfully tested the technology in over 1,100 taxis.[415] Mexico certified multiple times that Lusad's work had satisfied its obligations under the Concession.[416] Semovi issued a formal notice requiring all taxis to have Lusad's L1bre System installed no later than March 2019.[417] Mexico City's government at this time was publicly celebrating the benefits of Lusad's investments and technology for the city.[418] Throughout this entire period, the Mexico City government never indicated that anything it had authorized was illegal, nor that anything that Lusad had done violated the terms of the Concession—to the contrary, Semovi and Lusad were working closely together to execute on Lusad's plans to install the L1bre System *en masse*.[419] Mexico cannot for the first time before this Tribunal assert that the Concession, which the government to this day maintains has not been suspended,[420] is also somehow invalid.

259. Mr. Augustin Muñana, a senior Semovi official who acted as Semovi's legal advisor when the Concession was issued, has confirmed through his sworn declaration the legality of the Concession and the accuracy of the key documents provided in the Claim Memorial regarding the Concession.[421] Mr. Muñana (first as Semovi's Deputy Legal Director, then as Legal Director from January 2016 through March 2017, and later as Director of Regulation) has specific, personal knowledge of the Concession, its legality, and the authenticity of the documentary

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411 *See supra*, Section II.A.1; Claim Memorial, ¶¶ 77–79.

412 *See* Claim Memorial, ¶¶ 80–87.

413 *See* Claim Memorial, ¶ 85.

414 *See supra*, Section II.B; Claim Memorial, ¶¶ 88–112.

415 *See* Claim Memorial, ¶¶ 88-106.

416 *See supra*, Section II.B; Claim Memorial, ¶¶ 88–106.

417 *See supra*, Section II.B.6; Claim Memorial, ¶¶ 107–112.

418 *See supra*, Section II.B.6; Claim Memorial, ¶ 111.

419 *See supra*, Section II.B.

420 *See* Counter-Memorial, ¶ 401.

421 *See generally* Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022.

evidence relating to the Concession that Claimants submitted with their Claim Memorial. Specifically, he explains:

- The General Director of Semovi and a committee comprised of the secretaries of the Mexico City government confirmed that the Declaration of Necessity complied with all legal requirements.[422]
- Lusad's proposal for the Concession was submitted properly, through a competitive process, transparently, and in accordance with Semovi customary procedures and legal requirements.[423]
- The Adjudicating Committee, which awarded Lusad the Concession, did not identify any irregularities or violations of applicable laws and found Lusad's proposal to be the most technically and economically viable.[424]
- Mr. Muñana as former Legal Director of Semovi questions the authenticity of several documents provided by Mexico, including deeming the Concession a "concession project," calls and minutes for meetings which he was not aware of, and documents bearing his signature which he did not sign on the date listed—which Mr. Muñana does not believe are authentic based on his direct experience on this matter, and his identification of false pagination, seals, dates, and other references.[425]
- Mr. Muñana identified with his own eyes the original Concession Title in the Concession file as recently as August 2017.[426]
- It was evident to Mr. Muñana that Semovi was keeping a very messy file for the Concession and it does not surprise him that the government is unable to locate all authentic and relevant documents in the file and that the file provided by Mexico is missing hundreds of pages.[427]
- The amended Concession which included the maintenance recovery fee was duly approved by the Secretary's office and is part of the Concession.[428]
- The Comptroller's Office accepted and validated the Declaration of Necessity and award of the Concession to Lusad through an audit process.[429]

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422 *See* Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶¶ 10–11, 23.

423 *See* Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶¶ 13–14.

424 *See* Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶¶ 16, 20, 21.

425 *See* Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶¶ 24–25, 48–54, 56.

426 *See* Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶¶ 28–29.

427 *See* Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶ 28.

428 *See* Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶ 29.

429 *See* Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶¶ 32, 38.

- Lusad complied with its obligations under the Concession, including the bond policy and its modification, the tests and installations of tablets in taxis, and the registration of taxi drivers.[430]
- Mr. Meneses, the head of Semovi, told Mr. Zayas that an altered document was the same as the actual Concession and asked him to sign it (and take photos upon signing) without time to review in detail; however, this document was not the same as the Concession.[431]
- All material Concession documentation provided by Claimants to the Tribunal in this arbitration are authentic and complete, and should have properly been retained in Semovi's Concession file.[432]

260. However, Mayor Sheinbaum's campaign and election shifted the politics around Lusad's Concession, which led to the government's suspension of the Concession on 28 October 2018, solely for political reasons.[433] This government act had nothing to do with illegality of the Concession itself, nor any failed performance by Lusad. It had everything to do with politics and what was most convenient for the new administration.

261. The government's suspension of the Concession on the sole basis of the "political change" that had taken place in connection with a new mayoral administration's election amounts to an indirect expropriation that completely deprived Claimants of the benefit of the entire value of their investments. Before the suspension, Lusad had valuable rights under the Concession and was exercising those rights through its delivery and implementation of the L1bre System. However, after the suspension, the Mexico City government withdrew its participation and support for Lusad's work, refused to adhere to the government's own mandatory installation notice, and prevented Lusad from further pursuing the project. This deprivation was complete and permanent; the suspension was never lifted at any time. While Claimant maintains its ownership of Lusad, and Lusad (technically) continues to hold rights under the Concession,[434] the Mexico City government's refusal to implement the Concession through its permanent suspension has erased all value of those investments. Not only is it obvious that a permanent suspension of rights without cause makes those rights valueless, but also this total deprivation of the value of Claimants' investment does not appear to be in dispute. Nowhere in its submission does Mexico contend that Claimants' investments retained any residual value following the definitive suspension of the Concession. It follows that Mexico accepts that Claimants retained no value in connection with their investments.

262. Mexico City's replacement of Lusad with a government-run taxi technology system in Mi Taxi usurped Lusad's rights and made clear that the October 2018 suspension was indeed

[430] *See* Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶¶ 32–34.

[431] *See* Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶¶ 43–44.

[432] *See* Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶¶ 56–57.

[433] *See supra*, Section II.C; Claim Memorial, ¶¶ 113–117, 122–130.

[434] *See supra*, Section II.C; Counter-Memorial, ¶ 401 ("Semovi has not suspended the Lusad concession").

permanent.[435] Mexico does not say anywhere in its Counter-Memorial that Lusad could "rise from the dead" or that the L1bre System could suddenly be able to be installed in all of Mexico City's taxis. Although Mexico and Claimants disagree regarding Lusad's precise valuation as addressed in Section V, *infra*, there is no disagreement amongst Claimants and Mexico that Lusad at one time had significant value, but no longer has any value.

263. This expropriation was unlawful. As demonstrated in the Claim Memorial, the expropriation was not done for a public purpose, on a non-discriminatory basis, in accordance with due process of law, and in exchange for prompt and adequate compensation.[436] Respondent does not argue to the contrary. Mexico destroyed Claimants' investments for political reasons, without explanation, notice, or procedure for Lusad to be heard, without reason given, in favor of a Mexican government-owned replacement, and without any offer of compensation.[437] The only explanation Lusad has received from the Mexico City government for its decision to suspend the Concession (until the filing of its Counter-Memorial) has been "political change" due to the change in government administrations.[438]

264. Extraordinarily, one of Mexico's main factual defenses to its expropriation of Claimants' investments (in its own words, for political reasons) is that Semovi never suspended the Concession in the first place, and that the two suspension letters, documented at **Exhibit C-0018-SPA** and **Exhibit C-0019-SPA**, "are false" because Mexico was unable to locate them in Semovi's file.[439] This is directly contradicted by the letters themselves, which are authentic and have been supported by the introduction of originals[440]; sworn declarations from Mr. Zayas and Mr. León regarding their receipt of those letters and related discussions with Semovi officials; the sworn declaration of Mr. Herrera, who corroborated Mr. Zayas's account; and the sworn declaration of Semovi's former Legal Director Mr. Muñana, who recalls the suspension notices, the political reasonings behind them, speaking with Mr. Zayas about the first suspension notice, and verifying the signature on those documents as being accurate.[441] Mexico has not offered a credible rebuttal to the plain fact that the government permanently suspended the Concession solely and expressly for political reasons, without any (even purported) legitimate basis.

265. As described in the Claim Memorial, several tribunals have determined that governments had committed unlawful expropriations through similar (or less egregious)

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435 *See* Claim Memorial, ¶¶ 134–143.

436 *See* **Exhibit CL-0001-ENG** (Article 1110(1), North American Free Trade Agreement, 1 January 1994); Claim Memorial, ¶¶ 184-190.

437 *See* Claim Memorial, ¶¶ 122–126, 184–190.

438 *See* Claim Memorial, ¶ 122.

439 *See* Counter-Memorial, ¶ 399.

440 **Exhibit C-0226-SPA** (Original version of Oficio No. DGSTPI-965-2018 from Semovi announcing suspension of the Concession, dated 30 May 2018); **Exhibit C-0227-SPA** (Original version of Oficio No. DGSTPI-1943-2018 from Semovi announcing indefinite suspension of the Concession, dated 28 October 2018).

441 *See* Claim Memorial, ¶¶ 120–121.

government acts that violated firm government promises and destroyed claimants' investments. In *Tecmed* the tribunal found that the government's refusal to ***renew*** a permit for political reasons amounted to indirect expropriation.[442] In *Metalclad* the tribunal found that a ***denied*** permit amounted to indirect expropriation.[443] In *Abengoa* the tribunal found that a ***revocation*** of a license following political opposition amounted to indirect expropriation.[444] Mexico has not even attempted to rebut these analogous cases, which are arguably less extreme than Mexico's ***permanent suspension and refusal to implement*** an existing Concession with Lusad.

266. Mexico also elected not to attempt to rebut Claimants' discussion in the Claim Memorial of several analogous cases, many of which involve similar (or less egregious) government acts than in the present case. Mexico's silence is deafening. These analogous cases include:

- *Middle East Cement* where the tribunal found that an expropriation occurred when the government issued a decree depriving the claimant of its rights under a government license;[445]
- *ADC v. Hungary* where the tribunal found that the government's legislation was the basis to eliminate the claimant's rights in a concession;[446]
- *Biloune v. Ghana* where the tribunal found that the investor's reliance on representations by the government that a permit was forthcoming, in context, amounted to an indirect expropriation;[447]
- *Bear Creek v. Peru* where the tribunal found that a revoked concession for political reasons amounted to an indirect expropriation;[448] and
- *Crystallex v. Venezuela* where the tribunal found that a denied permit, harmful statements towards the investment, the government's termination of the contract with the investor, and the government's takeover of the covered activity amounted to indirect expropriation.[449]

267. Mexico likely chose not to attempt to rebut Claimants' case on expropriation because the violation of NAFTA Article 1110 is so clear, particularly when weighed against analogous cases. Even beyond the long list of comparable cases cited in the Claim Memorial, there are several other cases that are similarly analogous. In *Quiborax v. Bolivia*, for example, the Bolivian government revoked mining concessions held by the investors and handed them over to

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[442] *See* Claim Memorial, ¶¶ 191–194.

[443] *See* Claim Memorial, ¶ 195.

[444] *See* Claim Memorial, ¶ 196.

[445] *See* Claim Memorial, ¶ 182.

[446] *See* Claim Memorial, ¶ 186.

[447] *See* Claim Memorial, ¶ 199.

[448] *See* Claim Memorial, ¶ 199.

[449] *See* Claim Memorial, ¶ 200.

the authorities due to social and political opposition to foreign investors' economic interests.[450] The tribunal concluded that this amounted to an expropriation, because it found "that the revocation did not comply with due process, the determinative factors being that the [c]laimants were not heard during the [process] and that the revocation lacked valid reasons."[451] The tribunal in *Copper Mesa v. Ecuador* took a similar approach, finding that an expropriation occurred when Ecuador terminated mining concessions in an arbitrary manner and without due process against the backdrop of political protests.[452] The tribunal in *SAUR v. Argentina* likewise determined that the termination and nationalization of a water and sewage concession through provincial authorities under the pretext of alleged deficiencies in the investor's handling of the concession was an unlawful expropriation.[453] These cases confirm that Mexico's destruction of Claimants investments for political reasons, without providing explanation or offering Lusad the opportunity to be heard, and without any compensation, amounted to an unlawful indirect expropriation.

268. Finally, Mexico does not try to explain or rebut Claimants' citation to Mexico's own arguments in the *Odyssey Marine* case where Mexico cited tribunals' findings in *Abengoa* and *Metalclad* as instances involving "explicit assurances" to investors through government authorizations that then gave rise to those two tribunals finding that Mexico's subsequent harmful actions amounted to unlawful expropriations.[454] In *Odyssey Marine*, Mexico highlighted expropriatory acts where a municipality had "fully approved and endorsed" a project and "the investor had at least acted in reliance on explicit assurances to the effect that all necessary permits would be issued." There is nothing different in the present case. Lusad had received all relevant approvals from Mexico City's relevant regulatory authorities,[455] and Lusad acted in reliance on these express government assurances that the Concession conferred the legal rights specified therein.

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450 **Exhibit CL-0051-ENG**, ¶ 19–30, ¶ 252 (*Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015).

451 **Exhibit CL-0051-ENG**, ¶ 226 (*Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015).

452 **Exhibit CL-0187-ENG**, ¶¶ 6.66–6.69 (*Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, 15 March 2016).

453 **Exhibit CL-0146-SPA**, ¶ 381–382 (*SAUR International v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012) ("*Los hechos probados muestran que Sauri en su momento fue propietaria, a través de OSM, de una participación indirecta del 32,08% en la Concesión para la distribución de agua potable y la prestación de servicios de saneamientos en la Provincia de Mendoza, que OSM ha sido desposeída de la Concesión en virtud de actos administrativos y legislativos adoptados por la Provincia, que la Provincia ha otorgado la misma Concesión a una empresa pública controlada por ella, y que OSM se halla en proceso de liquidación, sin que Sauri haya recibido o tenga expectativa de recibir compensación alguna. En opinión del Tribunal Arbitral, estas actuaciones constituyen "medidas de expropiación o de nacionalización" incompatibles con el art. 5.2. del APRI, adoptadas por la Provincia de Mendoza, y de las que la República Argentina es internacionalmente responsable*.").

454 *See* Claim Memorial, ¶ 197.

455 *See supra*, Section II.B.3.

2. Lusad's Performance Under the Concession Did Not Extinguish Mexico's Treaty Obligations

269. Mexico argues that Lusad did not complete all requirements under the Concession, and therefore Claimant and its investments had no legal rights that could be expropriated.[456] First of all, Lusad at all times fulfilled its obligations under the Concession.[457] Mexico is wrong on the facts. And even if Mexico's list of Lusad's apparent errors were true (which they are not), any such alleged errors could not eliminate Lusad's Concession rights nor Mexico's obligations under NAFTA.

a. Lusad Performed Its Obligations under the Concession to the Mexico City Government's Satisfaction

270. Mr. Eduardo Herrera De Juana, the lead point of contact between Semovi and Lusad during the implementation of the L1bre Project from October 2016 to December 2018, has confirmed through his sworn declaration all of the essential facts that were represented in the Claim Memorial regarding the Concession's effectuation without condition, implementation by Semovi, and joint understanding of the rights and responsibilities granted by the Mexico City government to Lusad.[458] He explains that Semovi officials at all times during his tenure with the company acted with the understanding that a firm Concession was in force including the amendments to the Concession effectuated in January 2017, without any suggestion that the Concession title was improper or subject to any additional conditions or approvals, all the while affirming that Lusad was in compliance with its obligations as concessionaire.[459] ***This is because Lusad had been awarded a firm Concession with clear terms, a fact that was uncontroversial until at the earliest Mayor Sheinbaum's election.*** Instead of contesting the Concession's validity, as Mexico seeks to do in this arbitration, Semovi was focused on monitoring Lusad's progress to ensure that Concession was effectively implemented. Specifically:

- From November-December 2016, Mr. Herrera met with Semovi at least 1-2 times per week and always had fluid communications.[460]
- Some of these many meetings were documented through minutes, where Semovi would state that Semovi was aligned with the implementation of the L1bre project.[461]

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456 *See* Counter-Memorial, ¶¶ 395–401.

457 *See supra*, Section II.B.

458 *See* Witness Statement of Eduardo Herrera De Juana, dated 25 October 2022, ¶¶ 2–5.

459 *See* Witness Statement of Eduardo Herrera De Juana, dated 25 October 2022, ¶ 4.

460 *See* Witness Statement of Eduardo Herrera De Juana, dated 25 October 2022, ¶ 9.

461 *See* Witness Statement of Eduardo Herrera De Juana, dated 25 October 2022, ¶ 11.

- Semovi "never questioned Lusad's rights, much less stated that they were subject to additional conditions and/or approvals," including no statements that the success of the trial period was a condition of Lusad obtaining definitive title to the Concession.[462]

- Semovi communicated multiple times that it fully expected the Concession to be implemented and declared that the Concession was in force and running.[463]

- Semovi also issued several "*oficios*" addressed to Lusad, including confirmation that Semovi was aware that Lusad acquired the tablets with geolocation and taximeter application—Semovi never gave any representation that Lusad was prohibited from installing the tablets in the entire fleet, but instead Semovi officials inspected several boxes of tablets and expressed agreement.[464]

- In a meeting on 14 July 2017, Semovi discussed plans for Lusad to comply with its rights and responsibilities under the Concession, including the times to install each digital taximeter, workshop capacity to meet the schedule "established in the Concession," the "maximum capacity" to implement the L1bre System into the entire fleet of taxis, discussion regarding installation centers already in place, and estimates that Lusad could achieve installation in 10,800 taxis per month.[465]

- Lusad was never told by Semovi that it was under a trial period for the Concession; instead, Semovi was instructing Lusad to accelerate installation to broaden capacity beyond the 1,100-taxi test phase.[466]

- Semovi and the company discussed that the installation notice was the only requirement to "roll-out" installation of all tablets in all taxis, at no cost to the drivers.[467]

- Lusad worked closely with Semovi to create and monitor the installation centers to be ready to install in all taxis, acquire the tablets, develop the application, interconnect with C5 to facilitate operation of the panic button, and other functions—never with any suggestion by Semovi that the Concession was subject to any other approvals.[468]

- Semovi delivered to Lusad a database of 138,000 taxis for purposes of the "roll out" of the L1bre Project.[469]

- Semovi approved publication of the installation notice to incorporate the tablets into all 138,000 taxis, and then published the Notice of Installation in the Official Gazette on 17 April 2018, confirming that the trial period "showed satisfactory results for the user and

[462] *See* Witness Statement of Eduardo Herrera De Juana, dated 25 October 2022, ¶¶ 11–12.

[463] *See* Witness Statement of Eduardo Herrera De Juana, dated 25 October 2022, ¶¶ 12, 15.

[464] *See* Witness Statement of Eduardo Herrera De Juana, dated 25 October 2022, ¶¶ 13–14.

[465] *See* Witness Statement of Eduardo Herrera De Juana, dated 25 October 2022, ¶¶ 15–19.

[466] *See* Witness Statement of Eduardo Herrera De Juana, dated 25 October 2022, ¶¶ 18–19.

[467] *See* Witness Statement of Eduardo Herrera De Juana, dated 25 October 2022, ¶ 19.

[468] *See* Witness Statement of Eduardo Herrera De Juana, dated 25 October 2022, ¶ 24.

[469] *See* Witness Statement of Eduardo Herrera De Juana, dated 25 October 2022, ¶ 37.

the concessionaires, improving the experience, quality and safety of the service" and explaining that taxi drivers should access the tablets for free through scheduling an appointment on the Semovi website.[470]

- Lusad prepared the appointments portal including a server for management and filing of the information of each taxi that was part of the fleet, which Mr. Herrera personally delivered to Semovi—but Semovi never activated the portal, which was required to facilitate installation.[471]
- Beginning in late April 2018, Semovi and its officials abruptly and radically changed their approach with Lusad, ceasing to take Mr. Herrera's calls, cancelling scheduled meetings, and halting contact with Lusad.[472]
- At the end of May 2018, Semovi issued a communication ordering suspension of the Concession and the installation process due to electoral processes—which took Mr. Herrera by surprise because the Semovi official that signed the suspension notice, Ms. Balandrán, was instrumental in communicating with taxi drivers that the new technology in their taxis would be free.[473]
- Because Lusad was given every impression that the suspension was temporary, Lusad continued its work following the temporary suspension to begin installation including to have eight installation centers operational by September 2018 and ready to install the L1bre System in all of Mexico City's taxis within a year's time.[474]

271. Lusad continually lived up to its commitments under the Concession. Mexico's arguments to the contrary are based on incorrect facts and amount to an *ex post* attempt to shift blame for the government's own unlawful, unjust actions. On 17 April 2018 when Semovi published the mandatory installation notice in Mexico City's Official Gazette, Lusad had done everything expected of it to prepare for installing the L1bre System in every one of Mexico City's 138,000 taxis between April 2018 and March 2019, as specified in the mandatory installation notice.[475] Lusad had completed the testing period to Semovi's satisfaction, as evidenced by the publication of the mandatory installation notice and contemporaneous accounts of these successes by Mr. Herrera in his Declaration.[476] However, Semovi never set up the appointments page, which is why the mandatory installation period never begun.[477] Mexico now alleges (without any proof) that Mexico fulfilled its obligation by posting a hyperlink that (as has been proven by expert

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470 *See* Witness Statement of Eduardo Herrera De Juana, dated 25 October 2022, ¶¶ 35–37.

471 *See* Witness Statement of Eduardo Herrera De Juana, dated 25 October 2022, ¶¶ 38–41.

472 *See* Witness Statement of Eduardo Herrera De Juana, dated 25 October 2022, ¶ 45.

473 *See* Witness Statement of Eduardo Herrera De Juana, dated 25 October 2022, ¶¶ 44–47.

474 *See* Witness Statement of Eduardo Herrera De Juana, dated 25 October 2022, ¶¶ 46–47.

475 *See* Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶ 57; Witness Statement of Eduardo Herrera De Juana, dated 25 October 2022, ¶¶ 9–47.

476 *See* Witness Statement of Eduardo Herrera De Juana, dated 25 October 2022, ¶¶ 9–47.

477 *See* Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶ 56.

software forensics analyst Kroll) was apparently added onto its website no earlier than January 2020, not in April 2018.[478] Mr. León confirms that but for Mexico's refusal to facilitate the installations in contravention of its own mandatory installation notice, "[t]welve months was more than enough time to get these installations done."[479]

272. Semovi never took any action against Lusad for the alleged errors that Mexico presents for the first time in this arbitration. Mexico cannot now, several years later, argue that alleged problems with Lusad's performance under a Concession that Mexico City never moved to terminate (or even brought a single formal complaint against) has the effect of erasing Lusad's Concession in its entirety. In truth, the Mexico City government never took action to even allege that Lusad failed to perform under the Concession, because Lusad never failed to meet the government's expectations under Lusad's commitments. To the contrary, Lusad received several communications from Semovi expressing good standing and satisfactory results.[480] Claimants have provided voluminous documentary evidence in this arbitration to demonstrate Lusad's satisfaction of the government's expectations.

b. Lusad's Performance Under the Concession Does Not Erase Mexico's Expropriation

273. Even if Mexico's allegations regarding Lusad's performance under the Concession[481] were true (which they are not), they do not erase Mexico's breach of NAFTA Article 1110.

274. As stated in the Commentary to Article 31 of the ILC Draft Articles on State Responsibility, "unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct."[482] Relying on the Commentary, the tribunal in *Yukos Universal v. Russia*, held that "the mere fact that damage was caused not only by a breach, but also by a concurrent action that is not a breach does not, as such, interrupt the relationship of causation that otherwise exists between the breach and the damage."[483] Thus, contributory fault by the investor should not excuse a State's breach of a treaty, but instead (at most) lead to a reduction of

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478 *See* Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶ 56; Expert Report of Joshua Mitchell (Kroll), dated 3 November 2022, Appendix A; *see supra*, Section II.C.1.

479 *See* Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶ 56.

480 *See supra*, Section II.B.

481 *See* Counter-Memorial, ¶ 398.

482 *See* **Exhibit CL-0002-ENG**, Article 31, ¶ 13 (U.N. International Law Commission, Commentaries to the Draft Articles on Responsibility of States Internationally Wrongful Acts).

483 **Exhibit CL-0147-ENG**, ¶ 1775 (*Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227, Final Award, 18 July 2014); *see also* **Exhibit CL-0135-ENG**, ¶ 163 (*Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011)(it is the burden of "the offender to break the chain [of causation] by showing that the effect was caused—either partially or totally—not by the wrongful acts, but rather by intervening causes, such as factors attributable to the victim").

the amount awarded if appropriate based on the facts of each case.[484] In this case, no such reduction of damages is warranted, because Claimants did not contribute any material error under the Concession, and certainly not any error that contributed to the harmful treatment suffered at the hands of the Mexico City government which never gave explanation beyond "political change" for why the Concession was suspended indefinitely.[485]

275. Other investment tribunals have found that respondent States have breached treaties by expropriating investments governed by a government authorization, license, or concession, even if the claimant's performance under the government authorization contained flaws. Allegations of contributory fault by the investor that is disconnected from the State's harmful conduct do not sever treaty rights. For example, as the tribunal in *Bear Creek Mining v. Peru* noted, "[f]or the international responsibility of a State to be excluded or reduced based on the investor's omission or fault, it is necessary not only to prove said omission or fault, but also to establish a causal link between [the omission or fault] and the harm suffered."[486] As the tribunal found in *Occidental v. Ecuador (II)*, mere breach of a contract concluded between the investor and State does not break the causal link between the State's unlawful actions and the harm suffered by the investor.[487]

276. Mexico cites very few cases to analogize its arguments in this case that Mexico's harmful expropriation of the Concession is excusable because, as Mexico argues, Lusad did not meet certain terms of the Concession (which, as noted above, Claimants deny). Those citations are misplaced.

277. First, Mexico cites *Feldman v. Mexico*,[488] which found that the claimant did not produce invoices that were a condition precedent to receiving a government benefit that claimant

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[484] *See, e.g.*, **Exhibit CL-0184-ENG**, ¶ 926 (*Micula et al. v. Romania* (I), ICSID Case No. ARB/05/20, Final Award, 11 December 2013) ("an intervening event will only release the State from liability when that intervening event is (i) the cause of a specific, severable part of the damage, or (ii) makes the original wrongful conduct of the State become too remote. Unless they fall under either of these categories, cases of contributory fault by the injured party appear to warrant solely a reduction in the amount of compensation.").

[485] *See* Claim Memorial, ¶ 122.

[486] **Exhibit CL-0030-ENG**, ¶ 410 (*Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB 14/21, Award, 30 November 2017) (quoting **Exhibit CL-0028-ENG**, ¶ 670 (*Abengoa, S.A. and COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, 18 April 2013)).

[487] See **Exhibit CL-0093-ENG**, ¶¶ 297-452, 670-678 (*Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuado*r, ICSID Case No. ARB/06/11, Award, 5 October 2012) (finding that claimant breached a participation contract with the State and violated local law, but "it is not any contribution by the injured party to the damage which it has suffered which will trigger a finding of contributory negligence. The contribution must be material and significant. In this regard, the Tribunal has a wide margin of discretion in apportioning fault. . . . The Tribunal agrees that an award of damages may be reduced if the claiming party also committed a fault which contributed to the prejudice it suffered and for which the trier of facts, in the exercise of its discretion, considers the claiming party should bear some responsibility").

[488] *See* Counter-Memorial, ¶ 396.

was entitled to if he produced the invoices.[489] The *Feldman* tribunal explains: "The obvious and legitimate purpose of the requirement that the IEPS tax amounts be stated separately on invoices to be submitted to SHCP authorities on demand as the basis of a tax rebate is to make it possible for the tax authorities to determine in a straightforward manner whether the tax amounts on exported products for which a rebate is sought are accurate and not overstated."[490] However, the finding of the *Feldman* tribunal is inapposite to Mexico's confusing argument that Lusad failed to properly implement its obligations under the Concession and therefore has no Concession rights to speak of. Quite to the contrary, the Concession granted Lusad valuable rights and benefits that are clear on the face of the Concession, without the need to prove those rights with invoices as was the case in *Feldman*. Lusad was in the process of implementing its technology into Mexico City's taxi fleet when Mexico City abruptly stopped facilitating these installations.

278. Second, Mexico cites *Apotex v. United States*,[491] which found that applications to the U.S. government, which had not been decided upon and remained pending, were not a legal basis to claim expropriation. This is an entirely different circumstance than Mexico City awarding Lusad a Concession, Lusad spending considerable resources implementing and complying with the Concession's terms, and Mexico City then breaking its obligations under the Concession. The Concession was not pending—Mexico City had already granted the legal rights to Lusad through issuance of the Concession. It is puzzling why Mexico chose to cite to *Apotex* for this proposition.

279. Finally, Mexico makes another unsupported argument that Claimants' rights under the NAFTA were somehow abridged, because Lusad did not challenge Mexico City's harmful actions under Mexican law. Insofar as Mexico contends that Claimants and Lusad stood idle and did nothing following the indefinite suspension of the Concession, that is incorrect. As Mr. León describes in his witness statements, efforts were made by Lusad's representatives to discuss the status of the Concession with the new mayoral administration in Mexico City.[492] However, such attempts were rebuffed; it was clear that there was no possibility to change the Mexico City government's mind, and it decided instead to move on from Lusad in favor of the government-run copy-cat Mi Taxi system.[493] Insofar as Mexico contends that it was incumbent for Claimants or Lusad to challenge the suspension of the Concession through domestic legal action, Mexico points to no legal authority for this spurious argument. NAFTA does not require Claimants to pursue or exhaust local remedies to pursue a claim on the merits. In fact, NAFTA Article 1121 requires waiver of local claims as a condition precedent to bringing claims under NAFTA Chapter 11.[494] In the face of a politically-motivated campaign against Lusad, Claimants chose instead to bring

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[489] *See* **Exhibit CL-0069-ENG**, ¶ 129 (*Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002).

[490] *See* **Exhibit CL-0069-ENG**, ¶ 129 (*Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002).

[491] *See* Counter-Memorial, ¶ 397.

[492] *See* First Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 81–85; Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶¶ 71–72.

[493] Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022,¶¶ 83–85.

[494] *See* Counter-Memorial, ¶ 402.

forth these NAFTA claims, in accordance with their rights and Mexico's consent to international arbitration under the NAFTA.

280. In short, Claimants and Lusad have done nothing wrong under the Concession, and even if there were a breach of the Concession (which there is none), it would not erase Claimants' treaty claims. Mexico's argument must fail.

3. Claimants and Lusad Relied Upon Mexico City's Express Authorizations and Assurances of the Legality of the Investment

281. Mexico in its Counter-Memorial argues *ex post* that the Concession was unlawful, and therefore Claimants should forfeit Article 1110 protections. The Tribunal should not allow Mexico to hide behind this transparent cloak of purported illegality, when Claimants and Lusad were well within their rights under the NAFTA to rely upon Mexico's authorizations and assurances of legality of the investment.

282. Article 7 of ILC Draft Articles on State Responsibility for Wrongful Acts attribute actions to the State even if the State or its agent acted *ultra vires*: "The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, ***even if it exceeds its authority or contravenes instructions***."[495] A 2022 tribunal cited Article 7 as "reflect[ing] the current state of international customary law."[496] Therefore, customary international law does not permit States to avoid responsibility for their violations of treaty commitments simply because the acts of agents of the State or its agents are subsequently found to be *ultra vires*.

283. The tribunal in *SPP v. Egypt* applied this principle to similar facts as the present case. There, the tribunal found that the government's acts, even if "considered legally nonexistent or null and void or susceptible to invalidation" were "cloaked with the mantle of Governmental authority and communicated as such to foreign investors who relied on them in making their investments" and therefore created expectations that the investor reasonably relied upon.[497] The tribunal found that "a determination that these acts are null and void under municipal law would not resolve the ultimate question of liability for damages suffered by the victim who relied on the acts."[498] The tribunal, citing a secondary source, concluded: "the practice of states has conclusively established the international responsibility for unlawful acts of state organs, even if

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[495] **Exhibit CL-0002-ENG**, Article 7 (U.N. International Law Commission, Commentaries on the Draft Articles on the Responsibility of States Internationally Wrongful Acts) (emphasis added).

[496] *See* **Exhibit CL-0188-ENG**, ¶ 1105, (*BSG Resources Limited (in administration), BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea*, ICSID Case No. ARB/14/22, Award, 18 May 2022) (stating: "As a matter of international law, the conduct of State officials is attributable to the State, even if these officials act ultra vires.").

[497] *See* **Exhibit CL-0021-ENG**, ¶¶ 81–85 (*Southern Pacific Properties v. Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992).

[498] *See* **Exhibit CL-0021-ENG**, ¶ 83 (*Southern Pacific Properties v. Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992).

accomplished outside the limits of their competence and contrary to domestic law."[499] Subsequent tribunals, including *Arif v. Moldova*[500] and *Kardassopoulos v. Georgia*[501] have cited favorably to the principles espoused in *SPP v. Egypt* regarding State responsibility even for *ultra vires* acts. These cases are addressed in greater detail in the Section III.C, *supra*, related to this same principle which Mexico also raises as a jurisdictional issue.

284. Mexico's arguments that Lusad committed errors that extinguish Mexico's treaty obligations are in direct conflict with Semovi's behavior. Mexico admits that "[i]n clear terms, Semovi has not suspended the Lusad Concession, regardless of the fact that there are irregularities surrounding its granting to Lusad."[502] During all relevant times when Lusad was implementing the Concession, Mexico City never questioned the Concession's legality. If, as Mexico argues, the Concession was never lawful, or as Mexico argues in other places, that subsequent court actions invalidated the Concession, then it makes no sense that Mexico City maintains the Concession has not been suspended to this day.[503]

285. Mexico cannot in this arbitration seek to extinguish Claimant's Article 1110 claim on the basis that Mexico City did not lawfully issue it, or that government officials acted *ultra vires*. Claimants and Lusad reasonably relied on Mexico City's representations and actions, and proceeded with investing and performing on the Concession to deploy modern technology throughout Mexico City's taxi fleet. This would have been a successful endeavor, and the government would have permitted it to be effectuated but for local Mexico City politics getting in the way.[504]

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499 *See* **Exhibit CL-0021-ENG**, ¶ 85 (*Southern Pacific Properties v. Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992); *see also* **Exhibit CL-0190-ENG**, ¶ 444 **(***Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015) (finding: "Responsibility for the actions of these State organs is unlimited provided the act is performed in an official capacity (*i.e.*, it includes *ultra vires* acts performed in an official capacity).").

500 *See* **Exhibit CL-0182-ENG**, ¶ 539 (*Mr. Franck Charges Arif v. Republic of Moldova*, ICSID Case No ARB/11/23, Award, 8 April 2013) (finding: "The international responsibility of a State is not determined by the legality of an act under domestic law, but by the principle of attribution in international law.).

501 *See* **Exhibit CL-0181-ENG**, ¶ 194 *et seq.* (*Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007) (finding: "The reasoning in Southern Pacific Properties is apposite to this case in many respects. Thus, even if the JVA and the Concession were entered into in breach of Georgian law, the fact remains that these two agreements were "cloaked with the mantle of Governmental authority". Claimant had every reason to believe that these agreements were in accordance with Georgian law, not only because they were entered into by Georgian State-owned entities, but also because their content was approved by Georgian Government officials without objection as to their legality on the part of Georgia for many years thereafter. Claimant therefore had a legitimate expectation that his investment in Georgia was in accordance with relevant local laws. Respondent is accordingly estopped from objecting to the Tribunal's jurisdiction *ratione materiae* under the ECT and the BIT on the basis that the JVA and the Concession could be void *ab initio* under Georgian law.").

502 *See* Counter-Memorial, ¶401.

503 *See* Counter-Memorial, ¶401; Expert Report of Marco Antonio de la Peña (Cuatrecasas), dated 4 November 2022, ¶¶ 13.17–13.19.

504 *See* Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶¶ 57–58.

4. Claimants' Investments Are Protected by NAFTA Article 1110 Irrespective of Subsequent Mexican Court Cases

286. Mexico argues that results of subsequent Mexican court cases mean that Lusad never had rights to begin with that could have been expropriated.[505] This is wrong. Mexico City issued the Declaration of Necessity and the Concession. Mexican courts' subsequent findings do not absolve Mexico of its obligations under NAFTA Article 1110 or erase Mexico's harmful actions to suspend the Concession without any justification at all (beyond "political change" due to the change in government administrations).[506]

287. Mexico argues, with minimal legal support, that "Mexico is not precluded from recognizing the decisions of its domestic courts simply because it granted the rights in question in the first place."[507] This misses the point entirely. The government's expropriatory actions at issue were unrelated to the court proceedings addressed in Mexico's Counter-Memorial.[508] The suspension of the Concession did not reference any court actions, nor was it made on the basis of any court actions. No decision by a Mexican court was at issue at the time the Concession was permanently suspended. Instead, the issue before this Tribunal is the conduct of the Mexico City government when it made political decisions to deprive Claimants of their investment and caused the value of the investment to plummet to zero.

288. Additionally, Mexico's argument that the referenced Mexican court cases extinguished the Concession are contrary to Mexican law. No Mexican court has ever set aside the Concession as unlawful.[509] This is because as a matter of Mexican law, no Mexican court case had any legal effect on the Concession as a whole. The cases Mexico references are *amparo* actions. As Mexican legal expert Cuatrecasas explains, *amparo* actions allow a litigant to challenge acts of government authority as applied to that litigant.[510] This principle of relativity under Mexican law, which is enshrined in Mexico's Constitution, ensures that only the party that brings the *amparo* action may benefit from it.[511] Lusad was not a party to any of the *amparo* cases referenced by Mexico in its Counter-Memorial.[512]

289. Mexico also fails to acknowledge that the majority of *amparo* cases—at least 13—resulted in dismissal and findings that the responsible Mexico City authority acted in accordance

[505] *See* Counter-Memorial, ¶ 396.

[506] *See* Claim Memorial, ¶ 122.

[507] *See* Counter-Memorial, ¶ 404.

[508] *See* Counter-Memorial, ¶¶ 406–407.

[509] *See* Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶ 74.

[510] *See* Expert Report of Marco Antonio de la Peña (Cuatrecasas), dated 4 November 2022, Section 15.

[511] *See* Expert Report of Marco Antonio de la Peña (Cuatrecasas), dated 4 November 2022, Section 15.

[512] *See* Expert Report of Marco Antonio de la Peña (Cuatrecasas), dated 4 November 2022, Section 15.

with its legal framework.[513] These diverging opinions further demonstrate that *amparo* judgments did not adulterate Lusad's Concession as a whole. Moreover, Semovi defended the lawfulness of the Concession and related legal authorizations to issue the Concession throughout these *amparo* actions, strong evidence that the government was giving every indication that it believed that the Concession was lawful.[514] And Semovi took one step further, issuing legal opinions to Lusad in April and June 2017 to reflect its view that the Concession remained valid and enforceable.[515]

290. Mexico's arguments are not just wrong as a matter of Mexican law—they are also wrong as a matter of international law. Mexico has offered very little legal support for its arguments that subsequent court cases can extinguish a claimant's treaty rights. Mexico cites *Infinity Gold v. Costa Rica*,[516] where the tribunal found that there were no concession rights subject to expropriation, because a domestic court had invalidated the concession years before the date of the alleged expropriation. This is easily distinguishable. Here, Lusad had been given every indication from the government that the Concession was lawful and valid through the time of the expropriation. The Mexico City government did not reference or rely upon any court proceeding, or any other reason than local politics, when it suspended the Concession and refused to implement installation of the L1bre taximeters.

291. Mexico also argues that it is not estopped from contradicting its own consistent positions once the Mexican courts take a different view.[517] Mexico cites only to *Arif v. Moldova* on this point. In the first place, the Tribunal need not impose the doctrine of estoppel to find that Mexico granted rights to Lusad through the Concession that Mexico later expropriated. The Tribunal need only find that Mexico is obligated to comply with NAFTA Article 1110 based on rights the Mexico City government created in the Concession and subsequently destroyed. Additionally, the facts of the *Arif* case are distinguishable, because the *Arif* expropriation claim was based on the ***judiciary's*** invalidation of licenses, whereas here ***the Mexico City government*** committed the harmful act. Whether the Mexican courts' decisions were correct under Mexican law is beside the point and not part of Claimants' claims before this Tribunal.

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[513] *See* Expert Report of Marco Antonio de la Peña (Cuatrecasas), dated 4 November 2022, Section 15; Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶ 73; Witness Statement of Agustin Muñana Zúñiga, dated 28 September 2022, ¶¶ 40, 56(h); **Exhibit C-0244-SPA** (Final Ruling in Amparo case 373/2016, Auxilar 33/2017, 2 May 2017); **Exhibit C-0247-SPA** (Filing from Semovi in Amparo Case 1135/2016, 26 June 2017); **Exhibit C-0057-SPA** (Oficio No. DNRM-1460-2017 from Semovi confirming the validity of the Concession Agreement, 19 June 2017).

[514] *See supra*, Section II.A.4.

[515] **Exhibit C-0056-SPA** (Oficio No. DNRM-0673-2017 from SEMOVI confirming the validity of the Concession Agreement, dated 4 April 2017); **Exhibit C-0057-SPA** (Oficio No. DNRM-1460-2017 from Semovi confirming the validity of the Concession Agreement, dated 19 June 2017). Additionally, only one of the three *amparo* cases that Mexico references was issued before the Concession was suspended—the Neotax case, which was brought by the company that supplied the existing mechanical taximeters that L1bre was set to replace. The other two cases were concluded and complied with after Lusad's Concession had already been suspended. *See supra*, Section II.A.4.

[516] *See* Counter-Memorial, ¶ 402.

[517] *See* Counter-Memorial, ¶¶ 403–404.

292. If the Tribunal wishes to apply the doctrine of estoppel, there is substantial support for doing so. As the tribunal in *ATA Construction v. Jordan* states, there is a "general rule according to which a State cannot invoke its internal laws to evade obligations imposed by a given treaty or generally by public international law."[518] Tribunals have found that respondent States cannot excuse acts that violate international law by relying on subsequent findings of illegality by domestic authorities. As discussed above, in *SPP v. Egypt* the tribunal stated that the finding of illegality by a domestic authority does not exclude the State's liability under international law: "A determination that these acts are null and void under municipal law would not resolve the ultimate question of liability for damages suffered by the victim who relied on the acts."[519] In *ADC v. Hungary*, the tribunal overruled respondent's arguments that the contracts for the renovation, construction, and operation of two terminals of the Budapest airport, under which the investors operated for years, were illegal:

> These Agreements were entered into years ago and both parties have acted on the basis that all was in order. ***Whether one rests this conclusion on the doctrine of estoppel or a waiver it matters not. Almost all systems of law prevent parties from blowing hot and cold. If any of the suite of Agreements in this case were illegal or unenforceable under Hungarian law one might have expected the Hungarian Government or its entities to have declined to enter into such an agreement.*** However, when, after receiving top class international legal advice, Hungary enters into and performs these agreements for years and takes the full benefit from them, it lies ill in the mouth of Hungary now to challenge the legality and/or enforceability of these Agreements. These submissions smack of desperation. They cannot succeed because Hungary entered into these agreements willingly, took advantage from them and led the Claimants over a long period of time, to assume that these Agreements were effective. ***Hungary cannot now go behind these Agreements. They are prevented from so doing by their own conduct.***[520]

293. Despite Mexico relying on *Arif*, the tribunal's findings in that case actually support that Mexico cannot use the Mexican courts' decisions to escape liability. The tribunal in *Arif* called respondent's reliance on a judicially declared invalidity of the concluded agreements "formalistic", because "both [p]arties believed and were allowed to trust that the [agreements]

518 **Exhibit CL-0192-ENG**, ¶ 122 (*ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010).

519 **Exhibit CL-0021-ENG**, ¶ 83 (*Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992).

520 **Exhibit CL-0024-ENG**, ¶¶ 472, 475 (*ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006) (emphases added).

were valid, and that the investment had been made in accordance with the legislation."[521] The tribunal also expressly recognized that a judicial decision that frustrated the investor's legitimate expectations could amount to a breach of the BIT. Because the litigation in that case was still pending at the time the tribunal handed down the award, it clarified that "should subsequent judicial proceedings arising from the . . . litigation lead to court orders for closure of these stores, [r]espondent would be required to take action to remedy the consequences."[522] In the present case, no court order has invalidated the Concession, nor had Mexico acted to alter the Concession as a consequence of these *amparo* cases. Instead, Semovi defended the lawfulness of the Concession before the courts and assured Lusad at that time that the Concession was not harmed.

294. For these reasons, the Tribunal should dispense with Mexico's unsupported, *ex post* arguments that Claimants' investments lack treaty protections. The Mexico City government granted a Concession and implemented the rights thereunder until it was politically inconvenient to continue doing so. These are rights capable of being expropriated—and indeed, Mexico expropriated those rights. Mexico must be held responsible for its breaches of Article 1110.

B. Mexico Breached Its Obligation to Accord Claimants' Investments with Fair and Equitable Treatment in Accordance with International Law

295. Mexico's chief tactic to rebut Claimants' demonstration of Mexico's violation of the FET standard contained in NAFTA Article 1105 is to argue that the legal standard is stricter than Claimants outlined in their Memorial. Mexico frequently uses this tactic in NAFTA arbitrations. Mexico's attempts to narrow the legal standard are unsupported by the majority of tribunals interpreting it. Instead, the Tribunal should adopt Claimants' articulation of the legal standard, which is supported by the text, follows longstanding practice of tribunals under NAFTA Chapter 11, and is grounded in customary international law.

296. However, as outlined above, the classic distinction that respondent States attempt to draw between the minimum standard of treatment under customary international law (which is enshrined in NAFTA Article 1105) and the autonomous FET standard is meaningless in this case, given the nature of Mexico's conduct. Even if the Tribunal were to adopt the most restrictive legal standard associated with NAFTA Article 1105, Mexico City's egregious actions would still fall afoul of its obligations. Claimants established in their Memorial how Mexico violated NAFTA Article 1105. Respondent has not provided a credible defense.

297. Claimants address Mexico's arguments in its Counter-Memorial in four parts. Subsection 1 addresses the correct legal standard that applies under NAFTA Article 1105. Subsection 2 explains why Mexico's conduct amounted to a frustration of Claimants' legitimate expectations. Subsection 3 rebuts Mexico's incorrect contention that Claimants are making breach of contract claims, not to alleged violations of the Treaty. Subsection 4 addresses how Mexico's

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[521] **Exhibit CL-0182-ENG**, ¶ 374 (*Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013).

[522] **Exhibit CL-0182-ENG**, ¶ 555(g) (*Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013).

conduct further falls afoul of NAFTA Article 1105 on a range of different legal bases under the FET standard.

1. Claimants Have Articulated the Correct FET Standard Contained in NAFTA Article 1105

298. As a threshold matter, Mexico argues that NAFTA Article 1105's guaranteeing FET protections for "investments of investors" is somehow a more restrictive standard than Claimants have plead.[523] In all instances, Mexico City's harmful treatment of Claimants extended to their investments, in particular Lusad and the L1bre System. Mexico fails to point out any instance where the government harmed Claimants but not Claimants' investments in Mexico. This is because in every instance the breaches of the FET standard applied to both Claimants and their investments. And in any event the *Cargill v. Mexico* tribunal's finding of a breach of Article 1105 in relation to the investor (not the investment) shows that this issue is not significant.[524] Mexico is arguing for a distinction which lacks a difference in this case.

299. Mexico also seeks to distinguish between the legal standard Claimants articulated under NAFTA Article 1105 and the customary international law standard.[525] But the standard Claimants articulated in the Memorial is indeed the legal standard for breaches of FET under customary international law, supported by several NAFTA tribunals' common application of that standard as derived from the *Waste Management II* tribunal's articulation of the standard.[526] Claimants are not advocating for this Tribunal to "advance to existing customary norms" under the FET standard.[527] Nor are Claimants asking this tribunal to find that prior NAFTA tribunal's articulation of the existing standard of FET under customary international law amount to State practice.[528] Claimants merely ask the Tribunal to apply the same legal standard as applied by several tribunals before it, which has become widely accepted.

300. Mexico's argument that Claimants must reinvent the wheel to establish the legal standard under NAFTA Article 1105 in every arbitration is also misplaced.[529] The *Windstream v. Canada* tribunal aptly explains this issue:

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523 *See* Counter-Memorial, ¶ 410.

524 *See* **Exhibit CL-0046-ENG**, ¶ 305 (*Cargill, Inc. v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009) (discussing a "breach of the Article 1105(1) obligation to provide fair and equitable treatment to Claimant"); *see also* **Exhibit CL-0194-ENG**, ¶¶ 75–79 (*Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Judgment of the Ontario Superior Court of Justice on Application to Set Aside Award, 26 August 2010) (finding that NAFTA Article 1116 is sufficiently broad to confer viable claims for damages arising out of a breach of the NAFTA Article 1105 obligations owed to the investor and that "damages to the subsidiary are damages to the parent").

525 *See* Counter-Memorial, ¶¶ 411–413.

526 *See* Claim Memorial, ¶¶ 205–212.

527 *See* Counter-Memorial, ¶ 415.

528 *See* Counter-Memorial, ¶ 415.

529 *See* Counter-Memorial, ¶¶ 413–415.

The Tribunal agrees that it is in the first place for the party asserting that a particular rule of customary international law exists to prove the existence of the rule. However, in the present case the issue is not whether the relevant rule of customary international law exists; the minimum standard of treatment contained in Article 1105(1) of NAFTA is indeed a rule of customary international law, as interpreted by the FTC in its Notes of Interpretation. The issue therefore is not whether the rule exists, but rather how the content of a rule that does exist - the minimum standard of treatment in Article 1105(1) of NAFTA - should be established. ***The Tribunal is therefore unable to accept the Respondent's argument that the burden of proving the content of the rule falls exclusively on the Claimant. In the Tribunal's view, it is for each Party to support its position as to the content of the rule with appropriate legal authorities and evidence*** . . .

. . . .

. . .the Tribunal must rely on other, indirect evidence in order to ascertain the content of the customary international law minimum standard of treatment; the Tribunal cannot simply declare *non liquet.* ***Such indirect evidence includes, in the Tribunal's view, decisions taken by other NAFTA tribunals that specifically address the issue of interpretation and application of Article 1105(1) of NAFTA, as well as relevant legal scholarship***.

. . . .

As to the terms used, Article 1105(1) provides that each State party shall accord to investments of investors of another party "treatment in accordance with international law, including fair and equitable treatment and full protection and security." Consequently, while keeping in mind that the standard set out in the provision is the customary international law minimum standard of treatment, ***the Tribunal must also take into account the express language of the provision, which refers to "fair and equitable treatment"*** and "full protection and security." The Tribunal therefore considers that the treatment required under Article 1105 (1) is fair and equitable treatment and full protection and security consistent with the minimum standard of treatment under customary international law. In other words, as stated by the FTC, the treatment required is not "in addition to or beyond" that which is required by the customary international law standard, but one that is in accordance, or consistent, with the standard, while remaining "fair and equitable" and providing "full protection and security."[530]

[530] *See* **Exhibit CL-0059-ENG**, ¶¶ 350–351, 356 (*Windstream Energy LLC v. Canada*, PCA Case No. 2013-22, Award, 27 September 2016) (emphases added).

301. The *Windstream* tribunal's articulation is in line with other NAFTA tribunals' views.[531]

302. Mexico also proposes that tribunals' articulations of the legal standard for FET under customary international law are irrelevant unless the case is a NAFTA arbitration.[532] This is also wrong. Arbitral tribunals that articulate their view of the FET standard in accordance with international law, even if not interpreting NAFTA, provide valuable insight for this Tribunal. This is particularly true for treaties that contain a FET obligation in accordance with international law.[533] For example, the tribunal in the *Rusoro Mining Ltd. v. Venezuela* case cited by Claimants assesses the FET standard under customary international law, finding that "***there is no substantive difference*** in the level of protection afforded by both standards [FET and the minimum standard under customary international law]."[534] Mexico is again proposing a distinction without a difference.

303. The Claim Memorial accurately articulates the FET standard under NAFTA Article 1105. The minimum standard of treatment under international law includes the FET standard, which itself captures principles of "transparency, the protection of the investor's legitimate expectations, freedom from coercion and harassment, procedural propriety and due process, and good faith."[535] The *Waste Management II* tribunal has articulated this oft-repeated standard under NAFTA Article 1105 as including conduct which 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 . . . 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."[536] Several tribunals have applied this standard, or similar standards, to the facts of each case to assess whether violations of this standard

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531 *See, e.g.*, **Exhibit CL-0045-ENG**, ¶¶ 119, 123, 125 (*Mondev International Ltd. v. U.S.A.*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002) ("the Tribunal is bound by the minimum standard as established in State practice and in the jurisprudence of arbitral tribunals" and discussing "[a] reasonable evolutionary interpretation of Article 1105(1)"); **Exhibit CL-0197-ENG**, ¶ 184 (*ADF v. United States*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003) (citing *Mondev*).

532 *See* Counter-Memorial, ¶ 416.

533 *See, e.g.*, **Exhibit CL-0044-ENG**, ¶¶ 361–367 (*TECO Guatamala Holdings, LLC. v. Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013) (under the CAFTA-DR, which articulates an identical standard as NAFTA) (cited by Claimants at Claim Memorial, n. 434).

534 *See* **Exhibit CL-0038-ENG**, ¶¶ 520 (*Rusoro Mining Ltd. v. Venezuela* , ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016) (emphasis added).

535 *See* Claim Memorial, ¶ 206.

536 *See* Claim Memorial, ¶ 208.

have occurred.[537] Indeed, Mexico has recently accepted this standard as the proper one for assessing FET claims under NAFTA Article 1105.[538]

304. For these reasons, the Tribunal should adopt the legal standard Claimants have outlined under NAFTA Article 1105, which is in line with the large majority of tribunals' articulation of the correct standard. And for completeness, as noted above, Mexico's conduct falls afoul of all possible interpretations of Mexico's obligations under NAFTA Article 1105, even Mexico's unduly narrow and restrictive interpretation.

2. The Mexico City Government's Actions Created Legitimate Expectations, Which the Government Violated for Political Reasons in Breach of NAFTA Article 1105

305. The FET standard under customary international law protects foreign investors' legitimate investment-backed expectations. The Concession set such legitimate expectations and induced major investments in Mexico on the reliance that Mexico City would honor the Concession's terms. Mexico's complete destruction of Lusad's rights under the Concession amount to an erasure of those legitimate expectations, in violation of NAFTA Article 1105.

306. Mexico argues that the legal standard contained in NAFTA Article 1105 permits Mexico to violate investors' legitimate expectations.[539] However, as Claimants outlined in the Memorial, several NAFTA tribunals have determined that conformity with an investor's legitimate expectations regarding the government's treatment of its investment is a component of States' legal obligations under NAFTA Article 1105.[540] The seminal *Waste Management II* tribunal's articulation of the NAFTA Article 1105 standard includes whether "treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."[541] The tribunal in *Thunderbird v. Mexico* found that "the concept of 'legitimate expectations' relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages."[542] The tribunal in *Mobil v. Canada (I)* assessed the legitimate expectation standard as including "clear and explicit representations made by or attributable to the [r]espondent" including on future changes to the regulatory framework and that it is relevant when determining a violation of Article 1105 whether there have been "clear and explicit representations made by or attributable to the NAFTA host State in order to induce

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537 *See* Claim Memorial, ¶¶ 209–212.

538 *See* Claim Memorial, ¶ 208 (citing **Exhibit CL-0008-ENG**, (*Odyssey Marine Exploration, Inc. v. Mexico* ICSID Case No. UNCT/20/1, Mexico's Counter Memorial,, 23 February 2021)).

539 *See* Counter-Memorial, ¶ 419.

540 *See* Claim Memorial, ¶¶ 213–220.

541 *See* **Exhibit CL-0040-ENG**, ¶ 98 (*Waste Management Inc. v. Mexico II*, ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004).

542 *See* **Exhibit CL-0047-ENG**, ¶ 147 (*International Thunderbird Gaming Corp. v. Mexico*, UNCITRAL, Arbitral Award, 26 January 2006).

the investment."[543] The tribunal in *Grand River v. United States* provides that "[o]rdinarily, reasonable or legitimate expectations of the kind protected by NAFTA are those that arise through targeted representations or assurances made explicitly or implicitly by a state party."[544] The tribunal in *Clayton and Bilcon v. Canada* discussed a "reasonable expectations" standard taking into account the regulatory framework in place at the time.[545] This is a long history of NAFTA tribunals incorporating the legitimate expectations standard into the analysis of whether a NAFTA Party violated NAFTA Article 1105.

307. Even the tribunal's view in the *Glamis Gold* case cited frequently by Mexico, which is a minority view that imposes a more onerous standard under NAFTA Article 1105 than the large majority of NAFTA tribunals, finds that a "quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the investment[]" could amount to a violation of NAFTA Article 1105 "based on the unsettling of reasonable, investment-backed expectation."[546] The *Glamis Gold* tribunal further discusses "active inducement of a quasi-contractual expectation" as a possible basis for an upsetting of expectations in violation of NAFTA Article 1105.[547] The Concession—a legally-binding agreement between Lusad and the Mexico City government that grants rights to Lusad which were violated—is more than sufficient to fulfill the *Glamis Gold* tribunal's strict standard of a "quasi-contractual relationship" that forms "reasonable, investment-backed expectation."

308. To be clear, Claimants are not advocating that the Tribunal apply the FET standard used by tribunals interpreting treaties where the FET obligation is untethered from customary international law. The text of NAFTA Article 1105 states that the FET standard is to be applied "in accordance with international law." However, non-NAFTA BITs, particularly those that contain an FET standard that is tied to international law, are instructive on the types of government actions that are subject to, and may violate, the FET standard. For example, the tribunal in *Total*

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543 *See* **Exhibit CL-0043-ENG**, ¶¶ 169, 152 (*Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada (I)*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012).

544 *See* **Exhibit CL-0185-ENG**, ¶ 141 (*Grand River Enterprises Six Nations, Ltd., et.al. v. United States of America*, UNCITRAL, Award, 12 January 2011) (accepting that U.S. laws and a treaty might serve as sources of reasonable or legitimate expectations).

545 *See* **Exhibit CL-0067-ENG**, ¶ 474 (*William Ralph Clayton et al. v. Canada*, UNCITRAL, Award on Jurisdiction and Liability, 17 March 2015).

546 *See* **Exhibit CL-0007-ENG**, ¶ 766 (*Glamis Gold, Ltd. v. U.S.A.*,UNCITRAL, Final Award, 8 June 2009). For scholars' criticism of the *Glamis Gold* award, **Exhibit CL-0189-ENG** (Margaret Clare Ryan, *Glamis Gold, Ltd. v. The United States and the Fair and Equitable Treatment Standard,* McGill Law Journal Vol. 56, No. 4 (June 2011)) ("[The *Glamis* tribunal's] reassertion of the *Neer* standard as the applicable threshold test for finding a violation of article 1105 represents a major deviation, which the tribunal did not fully justify, from NAFTA awards rendered after the FTC interpretation."); **Exhibit CL-0193-ENG**, p. 210 (Roland Klager, *Fair and Equitable Treatment in International Investment Law* (Cambridge University Press), 2011) ("[T]he [*Glamis Gold]* tribunal took an extremely narrow approach and required – in questionable exaggeration — 'egregious and shocking' state actions beyond mere illegality, 'a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons.'").

547 *See* **Exhibit CL-0007-ENG**, ¶ 799 (*Glamis Gold*, *Ltd. v. U.S.A.,* (UNCITRAL, Final Award, 8 June 2009)).

v. Argentina when assessing obligations under the France-Argentina BIT which provides for FET "in accordance with the principles of international law" makes clear that concession agreements are specific legal obligations for the future that are "undoubtedly" subject to legitimate expectations by the investor.[548]

309. In short, the legal standard under NAFTA Article 1105 is sufficiently broad to find that Mexico's permanent suspension of the Concession amounts to a violation of FET, because Mexico created a legitimate expectation that Lusad would have the rights granted to it under the Concession. The government never gave any indication that the Concession was anything but a valid and lawful document that conferred rights to Lusad. NAFTA Article 1105 requires that Mexico act in conformity with those legitimate expectations. Mexico cannot create legitimate expectations through the Concession and then destroy the investment in a manner contrary to those legitimate expectations. Such actions violate Article 1105, irrespective of Mexico's *ex post* arguments around Lusad's alleged insufficient compliance with the Concession's terms or three *amparo* actions that had no legal effect on Lusad or the Concession as a whole, as discussed in Section III.A.4, *supra*.

310. Moreover, even if the Tribunal adopts Mexico's overly restrictive standard, Mexico has still breached NAFTA Article 1105. Mexico argues that NAFTA tribunals have "narrowly circumscribed the concept of legitimate expectations" to require "targeted representations or assurances made explicitly or implicitly by a state party" to breach Article 1105.[549] That's exactly what Mexico did here by awarding an explicit, written, signed, and stamped Concession that contained very specific representations and assurances as to Lusad's rights. The facts in this case meet the "quasi-contractual relationship" Mexico asserts is necessary[550]—in fact, the Concession is an actual contractual relationship between the government and Lusad, even more significant than the type of "quasi-contractual relationship" which Mexico discusses.

311. Finally, it appears that Mexico is arguing that Lusad could not have reasonably expected that the taxi drivers would comply with the law and that the Mexico City police would have enforced the law, even if L1bre had been installed in every taxi.[551] This argument is premised on wrong facts, because the L1bre System was self-enforcing and did not require the type of police enforcement Mexico presupposes.[552] Nor would such enforcement likely have been necessary—the L1bre System was a free technological upgrade that permitted higher fares and greater service for passengers.[553] Moreover, an investor should not be expected to temper their legitimate

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548 **Exhibit CL-0196-ENG**, ¶ 117 (*Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010) ("The expectation of the investor is undoubtedly "legitimate", and hence subject to protection under the fair and equitable treatment clause, if the host State has explicitly assumed a specific legal obligation for the future, such as by contracts, concessions or stabilisation clauses on which the investor is therefore entitled to rely as a matter of law.").

549 *See* Counter-Memorial, ¶ 420.

550 *See* Counter-Memorial, ¶ 420.

551 *See* Counter-Memorial, ¶ 424, fn. 556.

552 *See supra*, ¶ 117.

553 *See* Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶¶ 61–62.

expectations under a concession agreement based on an assumption that the government would break or fail to enforce its own laws and decrees.[554] It is a sad state of affairs that the Mexican government has no faith in its own laws and law enforcement. This is yet another absurd argument in the face of a clear breach of NAFTA.

3. Claimants Do Not Claim Breach of Contract Before This Tribunal

312. Mexico argues that claims for breaches of contract cannot be settled under NAFTA Article 1105.[555] But Claimants are not asking the Tribunal to find a breach of contract here. Claimants have not invoked an umbrella clause. Instead, Claimants are asking the Tribunal to find that Mexico City's permanent suspension of Lusad's Concession and the government's elimination of Lusad's rights therein violate the FET standard. This treaty claim does not require the Tribunal to assess a breach of the Concession contract.[556]

313. Claimants are not asking for an "insurance polic[y] against poor business judgment."[557] Instead, Claimants are asking for fair compensation to remedy Mexico City's purposeful destruction for political reasons of a Concession that it granted to Lusad. Claimant should not have been expected to consider the destruction of the entire value of the Concession as a reasonable and predictable government action. This is not a case, as Mexico terms it, of Claimants making "reckless commercial decisions" that do not give rise to State responsibility.[558] Nor is it a case requiring a finding of an expectation of a stable investment environment.[559] Under Mexico's proposed exacting legal standard, governments would be incentivized to regularly violate their own laws so that they could argue that any company entering into an agreement with the government should not have legitimate expectations that the agreement has any force of law. This cannot be the correct legal standard under international law or under the NAFTA.

314. The cases cited by Mexico are not analogous here. The tribunal in *MTD v. Chile* found a violation of FET, but chose to reduce damages due to claimant's lack of due diligence, so

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554 *See, e.g.* **Exhibit CL-0186-ENG**, ¶ 367 (*Micula et al. v. Romania* (II), ICSID Case No. ARB/14/29, Award, 5 March 2020) ("The Tribunal agrees that there may be circumstances in which a failure to enforce laws could amount to a denial of legitimate expectations and hence a breach of the obligation to provide fair and equitable treatment."); **Exhibit CL-0061**, ¶ 94 (*GAMI Investments, Inc. v. United Mexican States*, Ad hoc Arbitration, Final Award, 15 November 2004) ("Each NAFTA Party must to the contrary accept liability if its officials fail to implement or implement regulations in a discriminatory or arbitrary fashion.").

555 *See* Counter-Memorial, ¶ 428.

556 *See, e.g.,* **Exhibit CL-0099-ENG**, ¶ 7.73 (*Gemplus, S.A., et al. v. Mexico*, ICSID Case Nos. ARB(AF)/04/3 and ARB (AF)/04/4, Award, 16 June 2010) (finding that a new Mexico administration's termination of the claimant's concession violated Mexico's FET obligations. In coming to these conclusions, the tribunal states that because it is charged with evaluating claimant's rights under international law, it "is not concerned with the different legal rights of the Concessionaire under the Concession Agreement and Mexican law, which were the exclusive subject-matter of the decisions of the Mexican courts invoked by Respondent.").

557 *See* Counter-Memorial, ¶ 432.

558 *See* Counter-Memorial, ¶ 431.

559 *See* Counter-Memorial, ¶ 433.

in the first place this case does not support a rejection of an FET claim due to claimant's fault.[560] Moreover, more due diligence would not have informed Claimants and Lusad of the risks of an investment, because Claimants' investment was directly tied to the government's authorization and incentivizing of the investment through the Concession. Moreover, Mexico's argument omits that the claims in *Methanex v. United States* involved an assumption of regulatory stability, without a specific agreement anchoring that assumption like the Concession.[561] The claims in *Glamis Gold v. United States* similarly were untethered to a concession or other government authorization that conferred legitimate expectations that were reversed by the respondent State.[562]

315. Mexico also misrepresents Claimants' claim of legitimate expectations by referencing expectations conferred "starting in 2015."[563] Mexico conferred expectations of revenues under the express terms of the Concession. The Mexico City government's representations around its openness to Claimants' technology to improve the taxi system prior to granting the Concession were important backdrops for understanding Claimants' decision to make major investments in Mexico and to bolster Claimants' understanding of the importance of the Concession to the Mexico City government at that time. However, the Tribunal only need tether its analysis to the rights conferred to Lusad in the Concession to make a finding of breach of FET on the basis of Mexico's violation of Claimants' legitimate expectations. The "irregularities" that Mexico attributes to Lusad are of no consequence to the legitimate expectations conferred by Mexico City when it awarded the Concession to Lusad.[564] The Mexico City government never gave Lusad any indication that the terms of the Concession could be unilaterally withdrawn or disregarded at Semovi's will—until it suspended the Concession due to political reasons. As addressed in Sections II.A–B, *supra*, and in Mr. Herrero's Declaration, from the time the Concession was awarded to Lusad until the first suspension notice, Mexico City and Semovi told Lusad over and over again through their representatives' words and actions that they would continue, as promised, to implement the Concession, enable Lusad to install taximeters in all 138,000 taxis in Mexico City, and enable the website to set up appointments for those installations. Mexico's Counter-Memorial is the first time the government has contended that *amparo* actions had any connection to the government's destruction of the Concession, and the explanation is manifestly inconsistent with the one provided in the 28 October 2018 suspension letter.[565] Mexico's new explanation, provided in its Counter-Memorial, for the suspension of the Concession—if true—would reflect a lack of due process and transparency, and further breaches of NAFTA Article 1105. However, it is plain that these new explanations are simply an *ex post* attempt by the Mexico government to explain away its purposeful and political decision to violate its treaty commitments.

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560 *See* Counter-Memorial, ¶ 433.

561 *See* Counter-Memorial, ¶ 434.

562 *See* Counter-Memorial, ¶ 434.

563 *See* Counter-Memorial, ¶¶ 435–436.

564 *See* Counter-Memorial, ¶¶ 437–438.

565 *See* Counter-Memorial, ¶ 441.

4. Mexico City's Actions Were Unfair, Unpredictable, Arbitrary, Inconsistent, Non-Transparent, Inequitable, Amounting to Bad Faith, and Lacking Due Process

316. Beyond Mexico's violation of the legitimate expectations Mexico City created by issuing the Concession to Lusad, Mexico's actions violate several additional elements of the FET standard. Mexico pejoratively deems these additional bases for Mexico's FET violation a "shopping list."[566] If Claimants are "shopping" for violations of FET, the "store" is the widely accepted articulation of the FET standard by the *Waste Management II* tribunal, which was recently articulated by the *Nelson* tribunal as follows:

> [T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is ***arbitrary***, ***grossly unfair***, ***unjust*** or idiosyncratic, is ***discriminatory*** and exposes the claimant to sectional or racial prejudice, or involves a ***lack of due process*** leading to an outcome which offends judicial propriety—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***. The [t]ribunal agrees with [c]laimant in that the Waste Management standard has been widely accepted and followed by other NAFTA tribunals . . . [567]

317. As addressed in detail in the Claim Memorial,[568] tribunals have interpreted the scope of Article 1105 to include several elements, including "regulatory fairness"[569]; "stability of the legal environment" to "avoid sudden and arbitrary alterations of the legal framework[570]; "the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations" to "act consistently, i.e., without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities"[571]; and that bad faith "will certainly suffice" to find a

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566 *See* Counter-Memorial, ¶ 444.

567 *See* Claim Memorial, fn. 432 (citing **Exhibit CL-0042-ENG**, ¶¶ 321–322 (*Joshua Dean Nelson v. Mexico*, ICSID Case No. UNCT/17/1, Award, 5 June 2020) which in turn cites to *Waste Management II*)) (emphases added).

568 *See* Claim Memorial, ¶ 221–232.

569 *See* **Exhibit CL-0054-ENG**, ¶ 179 (*Crompton (Chemtura) Corp. v. Canada* , PCA Case No. 2008-01, Award, 2 August 2010).

570 *See* **Exhibit CL-0037-ENG**, ¶ 232 (*Merrill & Ring Forestry L.P. v. Canada,* ICSID Case No. UNCT/07/1, Award, 31 March 2010).

571 *See* **Exhibit CL-0010-ENG**, ¶ 154 (*Técnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003).

violation.[572] Mexico itself has agreed that "prior tribunals have stated that a gross violation [of FET] may occur when an investor is denied an opportunity to be heard or failure to give notice."[573] Mexico's termed "shopping list" is, in truth, a summary of specific ways that tribunals have described the bounds of the FET standard, and the types of actions by a respondent State that could amount to a breach of that standard.

318. The rest of Mexico's arguments in this section of its Counter-Memorial amount to noise. Whether good faith is "an autonomous stand-alone obligation"[574] is beside the point in this case, because there is clear evidence of ***bad*** faith. Mexico City never gave a reasonable justification for why it permanently suspended the Concession—only pointing to politics. This amounts to bad faith. Mexico has doubled down on its bad faith actions towards Claimants and Lusad in this arbitration, through denying the existence or authenticity of documents including the Concession itself, offering questionable alternative documents, refusing to produce other documents, and, more egregiously, imprisoning Mr. Zayas, a key witness and representative of Lusad, for civil charges that have since been dropped by the complainant.[575] Whatever specific articulation of arbitrariness the Tribunal adopts, the facts here are clear that Mexico City's conduct, which lacked reason or justification, was arbitrary.[576]

319. Mexico also cites a research paper which attempts to categorize political motivations in investment tribunal decisions to support Mexico's view that Mexico City's destruction of Claimants' investment without explanation was not for the type of political reasons that would trigger a FET violation.[577] This is confounding. Mexico City gave no explanation under Mexican law for its permanent suspension of the Concession and refusal to implement its obligations under the Concession. None, other than "political change."[578] It is hard to imagine a case that is more arbitrary and lacking due process than this one.

320. Mexico is also wrong about the timing of the harmful actions being too early to be blamed on politics.[579] Mexico fails to point out any contradiction in Claimants' outlining of the timeline of Mexico City's politically-motivated actions to harm Lusad.[580] To be clear, the temporary suspension in May 2018 was a result of the Mexico City government's awareness of the political backlash triggered by the Mayoral campaign. This fact is obvious, because the

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[572] *See* **Exhibit CL-0046-ENG**, ¶ 296 (*Cargill, Inc. v. Mexico*, ICSID Case No. ARB(AF)/05/2), Award, 18 September 2009).

[573] *See* **Exhibit CL-0008-ENG**, ¶ 490 (*Odyssey Marine Exploration, Inc. v. Mexico*, ICSID Case No. UNCT/20/1, Mexico's Counter Memorial, 23 February 2021) (citing *Metalclad* and *Tecmed*).

[574] *See* Counter-Memorial, ¶¶ 446–447.

[575] *See supra*, ¶¶ 129–146.

[576] *See* Counter-Memorial, ¶¶ 448–450.

[577] *See* Counter-Memorial, ¶¶ 451–452.

[578] *See* Claim Memorial, ¶ 122.

[579] *See* Counter-Memorial, ¶ 454.

[580] *See* Counter-Memorial, ¶ 455.

suspension notice said so.[581] But Mexico City continued to support Lusad and acted as if that suspension was temporary, never giving Lusad a clear indication that the suspension would be permanent.[582] It was not until after the election that the Concession was permanently suspended on 28 October 2018—after Mayor Sheinbaum had been elected in part on her campaign against L1bre and in favor of taxi driver interests (making false statements against the L1bre System during the campaign to her political benefit).[583] Lusad received clear confirmation that the permanent suspension was irreversible in January 2019, after the Sheinbaum Administration took office.[584] Semovi's suspension of the Concession accorded with the incoming Mayor's clearly expressed political positions. It is no coincidence that Lusad's fortunes began to turn at the same time that then-candidate Sheinbaum began campaigning against L1bre (and ultimately won the election) leveraging this political platform.

321. For these reasons, the Tribunal should find that Mexico has violated its FET commitment under NAFTA Article 1105.

C. Mexico Discriminated Against Claimants' Investment in Violation of Its National Treatment Commitment

322. Mexico City discriminated against Claimants' investments in the L1bre System in favor of the government-owned service Mi Taxi. In doing so, Mexico violated its national treatment obligations contained in NAFTA Article 1102. Mexico's arguments to the contrary lack factual or legal support and must be dismissed.

323. Claimants address Mexico's arguments in its Counter-Memorial in four parts. Subsection 1 rebuts Mexico's argument that there is a carve-out to the national treatment standard under NAFTA Article 1108(7). Subsection 2 explains why Mi Taxi is in "like circumstances" to Lusad and the L1bre System for purposes of evaluating whether Mexico breached the National Treatment standard. Subsection 3 explains how Mexico City treated Lusad less favorably than Mi Taxi. Subsection 4 addresses Mexico's attempt to invoke *ex post* rationales for having Mi Taxi replace Lusad for the provision of services envisaged under the Concession.

1. The Concession Is Not Government Procurement and Therefore the Carve-out in NAFTA Article 1108(7)(a) Does Not Apply

324. As a threshold issue, Mexico seeks to invoke the carve-out from NAFTA Article 1102 contained in NAFTA Article 1108(7)(a) for "procurement by a Party or a state enterprise", based on Mexico City's Concession with Lusad. However, no part of the Concession involves

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581 *See* Claim Memorial, ¶ 245, n. 512 (citing **Exhibit C-0018-SPA** ("*Lo anterior se solicita de conformidad al periodo de elecciones que atraviesa la Ciudad de México y en absoluto respeto a la jornada electoral, previendo que estas instalaciones pudieran ser objeto de señalamientos como propaganda proselitista es que se ha decidido suspender la instalación de taxímetros digitales a partir de la notificación del presente oficio y hasta pasado el día de las elecciones se le notifique oficialmente que pueda reanudarlas*.")).

582 *See* Witness Statement of Eduardo Herrera de Juana, dated 25 October 2022, ¶¶ 47–49.

583 *See* Claim Memorial, ¶ 246; .

584 *See* Claim Memorial, ¶ 246.

"procurement." "Procurement" means the purchases of goods or services. Nothing of the sort occurred here. The Concession granted Lusad rights, but Lusad never sold any goods or services to the government. Thus, Mexico's reference to NAFTA Article 1108(7)(a) is immaterial to this dispute.

325. NAFTA tribunals have addressed Article 1108(7)(a) and the scope of "procurement."[585] The *ADF* tribunal defined procurement under Article 1108(7)(a) "[i]n the world of commerce and Industry" as follows: "the activity of obtaining by purchase goods, supplies, services and so forth. Thus, governmental procurement refers to the obtaining by purchase by a governmental agency or entity of title to or possession of, for instance, goods, supplies, materials and machinery."[586] The *Mesa Power* tribunal defined procurement under Article 1108(7)(a) as "when a Party is engaged in formal purchasing of goods and services."[587] The *Mercer v. Canada* tribunal found that the ordinary meaning of "procurement by a Party or a state enterprise" in NAFTA Article 1108(7)(a) in its context and in the light of NAFTA's object and purpose means "buying of goods or services for or by a State or state enterprise (as defined in NAFTA Annex 1505) owned or controlled through ownership interests by that State."[588] These cases where the respondent invoked NAFTA Article 1108(7)(a) all involved exchange of goods and/or services in return for money paid by the government to the investor or its affiliates.

326. These tribunals' articulation of the scope of "procurement" under NAFTA make clear that the carve-out does not apply to the Concession, because it does not involve procurement. The Concession lacks any mention of procurement. The government did not ever ask to purchase goods or services. The government did not pay nor promise to pay Lusad anything. Nor did it purchase anything from Lusad or otherwise as part of the Concession. Instead, the Concession granted Lusad the right to install digital taximeters in all of Mexico City's taxis and earn revenue based on the services provided to the people in Mexico City who ride in those taxis. The government does not own the taxis—it regulates the taxis. Both Lusad and the government were to receive revenues based on portions of fares and advertising revenue, in return for the services provided through the L1bre System. But the government never promised to pay Lusad for goods or services. In fact, ***the government would be receiving additional revenue*** from the operation of the taxis once the L1bre System was operational. The government solely granted Lusad rights by issuing the Concession—with no money being paid by the government to Lusad. Thus, NAFTA Article 1108(7)(a) does not apply to the Concession or to any aspect of Claimants' investments.

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585 *See, e.g.* **Exhibit CL-0197-ENG**, ¶ 161 (*ADF v. United States*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003); **Exhibit CL-0148-ENG**, ¶¶ 402, 437 (*Mesa Power v. Canada*, PCA Case No. 2012-17, Award, 24 March 2016); **Exhibit CL-0198-ENG**, ¶ 6.35 (*Mercer v. Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018).

586 *See* **Exhibit CL-0197-ENG**, ¶ 161 (*ADF v. United States*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003).

587 **Exhibit CL-0148-ENG**, ¶ 420 (*Mesa Power v. Canada*, PCA Case No. 2012-17, Award, 24 March 2016).

588 **Exhibit CL-0198-ENG**, ¶ 6.35 (*Mercer v. Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018). *See also* **Exhibit CL-0200-ENG**, ¶ 390 (*Resolute v. Canada*, PCA Case No. 2016-13, Final Award, 25 July 2022) (agreeing with the *Mercer* tribunal's formulation of the definition of "procurement.").

327. Finally, even if the Tribunal finds that the Concession involves procurement that is carved-out of NAFTA Article 1102 protections (which it does not), Mexico's objection under NAFTA Article 1108(7)(a) is of no consequence, because the Tribunal could still find that Mexico discriminated against Claimants' investments in violation of NAFTA Article 1105. The carve-out contained in NAFTA Article 1108(7)(a) does not apply to NAFTA Article 1105. The FET standard includes an obligation to treat the investment on a non-discriminatory basis.[589] Thus, even if Mexico can prove that this case involves procurement (which it does not), Mexico's invocation of NAFTA Article 1108(7)(a) is simply inapplicable to the merits of this case.

2. L1bre and Mi Taxi Are in Like Circumstances

328. Mexico's argues that L1bre and Mi Taxi were not in "like circumstances" within the meaning of NAFTA Article 1102.[590] Mexico further argues that no investment or investor was in "like circumstances" to Lusad, the L1bre business, or Claimants.[591] The evidence proves otherwise.

329. As stated by the *Clayton and Bilcon* tribunal: "Moreover, the operative word in Article 1102 is 'similar', not 'identical.'"[592] Foreign investments are in like circumstances to domestic investments when they are similar. A perfect match is not required. As stated by the *ADM v. Mexico* tribunal, "it is the Tribunal's view that when no identical comparators exist, the foreign investor may be compared with less like comparators, if the overall circumstances of the case suggest that they are in like circumstances."[593] The tribunal in *ADM v. Mexico* also found that the decisive factor was that two companies operated in the same market.[594]

330. Mi Taxi is in like circumstances to L1bre based on their close similarities. Both Mi Taxi and L1bre fulfilled similar functions in the same market—updating Mexico City's taxi fleet using new technology, including in particular a smartphone application that would enhance users' experience and improve safety. Both include technology products to improve the same set of taxis in Mexico City. Both services had panic buttons. In fact, Mexico City officials confirmed that Mi

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[589] *See, e.g.*, **Exhibit CL-0067-ENG**, ¶ 435 (*William Ralph Clayton et al. v. Canada*, UNCITRAL, Award on Jurisdiction and Liability, 17 March 2015) (citing the *Merrill & Ring v. Canada* tribunal's view that "[c]onduct which is unjust, arbitrary, unfair, discriminatory or in violation of due process has also been noted by NAFTA tribunals as constituting a breach of fair and equitable treatment, even in the absence of bad faith or malicious intention….What matters is that the standard protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness.").

[590] *See* Counter-Memorial, ¶ 464.

[591] *See* Counter-Memorial, ¶ 466.

[592] *See* **Exhibit CL-0067-ENG**, ¶ 692 (*William Ralph Clayton et al. v. Canada*, UNCITRAL, Award on Jurisdiction and Liability, 17 March 2015) (comparing different mining investments).

[593] *See* **Exhibit CL-0013-ENG**, ¶ 202 (*Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007).

[594] **Exhibit CL-0013-ENG**, ¶ 202 (*Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007) (referring to the tribunal's finding in *Methanex v. United States* that two producers should be considered "like" because they both competed in the oxygenate market, even though one produced ethanol and one produced methanol).

Taxi was intended to replace the L1bre System.[595] These two services are in the exact same sector, in the same city, and share the same or similar functions. They are in like circumstances.

331. The Mexico City government's control of the Mi Taxi service does not strip its close similarities to L1bre. Mexico has cited no authority to support this argument.[596] NAFTA Article 1139 defines "investor of a Party" to include "a Party or state enterprise thereof." Plainly, government-owned enterprises can be comparable investors, and government ownership simply does not matter for the "in like circumstances" test. As we have made clear in Section III.B, *supra*, Claimants are "enterprises" (and so is Lusad) under the definition contained in NAFTA Article 201(1). Likewise, Mi Taxi is an "enterprise" under NAFTA Article 201(1), because it is "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned." In fact, Mi Taxi and L1bre are directly comparable—Mi Taxi usurped L1bre's prior rights and responsibilities as the improved technology for Mexico City's taxis.

332. In *UPS v. Canada*, the tribunal (interpreting NAFTA) compared a government-owned investor and its investment and a foreign-owned investor and its investment for purposes of the "in like circumstances" test. The tribunal found that Canada Post, a Canadian State-owned postal service, and UPS, a U.S.-based private delivery service, were not in like circumstances because the scope of services offered were not comparable.[597] The separate opinion in that case disagreed with the majority's findings, determining instead that Canada Post's products were very similar to UPS's products, customers had a choice between the two services, and the services directly competed, and therefore they were comparable under the like circumstances test.[598] Neither the majority opinion nor the separate opinion voiced any hesitation with making such a comparison between government-owned and privately foreign-owned services for purposes of the "in like circumstances" test under NAFTA Article 1102.

333. In *Occidental v. Ecuador (I)*, the respondent State argued that its state-owned oil company, Petroecuador, was in a like situation when compared with foreign investors.[599] This

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[595] *See* Claim Memorial, ¶ 280 (citing **Exhibit C-0023-SPA**) (Interview with Eduardo Clark, General Director of the Center of Technological Development of the Digital Agency of Public Innovation of the Government of Mexico City, dated 6 September2019).

[596] *See* Counter-Memorial, ¶ 466. *See also* **Exhibit CL-0195-ENG**, ¶¶ 21.22–21.58 (Andrea K. Bjorklund, *The National Treatment Obligation*, *in Standards of Investment Protection* 532-561 (August Reinisch, Oxford (2011)) (discussing the "in like circumstances" standard in detail but without any carve-out to the test in the case of a comparator service that is government-owned).

[597] *See* **Exhibit CL-0066-ENG**, ¶ 9 (*United Parcel Service of America Inc. v. Canada*, UNCITRAL, Award on the Merits, 24 May 2007) ("Canada Post is an 'agent of Her Majesty in right of Canada' and an 'institution of the Government of Canada'."); ¶ 93 ("the two programs appear to be dealing with different flows of goods with different characteristics"; ¶ 119 ("We conclude that UPS and Canada Post are not in like circumstances in respect of the customs treatment of goods imported as mail and goods imported by courier.")).

[598] *See* **Exhibit CL-0066-ENG**, ¶¶ 17–26 (*United Parcel Service of America Inc. v. Canada*, UNCITRAL, Award on the Merits, Separate Opinion, 24 May 2007).

[599] *See* **Exhibit CL-0070-ENG**, ¶ 172 (*Occidental Exploration and production Co. v. Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004).

argument from the respondent government party presumed that there is no prohibition against comparing claimant's investment with a government-owned entity's investment.

334. Mexico's further attempts to distinguish the L1bre and Mi Taxi services are unconvincing.[600] Software forensics expert Kroll examined the source code and confirmed that the two services are comparable on each of the nine features outlined in the Concession, including real-time tracking information; login data; online storage of travel history; relevant information on passengers, drivers, and units; real-time route generation with traffic filtering; monitoring, security, and alerts by the Mexico City command center; pricing of trips based on the official fares set for taxis in Mexico City; specifying the origin and destination of a trip; and payment using credit and debit cards or cash.[601] That the L1bre System offered additional benefits to its service, including hardware free of charge to taxi drivers, does not detract from the overwhelming similarities between the two services. That L1bre is superior to Mi Taxi, including installation of hardware that provides additional benefits to passengers and drivers, does not change the fact that the services are strikingly similar.

335. Moreover, Mexico City government's ***intended*** purpose for Mi Taxi[602] is similarly not relevant to whether the services are comparable ***in reality***. Mexico argues that Mi Taxi "is focused on providing security and certainty to users by obtaining clear and reliable information about the taxi used by the user."[603] But Mi Taxi can work towards these stated goals, and also provide services beyond the government's stated goals. Both L1bre and Mi Taxi operate in the market of taxi technology services. Both L1bre and Mi Taxi also were being deployed to increase security for users through a panic button. Both services increase assurances to riders through more information about the trip. Moreover, both services help Taxi drivers compete with other mobile ride hailing services and increase revenue for drivers. The similarities between the two services are hard to miss.

336. That Mi Taxi does not currently "seek to generate a profit" also does not distinguish the two services.[604] Mi Taxi transparently replaces the L1bre System, taking fees guaranteed to Lusad for use of the L1bre System and giving those fees to drivers. Indeed, rides hailed through Mi Taxi rather than through traditional methods grant the driver higher fares and this has the ultimate effect of increasing government revenue through increased taxes on those fees charged.

337. Finally, Mexico also argues that "nationality-based discrimination" under NAFTA Article 1102 requires something more than treating a domestic investment more favorably than a foreign investment in like circumstances, such as targeting the foreign investors on the basis of its

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[600] *See* Counter-Memorial, ¶¶ 467–468.

[601] Expert Report of Joshua Mitchell (Kroll), dated 3 November 2022, Section 4.

[602] *See* Counter-Memorial, ¶ 467 (discussing how Mi Taxi is "seek[ing] to compete").

[603] Counter-Memorial, ¶ 467.

[604] *See* Counter-Memorial, ¶¶ 469, 472.

nationality.[605] However, all that is required for Mexico to have violated NAFTA Article 1102 is the existence of differential treatment. As detailed in the Claim Memorial and supported by several tribunals' analyses, discriminatory intent is not required to amount to a national treatment violation.[606]

338. For these reasons, Mi Taxi and L1bre are in like circumstances because of their close similarities, irrespective of Mi Taxi's ownership by the government and L1bre's additional benefits.

3. The Mexico City Government Treated L1bre Less Favorably Than Mi Taxi

339. The Mexico City government harmed Claimants' investments in Mexico, including Claimants' rights to implement the L1bre System in Mexico City's taxi fleet. Then, the Mexico City government replaced L1bre's rights with its own service, Mi Taxi. This amounts to less favorable treatment of Claimants' investment than the government afforded the comparable service, Mi Taxi. In this case, the "less favorable treatment" at issue suffered by L1bre is even harsher than the typical case of a breach of national treatment, because here the Mexico City government directly usurped a foreign-owned private enterprise's business with a government-sponsored replacement.

340. Mexico does not even try to rebut the facts underlying claimants' "less favorable treatment" prong of the national treatment claim.[607] Mexico's repetition of its view that under NAFTA Article 1102, "Mexico has a right to procure goods and services," is no rebuttal to the plain fact that L1bre was treated less favorably than Mi Taxi. The Concession does not involve any procurement of goods and services by the government. The Concession awarded rights to Lusad to provide a service to the taxi drivers and passengers, and to be paid for that service through revenue paid by riders and advertisers. The government then refused to recognize these rights and replaced them with its own service—including drivers receiving higher fares when the passenger

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605 *See* Counter-Memorial at ¶¶ 463, 470 (arguing that Mr. León and Mr. Zayas being Mexican citizens and Lusad being a Mexican company is a valid basis to defeat claimants' national treatment claim).

606 Claim Memorial, fn. 563. *See, e.g.*, **Exhibit CL-0067-ENG**, ¶ 719 (*William Ralph Clayton et al. v. Canada*, UNCITRAL, Award on Jurisdiction and Liability, 17 March 2015) (referencing the *UPS* and *Feldman* tribunals' similar findings); **Exhibit CL-0069-ENG**, ¶¶ 181, 183 (*Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002). ("it is not self-evident . . . that any departure from national treatment must be *explicitly* shown to be a result of the investor's nationality. There is no such language in Article 1102."); **Exhibit CL-0071-ENG**, ¶¶ 343–345 (*Cargill, Inc. v. Poland II*, UNCITRAL, Award, 29 February 2008) (stating that a violation of national treatment obligations does not require proof that discrimination was intended: "Only the impact or result of the quotas must be examined"); **Exhibit CL-0070-ENG**, ¶ 177 (*Occidental Exploration and Production Co. v. Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004) ("The Tribunal is convinced that this has not been done with the intent of discriminating against foreign-owned companies. . . However, the result of the policy enacted and the interpretation followed by the SRI in fact has been a less favorable treatment of OEPC.").

607 *See* Counter-Memorial, ¶ 471.

hailed the taxi through the Mi Taxi application rather than through traditional methods.[608] This case of less favorable treatment is clear-cut.

341. Mexico's retort that a finding of less favorable treatment in this case would mean that "every disgruntled service provider would have a claim for national treatment" proves the point.[609] Foreign investors that provide services in Mexico and are discriminated against by the government in favor of a local champion ***do*** have valid national treatment claims. That is what happened here. Every time Mexico discriminates against concession holders by usurping foreign investors' rights in favor of local champions, it breaches its NAFTA commitments.

4. *Ex Post* Rationales Do Not Excuse Mexico's Discriminatory Treatment

342. Mexico argues that the Mexico City government's harmful treatment of Lusad and the L1bre System in favor of Mi Taxi is somehow excusable because, in Mexico's view, these harmful acts were "pursuant to rationale and non-discriminatory policies."[610] This argument also misses the point. Mexico City's mistreatment of Lusad and L1bre amounts to discriminatory treatment. Mexico's motives for usurping Lusad's rights and replacing them with Mi Taxi are irrelevant. That the government does not seek to make a profit from Mi Taxi is also irrelevant. What is relevant is that Lusad had guaranteed rights including to significant revenues based on services Lusad promised to provide—but the government unlawfully revoked and replaced those rights with a government-run copy-cat. Mexico City's harmful actions may have been rational from the viewpoint of the new Sheinbaum administration, which was elected on the backdrop of its mudslinging against Lusad and the L1bre System and derived significant political value from harming Lusad. But these actions were still discriminatory in violation of NAFTA Article 1102.

343. Mexico in making this argument failed to rebut (or even reference) Claimants' citation in the Memorial to *S.D. Myers* where the tribunal found that the respondent's legitimate goal does not override the effect of the measure and the way it was imposed which resulted in an outright effective cancellation of the investment, in violation of NAFTA Article 1102.[611] This is yet another example of Mexico making bare and unsupported arguments without a legal basis to do so. These arguments, like the rest, cannot shield Mexico from liability for its discriminatory acts that destroyed Claimants' investments.

344. For these reasons, the Tribunal should find that Mexico cannot rely on the carve-out contained in NAFTA Article 1108(7), and that Mexico has violated its National Treatment commitment under NAFTA Article 1102 by replacing L1bre with Mi Taxi.

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[608] *See* Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶ 83; Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶¶ 63–66.

[609] *See* Counter-Memorial, ¶ 471.

[610] *See* Counter-Memorial, ¶ 472.

[611] *See* Claim Memorial, ¶ 278 (citing **Exhibit CL-0016-ENG**, ¶ 255 (*S.D. Myers, Inc. v. Canada*, UNCITRAL, Partial Award, 13 November 2000)).

V. MEXICO IS REQUIRED TO COMPENSATE CLAIMANTS TO WIPE OUT ALL CONSEQUENCES OF ITS UNLAWFUL CONDUCT

345. Until Mexico's indefinite suspension of the Concession on 28 October 2018, Claimants, through their wholly-owned subsidiary, Lusad had—for the prior two and a half years—spent considerable time and money in launching the L1bre System. In total, more than USD $90 million was spent and results were showing.

346. The investment made in Lusad and the L1bre System created an enterprise of substantial value that was ready for full revenue-producing operations as of April 2018, months prior to the indefinite suspension. The only impediment that prevented Lusad from launching its full-scale revenue-producing operations was Mexico's self-declared "political" decision to suspend the Concession and put it permanently in limbo. Lusad had fully developed software, hardware ready-to-install, proven technology, obtained all necessary regulatory approvals and Mexico City's taxi drivers were under a legal dictate to have the L1bre System installed in their taxis. And the L1bre System was cost-free and value-enhancing for Mexico City's taxi drivers. Lusad also had a work force in place in the roles needed to execute on Lusad's business plan. The only task that remained was for Semovi to do its part and launch the registration system for Mexico City's taxis to book installation appointments. Instead, after first suspending the Concession temporarily, Semovi served Lusad with a letter notifying Lusad that it had complied with its obligations but that the government was moving in a different "political" direction.

347. There is agreement between the parties that, insofar as the Tribunal finds that Mexico breached NAFTA (and there is no reason for the Tribunal to find otherwise here), then Mexico is required to pay damages to Claimants to give effect to the customary international law principle of full reparation. That principle requires Mexico to pay compensation to restore Claimants to the position they would have in all probability occupied but-for the government's unlawful acts. Given the status of Lusad's operational readiness, there can exist no justifiable doubt that Lusad would have—but-for Mexico's measures—proceeded to the revenue collection stage of the Concession.

348. In these circumstances, the best way to value Claimants' damages, consistent with the principle of full reparation, is to compute the value of Lusad using the discounted cash flow ("DCF") method. The use of the DCF method is appropriate here not only because of Lusad's operational readiness but also because the inputs required to compute Lusad's lost cash flows can be estimated with precision and a high degree of confidence.

349. The revenues are driven by the fixed, per-ride fees that Lusad was entitled to charge under the Concession, the number of taxis registered in Mexico City and the average number of rides that the taxis give per day for which there is reliable government-sanctioned data. Lusad's costs can be estimated with precision because: (i) as of the indefinite suspension, Lusad had minimal remaining capital expenditures (primarily consisting of the costs to purchase hardware in the future, for which it had already entered a contract), and (ii) the majority of Lusad's operating costs were already defined by firm contracts or proposals from service providers. In preparing its valuation, Claimants' valuation expert, Mr. Howard Rosen of Secretariat ("Secretariat") has assessed and scrutinized every input required for it to assess Lusad's foregone cashflows.

350. What is more, the Tribunal has the benefit of a valuation prepared by Goldman Sachs in the same month as Mexico's indefinite suspension of the Concession. Goldman Sachs valued Lusad's rights under the Concession (assuming a 30-year term) as being worth USD $2.433 billion and it had the benefit of an extensive data room so that it could assess and from views on the information that management had provided to it.[612] By contrast, Secretariat more conservatively computed the net present value of Lusad's foregone cashflows, as of the valuation date of 27 October 2018, to result in a post-money enterprise value of $1.747 billion for the same Concession term, on which interest would need to be applied to fully compensate Claimants for their losses.[613]

351. In its Counter-Memorial, Mexico's principal argument is that the DCF method is inappropriate for valuing Claimants' losses because Lusad had not begun collecting revenue and did not therefore have a track record of profitable earnings upon which to project cash flows into the future. Mexico observes that investment arbitration tribunals are skeptical and reticent to use the DCF method for investments involving businesses that had not yet become operational. It then notes that there have been exceptions in particular in connection with mining cases, but it says that the cashflows of mining projects are easier to project as compared to Lusad's foregone cash flows because of the various engineering and feasibility studies that are usually performed for pre-operational mining companies. In doing so, Mexico ignores entirely Lusad's operational readiness, a point that Claimants made emphatically in the Claim Memorial. Mexico's contention that the cash flows of a pre-operations capital-intensive mining project, which are so reliant on long-term metals pricing forecasts and contain so many multi-faceted complicated cash flow inputs, can be more precisely projected than those of Lusad is dubious at best.

352. Mexico says exceedingly little to challenge the facts of this case that make the cash flow projections so reliable. In arguing against the use of the DCF, Mexico focuses its attention on "the number of taxi concessions" in Mexico, which is a relevant input to the DCF. Despite the Concession and numerous government sources stating it to be 138,000 or higher, Mexico says in these proceedings that the figure is much lower than that. Mexico also contends that the "the impact of taxi drivers' resistances to adopting the L1bre system" makes Claimants' DCF damages computation unreliable. Aside from the fact that Mexico's taxi drivers were under a legal obligation to have the L1bre System installed given Semovi's Mandatory Installation Notice, the doubt that Mexico now expresses over both the number of licensed taxi drivers in Mexico City and the prospects for their timely implementation of the L1bre System is directly undermined by what Semovi was announcing publicly in May 2018, just days prior to the temporary suspension of the Concession. The Semovi official who signed the 30 May 2018 suspension letter gave an interview on 18 May 2018 affirming the prospects of having all "138,000" taxis in Mexico City fitted with the new L1bre System within a year. The interview proceeded as follows:

612 **Exhibit C-0079-ENG**, pp. 14–15, 18–20 (Goldman Sachs Pre-Marketing Recap and Potential Next Steps, dated 4 October 2018); Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶¶ 64–70.

613 Secretariat also computes damages reflecting a 10-year and 20-year Concession term, which amount to USD $836 million and USD $1,465 billion respectively. *See* Second Expert Report of Howard Rosen (Secretariat Advisors), dated 4 November 2022, ¶ 245.

Reporter: *¿Cómo van los planes y sobre todo las acciones para que esto sea realidad? ¿En cuánto tiempo, cómo lo tienen ustedes proyectado, presupuestado?*

Alejandra Balandrán (Semovi): *Claro que sí, mira nosotros hemos diseñado un plan de un año para que los taxistas puedan ir sustituyendo de manera paulatina los taxímetros convencionales con los que cuentan en este momento, por nuevas tabletas que tienen la finalidad de servir como taxímetros y con la cual van a tener también acceso a otras tecnologías, como botón de pánico y fijar la geolocalización.*

Reporter: *Ciento treinta y ocho mil son los taxis registrados. ¿De todos ellos, todos ellos ya van a tener este tipo de tableta?*

Alejandra Balandrán (Semovi): *Así es, se prevé que en un año ellos ya cuenten con este nuevo mecanismo.*[614]

353. Mexico's arguments against the use of the DCF are unsustainable. Lusad's cash flows can be estimated with a high degree of confidence and Lusad was on the precipice of launching revenue-producing operations. If not for Mexico's decision to bring the Concession to a halt, there is no doubt that Lusad would have proceeded to launch revenue-producing operations, collect the fixed fee revenue from every taxi ride in Mexico City and support its operations by incurring costs in accordance with the well-defined cost structure that was in place by that time.

354. Claimants' damages must therefore be computed by reference to the net present value of those foregone cash flows just prior to the indefinite suspension of the Concession on 28 October 2018. Mexico contends that, instead, Claimants' damages should be computed only by reference to a portion of their investment costs. However, that approach is patently inconsistent with the standard of full reparation. Moreover, the market would not have valued Lusad or its rights under the Concession by reference to the sunk costs if Lusad or its rights under the Concession were being sold in October 2018. The Goldman Sachs work is a testament to that. It shows that the market would consider the DCF method to be the correct way to value Lusad and its cash flows as of the valuation date.[615]

355. Claimants address Mexico's arguments on damages in its Counter-Memorial organized in the following Subsections.

- **Subsection A** addresses Mexico's submissions on the legal standard for the compensation payable to Claimants and the appropriate valuation date;

614 **Exhibit C-0266-SPA** (Twitter Account of ADN Opinón, Tweet "*Alejandra Balandrán nos habla sobre la instalación de la Plataforma #L1BRE en unidades de taxi. @CDMX_Semovi*", dated 18 May 2018). The video of the interview is available at **Exhibit C-0267-SPA** and counsel's transcription of the video is available at **Exhibit C-0267-SPA-TRA**.

615 **Exhibit C-0079-ENG**, pp. 14–15, 18–20 (Goldman Sachs Pre-Marketing Recap and Potential Next Steps, dated 4 October 2018).

- **Subsection B** responds to Mexico's contention that computing damages using the DCF method is inappropriate in this case;

- **Subsection C** sets out Claimants' response to the observations that Mexico makes in its Counter-Memorial regarding the specific inputs used in Secretariat's estimate of Lusad's foregone cashflows;

- **Subsection D** explains why Mexico's primary position on damages—that Claimants must be compensated by reference to some of the amounts invested in the L1bre System—is incorrect and inconsistent with the applicable standard of compensation;

- **Subsection E** explains why Mexico's position that damages payable should accrue interest at a risk-free rate is inconsistent with the principle of full reparation; and

- **Subsection F** contains Claimants' conclusions on their entitlement to damages.

A. Claimants Are Entitled to Compensation Based on the Full Reparation Standard Calculated by Reference to the Fair Market Value of Their Investments on 27 October 2018

356. The parties agree that Mexico owes Claimants compensation in accordance with the full reparation standard applicable under customary international law. However, in its submission, Mexico ignores the consequences of that standard. In subsection 1 below, Claimants explain why—contrary to Mexico's suggestion otherwise—"fair market value" is the correct valuation metric to give effect to the principle of full reparation. In subsection 2, Claimants explain why they are owed the same compensation for Mexico's unlawful and indefinite suspension of the Concession regardless of the NAFTA provision upon which the Tribunal bases a finding of liability. In subsection 3, Claimants address Mexico's arguments on the appropriate date upon which damages are to be calculated.

1. Fair Market Value is the Correct Valuation Metric to Give Effect to the Principle of Full Reparation

357. The parties agree that, as NAFTA does not provide a compensation standard applicable for Mexico's treaty breaches described above, the applicable standard of compensation is the one owing under customary international law.[616]

358. Customary international law rules on remedies for breaches of international law are set out in the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Articles").[617] ILC Article 31 requires a State "to make full reparation for the injury caused by the internationally wrongful act" and, where restitution is not possible, for

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[616] *See* Claim Memorial, ¶ 295; Counter-Memorial, ¶¶ 477–479.

[617] **Exhibit CL-0002-ENG** (International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001)).

full reparation to come in the form of compensation "for the damage caused" by the internationally wrongful act.[618] Claimants contend that restitution here is impractical, given the government's substitution of the services that Lusad was to perform under the Concession Contract with a service of its own (operating under the Mi Taxi brand). Moreover, because of Mexico's actions, Lusad now is a shell of its former self, without the manpower, inventory or any of the features that had put it in a position to launch the L1bre System and restitution would cause Lusad to start its work over from scratch. Mexico does not dispute the impracticability of restitution and does not propose it as a remedy in this case.

359. The duty to make "full reparation" for internationally wrongful acts was described in detail in the 1928 decision by the Permanent Court of International Justice ("PCIJ") in the *Chorzów Factory* case. The PCIJ ruled as follows:

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[619]

360. Claimants showed in the Claim Memorial that full compensation for harm caused by an international wrong is normally assessed on the basis of the resulting diminution in "fair market value" of the affected asset.[620] Mexico contests this and notes that "nothing in the standard of full reparation requires that damages be determined based on the fair market value of the investment" and further notes that "other valuation criteria" may be considered under the standard.[621] Mexico's purpose for advancing this argument is clear: it wishes to avoid responsibility for paying Claimants the fair market value of their investment and instead prefers to limit compensation to only part of the costs associated with the development of the L1bre System.[622]

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[618] **Exhibit CL-0002-ENG**, Articles 31, 36(1) (International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001)).

[619] **Exhibit CL-0072-ENG**, p. 47 (*Factory at Chorzów (Germany v. Poland)*, Merits, PCIJ (Ser. A) No. 17, dated 13 September 1928) (hereafter "*Chorzów Factory*").

[620] *See* Claim Memorial, ¶ 301.

[621] *See* Counter-Memorial, ¶¶ 478–479.

[622] *See* Counter-Memorial, ¶¶ 544–548.

361. In attempting to cast doubt over the applicability of the concept of fair market value as a guiding principle for computing damages, Mexico entirely ignores (in that it says literally nothing about) the significant guidance available from scholars and tribunals alike on the prominence of the principle of fair market value in giving effect to the principle of full reparation. As Claimants referred to in the Claim Memorial, James Crawford's seminal text on State Responsibility explains:

> Compensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the 'fair market value' of the property lost.[623]

362. Claimants showed in the Claim Memorial that Tribunals have adopted this standard to calculate damages payable for both lawful and unlawful expropriations.[624] Claimants also showed that Tribunals have also used the same standard to calculate damages payable for breaches of other standards of treatment established in bilateral investment treaties.[625] Mexico addressed none of this in questioning the applicability of the principle of "fair market value" in assessing the damages that Claimants suffered as a result of Mexico's unlawful acts.

2. Mexico Owes Compensation Equal to the Total Value of Claimants' Investments Regardless of the Basis of Mexico's Liability

363. Claimants also explained in the Claim Memorial that—so long as the Tribunal finds that Mexico breached its obligations under NAFTA—the computation of damages will be the same regardless of whether the Tribunal finds that Mexico is liable under NAFTA Article 1110 (Expropriation), NAFTA Article 1105 (Minimum Standard of Treatment) or NAFTA Article 1102 (National Treatment). That is because Claimants ground their case on liability under all three provisions as relating to Mexico's indefinite suspension of the Concession on 28 October 2018.[626]

364. As all three of Claimants' different claims on the merits have a common factual basis (the indefinite suspension of the Concession), it follows that Claimants' losses are the same under each theory of liability. That is so on the straightforward application of the principle of full

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623 **Exhibit CL-0077-ENG**, p. 225 (J. Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (2002)).

624 *See, e.g.*, **Exhibit CL-0078-ENG**, ¶¶ 496–99 (*CME Czech Republic B.V. (The Netherlands) v. Czech Republic* (UNCITRAL), Final Award, dated 14 March 2003) (hereafter "*CME*"); **Exhibit CL-0079-ENG**, ¶ 124 (*Bernardus Henricus Funnekotter and others v. Zimbabwe*, ICSID Case No. ARB/05/6, Award, dated 22 April 2009).

625 *See, e.g.*, **Exhibit CL-0073-ENG**, ¶ 410 (*CMS Gas Transmission Company v. Argentina*, ICSID CaseNo. ARB/01/8, Award, dated 12 May 2005) (hereafter "*CMS*"); **Exhibit CL-0058-ENG**, ¶ 424 (*Azurix*); **Exhibit CL-0080-ENG**, ¶¶ 359–63 (*Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3,Award, dated 22 May 2007) (hereafter "*Enron*"); **Exhibit CL-0081-ENG**, ¶¶ 403–06 (*Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award, dated 28 September 2007); **Exhibit CL-0082-ENG**, ¶¶ 703–05 (*El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, dated 31 October 2011) (hereafter "*El Paso*").

626 *See* Claim Memorial, ¶ 295; *see supra*, Section IV.

reparation. Under each theory of liability, the question on damages is the same: what amount of compensation will wipe out all effects of Mexico's unlawful conduct? Or, more precisely, what amount of compensation will wipe out all effects of Mexico's indefinite suspension of the Concession? As the relevant damages question is the same under each theory of liability, the answer is necessarily the same.

365. Mexico "does not dispute that a violation of Articles 1102 or 1105 may have expropriatory effects, however, this is something that must be demonstrated" it then notes that "it is not clear that the alleged violation of Article 1102 or 1105 necessarily has expropriatory effects."[627] Mexico continues and contends "it would be difficult to imagine that the effects of [preferential treatment in favor of Mi Taxi] could be equivalent to an expropriation."[628]

366. Mexico's stated confusion only arises because of its failure to apply the principle of full reparation to Mexico's breaches of NAFTA Article 1102 and Article 1105, which—as noted two paragraphs above—results in the same question as the one that applies to the claim that Mexico's expropriated Claimants' investments in breach of NAFTA Article 1110. To repeat, that question is: what amount of compensation will wipe out all effects of Mexico's indefinite suspension of the Concession? That is so even for Claimants' allegation that Mexico breached NAFTA Article 1102 (National Treatment), where the wrongful preferential treatment is evidenced by Mexico's *indefinite suspension* of the Concession to make way for its own State-owned service, Mi Taxi.[629]

367. On the common relevant damages question that applies to all three bases for Mexico's liability under NAFTA, there is no genuine dispute between the parties. When Mexico indefinitely suspended the Concession, Lusad was no longer able to exercise its rights under the Concession. Rights that cannot be exercised are valueless. That is common sense, and Secretariat also opined in its first expert report that, in light of the indefinite suspension of the Concession, it would not be able to ascribe any value to Lusad's rights under the Concession.[630]

368. Mexico also accepts in its submission that an indefinite suspension of the Concession would render it valueless. In responding to the expropriation claim, Mexico does not dispute (in its submissions on liability or on damages) that the indefinite suspension of the Concession would have an effect equal to an outright taking of the Claimants' investments.[631] Mexico nowhere suggests that there was any residual value in Claimants' investments after the indefinite suspension letter. In fact, in making arguments for its primary damages case (which is that Claimants should be compensated commensurate with the costs invested in the L1bre System),

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627 *See* Counter-Memorial, ¶ 483.

628 *See* Counter-Memorial, ¶ 484.

629 *See* Claim Memorial, ¶¶ 279–286; *see supra*, Section IV.C.3.

630 *See* Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 163; Second Expert Report of Howard Rosen (Secretariat Advisors), dated 4 November 2022, ¶¶ 223–224.

631 *See* Counter-Memorial, Section IV.A (Mexico's defense on the expropriation claim is simply that, in its telling, "Claimants did not possess property rights subject to expropriation").

Mexico contends that "amounts invested . . . after the definitive suspension must be excluded."[632] Mexico argues that "expenses should have been immediately suspended after the suspension of the Concession and [Claimants should have] liquidate[d] the operations."[633] Notably, the suggestion that Lusad should have been liquidated the same day as it received the definitive suspension notice in October 2018 is in stark contrast to Mexico's argument elsewhere in its Counter-Memorial regarding the alleged "passivity of the Claimants" in not pursuing domestic legal recourse to have the indefinite suspension lifted.[634] Rather, in Mexico's submission, so clear were the effects of the indefinite suspension on 28 October 2018 that Lusad should have been liquidated the same day and not another dollar nor peso should have been spent by Claimants or Lusad in connection with the Concession.

369. The consequences of Mexico's indefinite suspension of the Concession on 28 October 2018 are clear and not in dispute. By indefinitely suspending the Concession, Mexico destroyed all value in the Concession. That is the factual consequence of Mexico's actions. Mexico must pay compensation to wipe out that consequence, which means Mexico must pay compensation equal to the fair market value of Claimants' investments. That is true regardless of the NAFTA provision on which the Tribunal bases its findings on liability.

1. The Correct Valuation Date is 27 October 2018

370. The parties disagree on the correct valuation date. Claimants argue that the valuation date must be 27 October 2018, just prior to Mexico's indefinite suspension of the Concession.[635] Mexico contends that the correct valuation date should be the date of the Award, but that submission is not made forcefully—Mexico did not even bother giving its valuation experts at Credibility an instruction to compute damages in that way.[636]

371. In the Claim Memorial, Claimants established that they suffered a "total loss of value in its investment" as from 28 October 2018 because the "Concession became valueless once Mexico indefinitely suspended it."[637] Mexico does not dispute that Claimants suffered a "total loss of value of its investment" as of 28 October 2018. Indeed, Mexico accepts "the date of the definitive suspension of the concession—*i.e.*, October 28, 2018."[638] That should put an end to any debate that 27 October 2018, the day prior to the act that wiped out the value of Claimants' investments, is the appropriate date on which Claimants' damages are to be computed.

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632 *See* Claim Memorial, ¶ 475.

633 *See* Counter-Memorial, ¶ 548.

634 *See* Counter-Memorial, ¶ 145.

635 *See* Claim Memorial, ¶¶ 295–303.

636 *See* Counter-Memorial, ¶¶ 480–481. Mexico's valuation experts at Credibility describe no such instructions anywhere in their report. *See* First Expert Report of Timothy Hart and Rebecca Vélez, dated 13 May 2022.

637 *See* Claim Memorial, ¶¶ 295–303.

638 *See* Counter-Memorial, ¶ 480.

372. Mexico contends that the Tribunal ought to compute damages here based on the date of the award on the basis that the Claimants' damages must account for "the effects of the pandemic."[639] Mexico observes that "the objective of full reparation is to put the investor in the position in which it probably would have found itself but for the violations" and, on that basis, argues that "ignoring the effects of the pandemic would put Claimants in a far more advantageous position than they would have enjoyed in the absence of the alleged breach."[640]

373. Before addressing why Mexico's argument is legally flawed, a simple observation shows the fallacy in Mexico's position. Mexico itself does not take its valuation date submissions seriously. If it had any faith in its position, Mexico would have instructed Credibility to compute damages as of the date of the award (using the date of the report as a proxy, as is typically done in date-of-award valuations). Not only is that instruction notably absent, Credibility adopts without any comment or reservation the valuation date used by the Claimants for all purposes in its report.[641]

374. Moreover, on the substance, while Mexico contends in its Counter-Memorial that it is necessary to account for the effects of the pandemic in valuing the damages owing to the Claimants, the word "pandemic" appears not a single time in the Credibility report. Credibility plainly did not consider it necessary to consider the effects of the COVID-19 pandemic in valuing the Claimants' damages because it is so obvious that damages here are to be computed as of 27 October 2018, a time when the pandemic was not remotely foreseeable. Mexico's position on the relevant valuation date is so untenable that its own damages expert does not and cannot support it.

375. Mexico argues for a date of award valuation without referring to any case law supporting its position, save for a general reference to the general full reparation standard from the *Chorzów Factory* case (without actually referring to or explaining the PCIJ's ruling in that case).[642] There are of course cases in which investment arbitration tribunals have found it sensible to compute damages as of the date of the award, but that is to ensure that claimants were not deprived of the upside benefit where the value of their investments increased between the date of the breach and the date of the award. To Claimants' knowledge, there is not a single case endorsing what Mexico proposes here: where a date of award valuation is to be preferred to a date of breach valuation in order to give effect to value-*depressing* events that were entirely *unforeseeable* as of the date of breach. As discussed below, Mexico's submission is inconsistent with basic principles that apply to the computation of damages, inconsistent with case law, and inconsistent with the positions it takes in other cases. There are several points to make in this regard.

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639 *See* Counter-Memorial, ¶¶ 480–481.

640 *See* Counter-Memorial, ¶ 481.

641 *See* First Expert Report of Timothy Hart and Rebecca Vélez, dated 13 May 2022, p. v, ¶ 102 (showing that Credibility describes "Valuation Date" as "27 October 2018").

642 *See* Counter-Memorial, ¶¶ 477–484.

376. *First*, the default presumption under customary international law is that damages will be computed using a valuation date contemporaneous to when a loss is suffered. That principle has been recognized by numerous investment arbitration tribunals.[643]

377. *Second*, the *Chorzów Factory* decision (to which Mexico refers without any explanation or analysis) is consistent with the position that damages should be computed contemporaneously to when a loss is suffered. However, the court cautioned that the inquiry should not end there *if* it would place the aggrieved party "in a situation more unfavourable" than would have taken place if the unlawful act (in that case resulting in the dispossession of the investment) had never taken place.[644]

378. In the decision, the PCIJ first accepted that it is relevant to first look "to the value of the undertaking at the moment of dispossession" but cautioned that "compensation due" for a violation of international law "is not necessarily limited" to that value.[645] In particular, the PCIJ was concerned that limiting compensation to be computed as of the value of the dispossession might place the aggrieved party "in a situation more unfavourable than that in which [it] would have been" but for the violation of international law, which would be "unjust."[646] In other words, where, for instance, the value of what has been taken from an investor has appreciated in value since the dispossession, it would be "unjust" for the aggrieved party to be deprived of the upside value of that which it was deprived and of which it could have benefited but for the unlawful conduct.[647] The PCIJ therefore proceeded to request two different valuations of the factory at issue in the dispute: (*i*) one reflecting the value of the factory as of the date of the dispossession, together with any profits enjoyed by the State in the time since the taking, and (*ii*) another reflecting the value of the factory as of the date of the decision.[648] The case subsequently settled.

379. *Third*, consistent with the *Chorzów Factory* case, modern investment arbitration tribunals have on occasion found it sensible to award damages using a date of award as opposed to date of breach valuation. However, in each such case, the tribunals did so in order to ensure that claimant-investors were not put in a position "more unfavourable" than they would have occupied had the relevant investment treaty not been breached and had they simply been left to enjoy the fruits of their investments. For instance:

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643 *See* **Exhibit CL-0074-ENG**, ¶ 831 (*Hydro S.r.l., Costruzioni S.r.l., Francesco Becchetti, Mauro De Renzis, Stefania Grigolon, Liliana Condomitti v. Republic of Albania*, ICSID Case ARB/15/28, Award (24 April 2019)) (hereafter "*Hydro*") ("Compensation is usually assessed at the date of the wrongful act"); **Exhibit CL-0089-ENG**, ¶ 125 (*Perenco Ecuador Limited v. Ecuador*, ICSID Case No. ARB/08/6, Award, dated 27 September 2019); **Exhibit CL-0099-ENG**, ¶ 12–43 (*Gemplus, S.A. et al. v. Mexico*, ICSID Case Nos. ARB(AF)/04/3 and ARB (AF)/04/4, Award, dated 16 June 2010) (hereafter "*Gemplus*").

644 **Exhibit CL-0072-ENG**, p. 47 (*Chorzów Factory*).

645 **Exhibit CL-0072-ENG**, p. 47 (*Chorzów Factory*).

646 **Exhibit CL-0072-ENG**, p. 47 (*Chorzów Factory*).

647 **Exhibit CL-0072-ENG**, p. 47 (*Chorzów Factory*).

648 **Exhibit CL-0072-ENG**, p. 51 (*Chorzów Factory*).

- The tribunal in *ADC v. Hungary* considered the full reparation standard emerging from the *Chorzów Factory* case. The tribunal observed the relatively unique circumstances in that case in which, *unlike* in most cases involving improper government regulatory interference, the value of the investment "has risen very considerably."[649] Referring to the usual circumstances in which the value of an investment has declined following regulatory interference, the tribunal went on to explain: "It is for this reason that application of the restitution standard by various arbitration tribunals has led to use of the date of the expropriation as the date for the valuation of damages."[650] It went on to explain that, where the value of the investment has *increased*, then using the date of the award is appropriate for valuation purposes.[651] The tribunal cited the *Chorzów Factory* decision as support for that position. It also observed that "the European Court of Human Rights has applied *Chorzów Factory* in circumstances comparable to the instant case to compensate the expropriated party the higher value the property enjoyed at the moment of the Court's judgment rather than the considerably lesser value it had had at the earlier date of dispossession."[652]

- In *Kardassopoulous v. Georgia*, the tribunal provided similar guidance. The tribunal acknowledged that it would be appropriate "[i]n certain circumstances" to value a claimant investor's damages as of the date of an arbitral award.[653] The tribunal explained that "[i]t may be appropriate to compensate for value gained between the date of the expropriation and the date of the award in cases where it is demonstrated that the [c]laimants would, but for the taking, have retained their investment."[654]

- The tribunal in *Siemens v Argentina* faced a similar question. It found that "the [t]ribunal has to apply customary international law. Accordingly, the value of the investment to be compensated is the value it has now, as of the date of this [a]ward, unless such value is lower than at the date of expropriation, in which event the earlier value would be awarded."[655]

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[649] **Exhibit CL-0024-ENG**, ¶ 496 (*ADC Affiliate Ltd. et. al. v. Hungary*, ICSID Case No. ARB/03/16, Award, dated 2 October, 2006) (hereafter "*ADC*").

[650] **Exhibit CL-0024-ENG**, ¶ 496 (*ADC*).

[651] **Exhibit CL-0024-ENG**, ¶ 497 (*ADC*).

[652] **Exhibit CL-0024-ENG**, ¶ 497 (*ADC*).

[653] **Exhibit CL-0102-ENG**, ¶ 514 (*Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, dated 3 March 2010) (hereafter, "*Kardassopoulos*").

[654] **Exhibit CL-0102-ENG**, ¶ 514 (*Kardassopoulos*).

[655] **Exhibit CL-0090-ENG**, ¶ 360 (*Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, dated 6 February 2007).

- The *Yukos v. Russia* tribunal's determinations on the appropriate date to value an investment where it has been unlawfully expropriated is also instructive. The tribunal emphasized that it is the aggrieved claimant-investor that is entitled to benefit from value-enhancing developments relating to the affected investment in the period from dispossession to the date of the award. It wrote: "The [t]ribunal also holds that, in the case of an unlawful expropriation, as in the present case, Claimants are entitled to select either the date of expropriation or the date of the award as the date of valuation."[656]

  The *Yukos* tribunal reasoned that "the question of whether an expropriated investor is entitled to choose between a valuation as of the expropriation date and the date of an award is one best answered by considering which party should bear the risk and enjoy the benefits of unanticipated events leading to a change in the value of the expropriated asset between the time of the expropriatory actions and the rendering of an award."[657] The tribunal then referred to the ILC Articles on State Responsibility, which enshrine the principle of full reparation set out in the *Chorzów Factory* case. The tribunal then drew the following conclusions:

  > The consequences of the application of these principles (restitution as of the date of the decision, compensation for any damage not made good by restitution) for the calculation of damages in the event of illegal expropriation are twofold. First, investors must enjoy the benefits of unanticipated events that increase the value of an expropriated asset up to the date of the decision, because they have a right to compensation in lieu of their right to restitution of the expropriated asset as of that date. If the value of the asset increases, this also increases the value of the right to restitution and, accordingly, the right to compensation where restitution is not possible.
  >
  > Second, investors do not bear the risk of unanticipated events decreasing the value of an expropriated asset over that time period. While such events decrease the value of the right to restitution (and accordingly the right to compensation in lieu of restitution), they do not affect an investor's entitlement to compensation of the damage "not made good by restitution" within the meaning of Article 36(1) of the ILC Articles on State Responsibility. If the asset could be returned to the investor on the date where a decision is rendered, but its value had decreased since the expropriation, the investor would be entitled to the difference in value, the reason being that in the absence of the expropriation the investor could have sold the asset at an earlier date at its previous higher value. The same

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[656] **Exhibit CL-0147-ENG**, ¶ 1763 (*Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Award, dated 18 July 2014) (hereafter "*Yukos*").

[657] **Exhibit CL-0147-ENG**, ¶ 1766 (*Yukos*).

> analysis must also apply where the asset cannot be returned, allowing the investor to claim compensation in the amount of the asset's higher value.[658]

380. Consistent with this line of cases, Claimants are unaware of any investor-state dispute decision in which a tribunal decided to use the date of award, as opposed to the date of breach or date of loss, to value damages in order to ensure that investor-claimants were forced to incur value-depressing effects that were unforeseeable at the time they suffered their loss. Mexico appears also to be unaware of any case that supports its position. It cited to no such case in its Counter-Memorial.

381. *Finally*, Mexico's insistence on a date-of-award valuation here is in stark contrast to the position that it appears to have taken in nearly every other case against it. Indeed, and as stated above, if Mexico believed in its position here, it would have requested Credibility to perform a valuation using the date-of-award as the valuation date and taking into account the effects (if any) of the COVID-19 pandemic.

382. For the reasons set out above, and in Claimants' Claim Memorial, Mexico is obliged to pay compensation to Claimants in an amount equal to the fair market value of their investments just prior to the date on which Claimants suffered their loss. Accordingly, compensation must be computed by reference to the fair market value of Claimants' investments as of 27 October 2018.

B. Computing Damages by Reference to Lusad's Foregone Cashflows More Than Satisfies Claimants' Burden and Standard of Proof

383. The parties disagree on the appropriate method for computing damages in this case. Claimants' argued in their Claim Memorial that the DCF method of valuation, which estimates future cash flows and discounts them to a present value, is the most appropriate method for deriving the fair market value of Claimants' investments.[659] This is because Lusad was on the precipice of beginning revenue-producing operations, and the cash flows that would have accrued during those operations are able to be estimated with a high degree of confidence.

384. Mexico disputes this position in its Counter-Memorial. It contends that Claimants' DCF-based valuation does not accord with the "principle of reasonable certainty of damages" because, as a non-operational business, Lusad's cash flows cannot be estimated with sufficient reliability.[660] Before addressing the substance of Mexico's position, it bears first recalling the relevant standard of proof that Claimants are to meet to establish the loss that they have suffered and the compensation to which they are entitled.

385. In the Claim Memorial, Claimants showed that there is broad support that, for the purposes of determining the *quantum* of damages, Claimants must provide "*a reasonable basis* for

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658 **Exhibit CL-0147-ENG**, ¶¶ 1767–1768 (*Yukos*).

659 *See* Claim Memorial, ¶¶ 304–318.

660 *See* Counter-Memorial, ¶¶ 485–508.

the Tribunal to determine the amount of loss."[661] In its Counter-Memorial, Mexico acknowledges that "damage estimation is not an exact science, so the use of approximations and assumptions are frequent and even desirable in some contexts."[662] The parties are aligned in this respect. Mexico then states that the relevant legal standard for determining the quantum of damages is "reasonable certainty."[663] But, Mexico then lists a series of cases that characterize the relevant standard of proof as being on the "balance of probabilities" standard.[664] Mexico ultimately states, in what appears to be its conclusion on the standard of proof, that Claimants must establish that damages are "probable and not merely possible."[665]

386. Claimants maintain their position that they are required to provide the Tribunal with "a reasonable basis" for the computation of damages.[666] If one were to split hairs, it is possible that the "balance of probabilities" test is slightly different than the "reasonable basis . . . to determine the amount of loss" test, and both might be slightly different to a "reasonable certainty" test. However, for present purposes, such distinctions (if any) are immaterial. Claimants' computation of damages using the DCF method is well-supported and the underlying estimates reflected in the projected cash flows can be made with a high degree of confidence, satisfying whichever formulation of the standard the Tribunal feels most comfortable applying.

387. In this section, Claimants address in detail Mexico's contentions on the correct method to apply for computing damages. In subsection 1, Claimants show that a number of investment arbitration tribunals have supported the use of the DCF for non-operational businesses, like Lusad (which was on the precipice of revenue-collecting operations). In subsection 2, Claimants explain how each of the critical inputs to project Lusad's foregone cash flows can be estimated to a high degree of confidence, which supports the use of the DCF method in this case. In subsection 3, Claimants explain why Goldman Sachs's valuation prepared just prior to Mexico's indefinite suspension of the Concession provides further independent support for Claimants' approach to valuation in this case. In subsection 4, Claimants address Lusad's operational readiness, which also supports the use of the DCF method in this case.

1. Case Law Supports Using a DCF Valuation for Businesses (Operational or Not) for Which Future Cash Flows Can Be Estimated with a High Degree of Confidence

388. Claimants observed in the Claim Memorial that the "DCF method is used almost uniformly by investment tribunals valuing business interests that have historical cash flows from which to estimate future ones" but also noted that "investment tribunals have relied on the [DCF

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661 *See* Claim Memorial, ¶ 314.

662 *See* Counter-Memorial, ¶ 488.

663 *See* Counter-Memorial, ¶¶ 488, 490.

664 *See* Counter-Memorial, ¶ 488.

665 *See* Counter-Memorial, ¶ 489.

666 *See* Claim Memorial, ¶ 314.

method] in cases involving pre-operational or pre-profitable business interests where there was nevertheless sufficiently reliable information on which to base an estimate of future cash flows."[667]

389. In its Counter-Memorial, Mexico starts by emphasizing cases in which investment tribunals have rejected the DCF method for pre-operational businesses or businesses that do not have a sufficient track record of profitable operations.[668] It then acknowledges that "Claimants are correct that the reliability of the DCF method depends on the circumstances of the particular case, and it is possible that, in a given case, the necessary conditions exist to reliably project the [future cash flow] results without the need for such a history."[669] However, Mexico then contends that the instances in which investment tribunals have awarded damages using the DCF method for pre-operational businesses or businesses without a track record of profitability have almost exclusively concerned mining projects.[670]

390. Mexico is correct that there are examples of investment tribunals awarding damages using the DCF method in cases involving pre-operational mining projects. However, there are cases in other sectors too that Mexico disregards entirely. Moreover, in addressing the cases in the mining sector, Mexico pays little attention to the key reasons why tribunals have been comfortable to award or consider awarding damages based on the DCF method in the absence of a track record of profitable operations.

391. In the present circumstances, before addressing the facts here that support the use of the DCF method, it is useful first to briefly canvass some of the most noteworthy cases where tribunals have discussed the use of the DCF method for pre-operational companies or companies without any track record of profitability, starting with those in the mining sector and followed by other decisions.

- In *Rusoro v. Venezuela*, the tribunal acknowledged that the DCF method could be an appropriate valuation if "all, or at least a significant part" of certain criteria were met (as set out in more detail in the Claim Memorial).[671] While "an established historical record of financial performance" was one criterion, the other criteria that could satisfy the tribunal in the absence of a historical track record included (i) "reliable projections of [the business's] future cash flow" ideally prepared in the course of business at a non-suspect time, (ii) where "the price at which the enterprise will be able to sell its products or services can be determined with reasonable certainty", (iii) where the business "can be financed with self-generated cash" or where there is "no uncertainty regarding the availability of financing", (iv) where it is possible to calculate a meaningful weighted average cost of capital, and

[667] *See* Claim Memorial, ¶ 306.

[668] *See* Counter-Memorial, ¶ 493.

[669] *See* Counter-Memorial, ¶ 496.

[670] *See* Counter-Memorial, ¶ 497.

[671] Claim Memorial, ¶ 307; **Exhibit CL-0038-ENG**, ¶ 758 (*Rusoro*).

(v) where the enterprise is in a sector with low regulatory pressure.[672] As discussed in further detail below, Claimants satisfy all of these criteria.

- In *Crystallex v. Venezuela*, the tribunal was faced with the valuation of a gold mining project that "did not have a proven track record of profitability, because [Crystallex] never started operating the mine."[673] The tribunal still found that Crystallex "if it had been allowed to operate, . . . would have engaged in a profitmaking activity and that such activity would have been profitable."[674] The tribunal considered that "the development stage of the project" was such that its "costs and future profits [could] be estimated with greater certainty."[675] The tribunal thus concluded that "predicting future income from ascertained reserves to be extracted by the use of traditional mining techniques . . . can be done with a significant degree of certainty, even without a record of past production."[676]

- The tribunal in *Gold Reserve v. Venezuela* considered the value of an adjacent mining project to the one at issue in Crystallex. That project also "was never a functioning mine and therefore did not have a history of cashflow."[677] That notwithstanding, the tribunal also accepted the use of the DCF method to compute damages, concluding that "a DCF method can be reliable used in the instant case because of the commodity nature of the product and detailed mining cashflow analysis previously performed."[678] In other words, the tribunal in Gold Reserve was comforted by the fact that the commodity was known to have an existing market and the project's stage of development was such that detailed, contemporaneous cash flow analysis had been prepared in the ordinary course of business.

- The dispute between Tethyan Copper and Pakistan also considered adverse government measures affecting a project that had not yet become operational but was well advanced in its development. In considering the applicability of the DCF method for valuing the project, the tribunal observed "that the question whether a DCF method (or a similar income-based valuation methodology) can be applied to value a project which has not yet become operational depends strongly on the

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672 Claim Memorial, ¶ 307; **Exhibit CL-0038-ENG**, ¶ 758 (*Rusoro*).

673 **Exhibit CL-0031-ENG**, ¶ 877 (*Crystallex*).

674 **Exhibit CL-0031-ENG**, ¶ 877 (*Crystallex*).

675 **Exhibit CL-0031-ENG**, ¶ 879 (*Crystallex*).

676 **Exhibit CL-0031-ENG**, ¶ 879 (*Crystallex*).

677 **Exhibit CL-0031-ENG**, ¶ 830 (*Crystallex*).

678 **Exhibit CL-0031-ENG**, ¶ 830 (*Crystallex*).

circumstances of the individual case."[679] The tribunal described the inquiry as follows: "The first key question is whether, based on the evidence before it, the Tribunal is convinced that in the absence of Respondent's breaches, the project would have become operational and would also have become profitable. The second key question is whether the Tribunal is convinced that it can, with reasonable confidence, determine the amount of these profits based on the inputs provided by the Parties' experts for this calculation.[680] The tribunal was impressed by "several years of intensive work on the ground" in the years prior to the government's measures.[681] Consequently, in light of the project's stage of development, the tribunal concluded that "it is appropriate to assume that [c]laimant's investment would have been profitable and to determine these future profits by using a DCF method."[682]

- In *Devas v. India*, a dispute arose out of the cancellation of an agreement by the claimants to lease certain satellite broadcasting spectrum from a state-owned entity. The tribunal held that India had expropriated claimants investments and breached the relevant treaty's FET clause because it had improperly cancelled the satellite broadcasting spectrum lease contract.[683] The respondent argued against the use of the DCF method to award damages because, it contended, "the approach is highly suspect in the circumstances of this case, which involves a start-up company with no track record."[684] The tribunal used the DCF method and credited the analysis in the *Tethyan Copper* case, which it noted was also a "a project without any track record of operations."[685] In explaining the reasons for using the DCF method, the Tribunal credited, *inter alia*, that it had available to it reliable business projections "developed in the ordinary course of business" and noted the "solidly-formulated long-term contract" that gave the relevant claimant entity a basis upon which business planning projections could be based.[686]

- In *Hydro v. Albania*, Albania expropriated the claimant's digital broadcast business that it was launching in Albania, and which it had only operated for a short period

[679] **Exhibit CL-0032-ENG**, ¶ 330 (*Tethyan Copper*).

[680] **Exhibit CL-0032-ENG**, ¶ 330 (*Tethyan Copper*).

[681] **Exhibit CL-0032-ENG**, ¶ 332 (*Tethyan Copper*).

[682] **Exhibit CL-0032-ENG**, ¶ 335 (*Tethyan Copper*).

[683] **Exhibit CL-0201**, ¶ 34 (*CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India*, PCA Case No. 2013-09, Award on Quantum dated 27 May 2022) (hereafter "*Devas*").

[684] **Exhibit CL-0201**, ¶ 454 (*Devas*).

[685] **Exhibit CL-0201**, ¶ 537 (*Devas*).

[686] **Exhibit CL-0201**, ¶ 540 (*Devas*).

of time before the expropriation.[687] The tribunal observed that "[a]lthough not yet making a profit, [the business] had prospects to do so, and a reasonable likelihood of so doing."[688] On damages, the respondent argued that "the DCF method [was] inappropriate" to compute damages because the project "did not operate for sufficient time to generate adequate and reliable data."[689] The tribunal, however, considered it appropriate to use the DCF method. It observed that to otherwise cast aside the income-based approach in favor of an alternative method (such as the sunk costs approach) because of the business's early stage (i) would not adequately compensate the claimant in accordance with the applicable standard of compensation, and (ii) would reward the State for expropriating a promising business shortly after its founding and creating uncertainty affecting a DCF valuation.[690]

- The tribunal in *Rumeli Telekom v. Kazakhstan* reached a similar conclusion to the tribunal in *Hydro* in connection with a business in the telecommunications sector. The tribunal decided to award damages using the DCF method even though "the enterprise had not been in existence for long enough to have generated the data required for the calculation of future income" and observing that "[s]ince the value of that asset was directly linked to its potential to produce future income, there is no realistic alternative to using the DCF method to ascribe a value to it."[691]

- The *Bankswitch Ghana v. Ghana* case involved a contractual dispute but the tribunal, comprised of Michael Hwang, Stephen Schwebel and Gary Born, applied investment arbitration rationale and case law, in particular in how it considered its award of damages. The case involved a business in the telecommunications sector that had not yet gotten off the ground. The tribunal observed: "In a case like this, where a business has not got off the ground, the test is whether the Tribunal is satisfied, on a balance of probabilities, that the [c]laimant has already suffered or will suffer substantial loss caused by the Respondent's breach of contract. If so, then the fact that damages cannot be calculated with absolute certainty or precision will not prevent a substantial award of damages, but rather, the DCF of the valuation may be adjusted depending on the perceived level of speculation and the relative weakness of the evidence from the claimant."[692] The tribunal further noted that "while the absence of demonstrable profitability does not absolutely preclude

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687 **Exhibit CL-0074-ENG**, ¶¶ 286, 697 (*Hydro*).

688 **Exhibit CL-0074-ENG**, ¶ 851 (*Hydro*).

689 **Exhibit CL-0074-ENG**, ¶ 791 (*Hydro*).

690 **Exhibit CL-0074-ENG**, ¶¶ 847–49 (*Hydro*).

691 **Exhibit CL-0048-ENG**, ¶ 811 (*Rumeli Telekom*).

692 **Exhibit CL-0208-ENG**, ¶ 11.177 (*Bankswitch Ghana Ltd. v. The Republic of Ghana acting as the Government of Ghana*, PCA Case No. 2011-10, Award, dated 11 April 2014) (hereafter "*Bankswitch*").

the use of DCF valuation, to overcome the lack of a demonstrated profit, 'a claimant must lead convincing evidence of its ability to produce profits in the particular circumstances it faced.'"[693] The tribunal then emphasized, *inter alia*, that the existence of the contract, with a clear service fee, gave it comfort that it could compute damages in a reliable way using the DCF method.[694]

392. The key principle that emerges from the cases, both within the mining sector (which is the focus of Mexico's submissions) and in other sectors, is that businesses that are not yet operational or do not yet have a track record of profitability can be valued using the DCF method so long as tribunals have sufficient comfort that cash flows can be projected in a reasonable way.[695] Tribunals have been comforted by a range of factors, but they coalesce around two key points: (i) the inherent predictability of the cash flows based on a variety of factual circumstances (such as the existence of contracts establishing a business's revenue generating capacity), and (ii) the progress that the relevant business made in driving towards profitable operations in order to provide comfort that, but for the relevant government measures, the business would likely have become profit-making.

393. In the present circumstances, as discussed in the next two sub-sections, Lusad's cash flows are reliably able to be estimated and Lusad was on the precipice of launching revenue-producing operations before the government suspended indefinitely the Concession on 28 October 2018. The facts thus support using the DCF method here.

2. Lusad's Cash Flows Can Be Estimated with a High Degree of Confidence

394. In its Counter-Memorial, Mexico justifies the use by investment tribunals of the DCF method in cases involving pre-operational mining projects. Mexico's contention is that it is an easier exercise to project the cash flows of a mining project as compared to Lusad's cashflows.[696] Mexico emphasizes that the cash flows for non-operating mining projects are somehow more straightforward to estimate because of the substantial time and effort that go into

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693 **Exhibit CL-0208-ENG**, ¶ 11.178 (*Bankswitch*).

694 **Exhibit CL-0208-ENG**, ¶¶ 11.182–11.184 (*Bankswitch*).

695 For its part, Mexico contends that the present case is analogous to *Gemplus* where the tribunal declined to use a DCF based valuation to award damages even though there was a concession in place there that required mandatory compliance. *See* Counter-Memorial, ¶ 506. Evidently, the decision on the appropriate valuation method to apply requires an extensive appreciation of the facts associated with each business and, despite certain similarities, the facts in Gemplus are not analogous to those present here. In the present matter, the facts not only overwhelmingly show that Lusad was prepared to successfully launch revenue-producing operations (as discussed more below), but it was also receiving support from Semovi in that regard. In that sense, and unlike in Gemplus, Lusad had the full support of the government up to the point in time when it decided to suspend the Concession indefinitely without cause (*i.e.*, up to the point in time when the measures that give rise to the present dispute occurred, the effects of which must be excluded for computing damages). Moreover, what Mexico omits from its explanation is that the *Gemplus* tribunal still decided that it ought to compute damages by reference to a future income-based approach, albeit not the one reflecting the claimant's primary case. *See* **Exhibit CL-0099-ENG**, ¶¶ 13–75 (*Gemplus*).

696 *See* Counter-Memorial, ¶¶ 497–503.

a variety of studies that are conducted to assess the "regulatory, technical and economic aspects, among others" of mining projects.[697] While it is true that mining projects involve the preparation of such studies, in making its submissions, Mexico fails to engage at all in an analysis of the inherent predictability of Lusad's cash flows and fails to perform any comparison to the inherent predictability of the cash flows of a non-operational mining project.

395. When viewed in that light, Mexico's argument against the use of the DCF method here falls apart. As discussed below, at every turn on revenue inputs and cost inputs, Lusad's cash flows can be estimated with greater precision and reliability than those of a pre-operational mining company. As Mexico accepts the use of the DCF for valuing pre-operational mining projects, it should have no genuine objection to the use of that same method for the Lusad project.

a. Lusad's Foregone Revenues Can Be Estimated with a High Degree of Confidence

396. Mining projects make revenue by selling precious metals. To estimate future revenues, that requires evaluating the price at which those metals can be sold (a unit price) and the volume that can be economically extracted for sale. Lusad's business is conceptually similar: it had a unit price that it could recover for every taxi ride (the Recuperation Fee and, where applicable, the Application Fee) and its revenues require an estimate of the volume of taxi rides.

397. The unit price applicable to Lusad's business is immeasurably more predictable than the unit price applicable in the mining industry:

- Aside from advertising revenue, Lusad's revenues are based on a fee-per-ride in every single taxi in which the L1bre System was installed (the Recuperation Fee and, where applicable, the Application Fee). The Recuperation Fee and Application Fee are fixed and established in the Concession and would remain fixed for the duration of the Concession term.[698] The revenue per ride to which Lusad was entitled can therefore be established with full confidence and accuracy. Lusad was also entitled to make advertising revenue through the sale of advertisements on the passenger facing tablet. As for the advertising revenue, which reflects less than 10% of Claimants' estimated revenues included in Claimants' claim,[699] Lusad was in the process of negotiating a term sheet at the time of Mexico's measures bringing the enterprise to a halt.[700] There is thus a more than sufficiently reasonable basis upon which to estimate the revenues that Lusad would in all likelihood of enjoyed.

- By contrast, the unit price in the mining industry (the price per unit of the metal or resource being mined) is not at all fixed and is subject to market forces. As a

[697] *See* Counter-Memorial, ¶¶ 497–503.

[698] **Exhibit C-0007-SPA**, Article 6 (Amended Concession Agreement, dated 9 January 2017).

[699] Second Expert Report of Howard Rosen (Secretariat Advisors), dated 4 November 2022, Updated Schedule 2A ("Advertising Revenue" in proportion to "Fee Revenue").

[700] Second Expert Report of Howard Rosen (Secretariat Advisors), dated 4 November 2022, ¶¶ 169–170.

consequence, in projecting the future cash flows of a mining project, it is necessary to rely on long term price estimates and, of course, those price estimates can be the subject of sharp disagreement. Evidently, changes to price forecasts can drive substantial changes in value. Price forecasts, even in the shorter to medium term, can also prove to be incorrect. For instance, the average price for an ounce of gold in 2016 was USD $1249.[701] In January 2017, the World Bank estimated that gold prices would decline to USD $1150/oz for 2017, USD $1138/oz for 2018 and USD $11114/oz for 2020.[702] In reality, gold prices increased year-on-year from USD $1258/oz in 2017, to USD $1269/oz in 2018 and to USD $1770/oz in 2020.[703]

- The point is simple: when it comes to estimating the unit price (in the case of Lusad, per ride; in the case of a mining project, per ounce of precious metal), Lusad's can be established by reference to what is set out in the Concession, while any future estimate of the prices of any precious metals can, evidently, not be established with the same degree of confidence.

398. Further, the volume of taxi rides in Mexico can also be estimated with a high degree of confidence, and certainly to a much higher degree of confidence than mining projects can estimate the volume of metals that can be economically recovered (in part because that estimate is entirely dependent on the long-term price forecasts for those metals).

- Lusad's total revenues are driven by the number of taxis registered in Mexico City and estimates as to the average number of rides for each taxi per day.[704] There is reliable data available to estimate the number of rides each day. The Mexican government has certified historical data regarding the number of taxi rides in Mexico City.[705] This is the key metric necessary for estimating Lusad's revenues and Mexico cannot deny the existence of substantial demand for taxis in Mexico City. There is thus a track record of reliable historical data on the key estimate needed to estimate Lusad's foregone cash inflows.

- By contrast, pre-operational mining projects create estimates on the volume of mineable precious metals using, amongst other considerations, two key factors that are decidedly less certain:

    - *First*, pre-operating mining projects collect scientific data regarding the volume of minerals or metals in a deposit through exploratory drilling. The

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[701] **Exhibit C-0269-ENG** (Statista, Average prices for gold worldwide from 2014 to 2025).

[702] **Exhibit C-0268-ENG**, p. 1 (World Bank Commodities Price Forecast, dated 24 January 2017). *See also* **Exhibit C-0300-ENG**, p. 1 (World Bank Commodities Price Forecast, dated 22 January 2015).

[703] **Exhibit C-0269-ENG** (Statista, Average prices for gold worldwide from 2014 to 2025).

[704] *See* Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 107(a)–(b); Second Expert Report of Howard Rosen (Secretariat Advisors), dated 4 November 2022, ¶¶ 139–152, 161–167.

[705] *See infra*, Section V.C.2; Second Expert Report of Howard Rosen (Secretariat Advisors), dated 4 November 2022, ¶¶ 139–152, 161–167.

purpose of these drill holes is to allow geologists to estimate mineral continuity throughout a deposit. Resource estimators interpolate between these drill holes to come up with an estimate of the total volume of minerals that are located in the deposit. There are a variety of different means and methods to perform this interpolation, and of course reasonable minds may differ on them.[706] To illustrate the complexity of issues that may come up in mineral resource estimation, in a different case concerning alleged measures affecting the value of a mining property, Mexico argued that the investor's mineral resource estimate was unreliable and observed that there was a need to "ensure that data abundance, appropriateness, and spatial distribution are adequate to produce acceptable experimental variograms/correlograms to which models can be fitted with confidence."[707] Mexico then continued that claimant's "assumptions about the estimated distribution and thickness of the mineral deposit are based, to a large extent, on projections between holes, and there may be considerable variability between samples."[708]

- *Second*, it is obvious that not every ounce of the volume of minerals or metals estimated to be located in a deposit can be economically extracted. In a deposit, the average "grade"—or average volume of precious metals that are present in a tonne of ore that can be removed from the earth—may vary considerably throughout the deposit. Depending on the price at which the precious metal is to be sold (and the estimated costs at which the metal can be extracted and then brought to market, described further below), low grade areas of a deposit might not be economically extractable. Put in other words, there may not be enough gold in a tonne of ore to make money from its extraction. Therefore, in estimating the volume of precious metals to be extracted, mining projects compute a "cut-off grade"—that is the minimum amount of precious metal that must be estimated to be present in a tonne of

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[706] **Exhibit C-0294-ENG**, p. 1 (S.C. Dominy and A.E. Annels, Evaluation of gold deposits—Part 1: review of mineral resource estimation methodology applied to fault- and fracture-related systems, dated December 2001) ("The methods available to the estimator for the determination of local and global grades and tonnages fall into two categories: conventional and geostatistical. Conventional techniques are generally based on weighting, averaging or projection of grade, thickness, etc., to produce a global or local resource. Geostatistical methods are mathematically more complex, less biased and permit global and local estimation through the use of interpolation procedures, which reflect the nature and continuity of the mineralization. The choice of what method to apply must be made in consideration of the deposit geology, grade distribution and sample density. In fault- and fracture-related gold deposits major considerations in resource estimation comprise the deposit geology (including continuity and ore controls) and grade distribution (skewness, nugget effect, continuity, mixed populations, etc.). Selected conventional and geostatistical methods are subjected to a critical review, and deposit characteristics that must be taken into account during estimation are discussed.").

[707] **Exhibit CL-0199-ENG**, ¶ 635 (*Odyssey Marine Exploration, Inc. v. Mexico*, ICSID Case No. UNCT/20/1, Excerpt from Mexico's Rejoinder, dated 19 October 2021).

[708] **Exhibit CL-0199-ENG**, ¶ 637 (*Odyssey Marine Exploration, Inc. v. Mexico*, ICSID Case No. UNCT/20/1, Excerpt from Mexico's Rejoinder, dated 19 October 2021).

ore to allow profitable extraction. Of course, to compute the "cut-off grade", that requires estimating not only the costs of extraction but also the applicable market price for the relevant precious metal.[709] In other words, the estimate for the total volume of precious metals that may be extracted from a mining project suffers from the same relative uncertainty (vis-à-vis Lusad's cashflows) that affects the applicable unit price.

399. In terms of a comparison, Lusad's projected revenues as of 27 October 2018 (the valuation date) benefit from historical data on the number of taxi rides taken in Mexico City every single day, and that data is government-backed.[710] In the case of a non-operating mining company's projected revenues, that is based on estimates prepared by interpolating data and applying to that long-term gold price forecasts to determine the proportion of estimated resources that exist that can be mined economically. Given the variables and uncertainty inherent in any interpolation of data, it is plain that one can place greater confidence in estimating the number of taxi rides that will take place in Mexico City on an annual basis than one can have on estimating the volume of precious metals that will be extracted during the life span of a mining project.

400. Accordingly, it is plain that estimating Lusad's future revenues can be done with significantly more confidence than is possible for estimating the future revenues from a non-operating mining project.

b. Lusad's Costs Can Be Estimated with a High Degree of Confidence

401. Lusad's capital costs are far more predictable than are those for a capital-intensive mining project, which is an industry renowned for cost overruns.

- In the period 2016 to 2018, Lusad had already incurred the costs necessary to develop the L1bre System, was conducting regular operations, and was ready to enter the revenue-producing stage of the Concession under the Mandatory

[709] *See, e.g.,* **Exhibit C-0295-ENG**, p. 142 (Technical Report Update on the Las Cristinas Project prepared for Crystallex International Corporation, dated 7 November 2007) ("The mineral resource and gold equivalent (AuEq) cut-off is based on $400 per gold ounce and $1.15 per pound copper."); **Exhibit C-0296-ENG**, p. 017 (NI 43-101 Technical Report – Timok Copper-Gold Project, Serbia: Upper Zone Prefeasibility Study and Resource Estimate for the Lower Zone, dated 7 August 2018) ("The original Upper Zone NI 43-101 Mineral Resource estimate prepared by SRK Consulting (UK) Limited ("SRK UK") in 2017, on which this PFS and subsequent NI 43-101 Reserve Statement is based, was reported using a resource net smelter return (RscNSR) cut-off value based on copper, gold and arsenic, using a copper price of $3.49/lb and gold price of $1,565/oz, derived from long-term consensus metal price forecasts, with a 20% uplift to ensure that the Mineral Resource includes all mineralization appropriate for assessing eventual economic potential of mineral resources."), p. 210 ("This is to show the continuity of the grade estimates at various cut-off increments and the sensitivity of the mineral resource to changes in RscNSR cut-off."); **Exhibit C-0298-ENG** (GoldHub, Gold mining costs continue rising in Q1'21, dated 30 June 2021) ("Average grades declined by 4% over this period dropping from 1.44 g/t to 1.39 g/t, as lower grade material has become economic to exploit at higher gold prices"); *see also* **Exhibit C-0315-ENG** p. 105 (Pincock Allen & Holt, Technical Report Update for Brisas Project, Venezuela, dated 31 March 2008); **Exhibit C-0305-ENG** pp. 175–176 (RPA, Technical Report on the Siembra Minera Project, Venezuela, dated 16 March 2018).

[710] *See infra*, Section V.C.2.

Installation Notice.[711] Most of the capital expenditures necessary for the L1bre System had therefore already been incurred and need not be estimated. The principal capital expenditures that remained going forward, for which estimates were to be made, concerned the cost of acquiring additional tablets to complete the initial installation of the L1bre System and acquiring new, replacement tablets every three years.[712] Those costs can be estimated with a high degree of confidence based on pre-October 2018 invoices reflecting the costs that Lusad had incurred in paying for and acquiring the first 85,000.[713] Lusad's capital costs are therefore able to be computed to a high degree of confidence.

- By contrast, pre-operating mining projects are, as Mexico notes in its Counter-Memorial, highly capital-intensive. At the pre-operational stage, those costs are estimated through a variety of engineering studies and feasibilities studies.[714] However, technical assessments, prefeasibility studies and feasibility studies are prepared knowing that they reflect cost estimates with a 50% margin of error for initial assessments, 25% margin of error for pre-feasibility studies and a 15% margin of error for feasibility studies, which is consistent with SEC guidelines.[715] In reality, however, the mining industry is renowned for suffering from significant cost overruns. A recent study by Samuel Engineering—a firm specializing in the mining industry—found that mining projects have had, for a number of years, an average capital cost overrun of 37%, and that recent projects have had average cost overruns exceeding 40%.[716] The largest projects have average capital cost overruns approaching 60%.[717]

402. Lusad's operating costs can be reliably estimated because they were, for the most part, reflected in binding contracts that Lusad had secured with most of its suppliers. By contrast, the operating costs for running a mining project are highly dependent on commodity prices:

- Lusad's operating costs can be estimated with a high degree of confidence because, by 27 October 2018, Lusad had already entered into binding contracts for the majority of its operating cost needs, and otherwise had contemporaneous proposals

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[711] Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 107(i), section A4.5.

[712] Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 107(i), section A4.5.

[713] Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 107(i), A.128–A.130.

[714] *See* Counter-Memorial, ¶¶ 497–503.

[715] **Exhibit C-0271-ENG**, p. 425 (U.S. Securities and Exchange Commission, Modernization of Property Disclosures for Mining Registrants, 17 CFR Parts 229, 230, 239, and 249).

[716] **Exhibit C-0270-ENG**, pp. 5–6 (Samuel Engineering, And the Saga Continues for Capital Cost Overruns in the Mining Industry, dated 8 November 2019).

[717] **Exhibit C-0270-ENG**, pp. 5–6 (Samuel Engineering, And the Saga Continues for Capital Cost Overruns in the Mining Industry, dated 8 November 2019).

that it received from service providers.[718] In other words, as of 27 October 2018, Lusad was contractually entitled to performance by service providers at the costs reflected in the binding contracts and, because of the contemporaneous proposals, Secretariat has a reliable basis upon which to estimate the remaining costs.

- By contrast, the operating costs of mining projects are closely linked to fuel prices and estimating the operating costs of mining projects thus requires taking a view on long term energy prices.[719] However, as with all commodity prices, there are uncertainties associated with long term forecasts.

403. In short, Mexico's assertion that there is greater certainty or more comfort in the accuracy of cash flow projections in pre-operational stage mining projects than Lusad's cash flows here are unsustainable. Mexico provides statistics regarding investment tribunal decisions, noting that—to its knowledge—there have been eleven cases arising from mining project in the pre-production stage and only three of them involved the computation of damages using the DCF approach.[720] Mexico appears to rely on the rarity with which tribunals in mining cases use the DCF method for non-operational projects. However, the important point of emphasis is that—even in the context of hyper complex, capital-intensive mining projects the values of which are so dependent on long term pricing forecasts—investment tribunals have found that cash flow projections in connection with a DCF method provided a reasonable enough basis upon which to award damages. At practically every turn, Lusad's cash flows can more reliably be estimated than the cash flows of any pre-operational mining project.

3. Lusad's Cash Flows Were Diligenced and Scrutinized by Goldman Sachs in Its Preliminary Valuations, Supporting the Use of the DCF Method for Computing Damages Here

404. In the Claim Memorial, Claimants explained that, just prior to the indefinite suspension of the Concession, Goldman Sachs completed a valuation of Lusad's business under the Concession and concluded that it had an enterprise value of US$2.433 billion.[721] By comparison, Secretariat's DCF valuation on which Claimants' case is based makes more

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[718] Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 107; Second Expert Report of Howard Rosen (Secretariat Advisors), dated 4 November 2022, ¶¶ 18–19, 20(b), 80, 173–174.

[719] **Exhibit C-0297-ENG**, p. 1 (Goldmoney, Gold Price Framework Vol. 2: The Energy Side of the Equation – Part II) ("We find that gold miners are not just exposed to significant direct energy costs such as fuels and power; their indirect energy exposure is even larger. Our bottom-up analysis shows that ~50% of production costs of the average gold miner are closely linked to energy prices. This is in line with the findings of part I of our gold price framework which showed that a 1% change in longer-dated energy prices impacts gold prices by about 0.5%.").

[720] *See* Counter-Memorial, ¶¶ 497–502.

[721] Claim Memorial, ¶¶ 320–323.

conservative projections and, for a 30-year Concession period, yields a post-money enterprise value of USD $1.746 billion (before the addition of pre-award interest).[722]

405. As shown in the Claim Memorial, Goldman Sachs first made a Financial Advisory Services Proposal in June 2018.[723] Goldman Sachs was then engaged in August 2018.[724] By October 2018, Goldman Sachs provided a valuation model and a presentation with its preliminary valuation results.[725] Goldman Sachs is not only one of the world's leading investment banks, but, as outlined in its Financial Advisory Services Proposal, it is the leading technology M&A advisory franchise with unrivaled experience in the auto tech spec and the leading investment bank in Mexico.[726] On any view, Goldman Sachs's observations on Lusad and the L1bre platform are valuable and informative.

406. Notwithstanding Goldman Sachs's experience, Mexico contends that the Tribunal should pay no attention to its work and analysis because, in Mexico's telling, Goldman Sachs's work is merely "preliminary marketing material" and it simply regurgitated information provided by Lusad's management.[727] Mexico's arguments are unpersuasive. As discussed below, Goldman Sachs's work provides guidance for purposes of computing damages in this case.

a. Goldman Sachs Endorsed the Use of the DCF Method to Value Lusad in October 2018

407. Goldman Sachs, with all of its experience in technology M&A, provides guidance on the relevant valuation methodologies for valuing Lusad.[728] In other words, Goldman Sachs provides guidance on how Lusad would be valued in a transaction.[729] Goldman Sachs determined that Lusad would be valued by reference to the DCF method or multiples based on comparable companies.[730] Nowhere does Goldman Sachs suggest that Lusad would be valued by reference to the costs sunk into L1bre's development, which is Mexico's position in this case.

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[722] Second Expert Report of Howard Rosen (Secretariat Advisors), dated 4 November 2022, ¶ 245.

[723] **Exhibit C-0077-ENG** (Goldman Sachs financial advisory services proposal, 14 June 2018).

[724] **Exhibit C-0078-ENG** (Goldman Sachs engagement letter, dated 30 August 2018).

[725] **Exhibit C-0079-ENG** (Goldman Sachs Pre-Marketing Recap and Potential Next Steps, dated 4 October 2018).

[726] **Exhibit C-0077-ENG**, p. 4 (Goldman Sachs financial advisory services proposal, 14 June 2018).

[727] *See* Counter-Memorial, ¶¶ 503, 515.

[728] **Exhibit C-0077-ENG**, pp. 23–24 (Goldman Sachs financial advisory services proposal, 14 June 2018).

[729] **Exhibit C-0077-ENG**, p. 24 (Goldman Sachs financial advisory services proposal, 14 June 2018).

[730] **Exhibit C-0077-ENG**, p. 24 (Goldman Sachs financial advisory services proposal, 14 June 2018).

b. Goldman Sachs Diligenced Lusad's Cash Flows in Connection with the Concession in October 2018

408. Mexico contends that the Goldman Sachs analysis "is not an objective and independent analysis" and its results are suspect, Mexico says, because "it is based on projections and uncorroborated information that was provided by Lusad."[731] Mexico contends that boilerplate language in the Goldman Sachs engagement letter that says that Goldman Sachs will not "assume . . . liability . . . or responsibility for the accuracy, completeness or independent verification" of information provided by Lusad renders its analysis void of meaning. Mexico further contends that the "there is no indication that Goldman Sachs has validated Lusad management's estimates" that were provided to it.[732]

409. Mexico's characterization that Goldman Sachs came on board to blindly execute calculations of inputs that were provided to it without evaluation of its own is wrong and misleading. As Mr. León describes in his second statement, Goldman Sachs was retained to value the business and to explore strategic investment options.[733] It was important to Lusad's shareholders to have Goldman Sachs's expertise and judgment on the value of the business, and how it could be perceived by an outside investor.[734] Mexico's position is also undermined by the Goldman Sachs documents as well. It is of course true that Goldman Sachs was provided with management's business projections—which, as an aside, does not make them inherently unreliable as Mexico suggests—but Goldman Sachs's Phase 1 work included to "diligence financial forecasts" in connection with preparing the financial model.[735] Goldman Sachs's scope of work confirmed that it would "perform due diligence on L1bre" and that it would "build a financial model together with L1bre's management and perform a valuation analysis on the Company, based on commonly accepted methodologies, performing sensitivities to main assumptions and variables."[736] To enable that work, Goldman Sachs was provided with a data room with a large volume of materials regarding Lusad.[737]

410. The fact that Goldman Sachs did more than just compute results of figures provided by management is evident in the evolution of its work.

- Goldman Sachs received initial information about the company prior to its June 2018 Financial Advisory Services Proposal and prepared a first DCF valuation (***First Goldman Sachs Valuation***). In that valuation, Goldman Sachs computed a value of $852 million in connection with Lusad's rights under the Concession

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731 *See* Counter-Memorial, ¶ 503.

732 *See* Counter-Memorial, ¶ 514.

733 Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶¶ 64 –70.

734 Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶¶ 64 –70.

735 **Exhibit C-0077-ENG**, p. 18 (Goldman Sachs financial advisory services proposal, 14 June 2018).

736 **Exhibit C-0077-ENG**, p. 28 (Goldman Sachs financial advisory services proposal, 14 June 2018).

737 Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶ 68.

(assuming a 30-year Concession term) and a further $966 million in value in other Mexican markets that Lusad was developing.[738]

- Goldman Sachs was then provided with substantially more information in a data room had more than a month to perform the due diligence envisaged by its scope of work.[739]

- Goldman Sachs then delivered its second DCF valuation in its October 2018 presentation (***Second Goldman Sachs Valuation***).[740] Following its due diligence exercise, Goldman Sachs's valuation of Lusad's rights under the Concession increased to USD $2.364 billion.[741] Even Goldman Sachs's more pessimistic "alternate case" yielded a value of US$1.986 billion.[742] Both of these valuations are higher than Secretariat's valuation and Claimants' claim.

411. Beyond the value that Lusad could realize under the Concession, Goldman Sachs acknowledged the intrinsic value in the service add-ons that Lusad was working on providing in Mexico City (namely, package delivery and restaurant delivery services).[743] Goldman Sachs also acknowledged the intrinsic value associated with Lusad's operations that it was working on launching in other markets in Mexico, including in the State of Mexico, Guadalajara, Monterrey and Cancun, amongst other markets.[744] Despite the additional value that could be ascribed to these opportunities, Secretariat conservatively excludes them from its valuation.[745]

c. Goldman Sachs Found Prospective Interested Investors in October 2018

412. Mexico further observes that "some of the potential buyers were skeptical about the project."[746] It then proceeds to quote sentences reflecting the reticence of those companies to whom Goldman Sachs had reached out who were not interested in proceeding with a transaction.

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[738] **Exhibit C-0077-ENG**, p. 25 (Goldman Sachs financial advisory services proposal, 14 June 2018).

[739] *See* Second Witness Statement of Santiago León Aveleyra, dated 3 November 2022, ¶¶ 68–70.

[740] **Exhibit C-0079-ENG** (Goldman Sachs Pre-Marketing Recap and Potential Next Steps, dated 4 October 2018).

[741] **Exhibit C-0079-ENG**, p. 19 (Goldman Sachs Pre-Marketing Recap and Potential Next Steps, dated 4 October 2018).

[742] **Exhibit C-0079-ENG**, p. 20 (Goldman Sachs Pre-Marketing Recap and Potential Next Steps, dated 4 October 2018).

[743] **Exhibit C-0079-ENG**, p. 15 (Goldman Sachs Pre-Marketing Recap and Potential Next Steps, dated 4 October 2018).

[744] **Exhibit C-0077-ENG**, p. 21 (Goldman Sachs financial advisory services proposal, 14 June 2018); **Exhibit C-0079-ENG**, p. 15 (Goldman Sachs Pre-Marketing Recap and Potential Next Steps, dated 4 October 2018).

[745] Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 109.

[746] *See* Counter-Memorial, ¶ 504.

What Mexico ignores, is that as part of that "pre-marketing" exercise before the formal launch of any sale process, three companies (including leading private equity firm, Blackstone, which was "very interested in the asset" having "already done extensive work on the Company on previous approach") had expressed interest in participating in reviewing the business as part of a sales process.[747] The takeaway point is that there was a market for Lusad and, beyond that, Lusad had developed to such a point where one of the world's leading investors was "very interested" in investing.

413. Finally, Mexico attempts to confront the decisions of investment tribunals that have emphasized that it makes good sense to credit pre-expropriation ordinary course business planning documents in estimating cash flows for damages purposes.[748] For instance, in the Claim Memorial, Claimants referred to the decision in *ADC v. Hungary* in which the tribunal emphasized that such documents are the "best evidence . . . of the expectations" for the business "at the time of expropriation."[749] That gives even more reason to credit the Goldman Sachs work, which reflects an ordinary-course-of-business effort that Lusad's shareholders were making to attract further investment into Lusad.

414. Mexico acknowledges the force of these decisions, but then contradicts itself. Whereas on the one hand it seeks to discredit (incorrectly) the Goldman Sachs's valuations as merely regurgitating management business plans and projections, it then contends that what is reflected in the Goldman Sachs documents do not reflect contemporaneous, ordinary-course-of-business projections by management.[750] The basis for that contention is unclear and unstated. Mexico elsewhere seeks to emphasize that Goldman Sachs incorporated the then prevailing management expectations and projections (though, as noted above, it then significantly diligenced those expectations and projections before producing the Second Goldman Sachs Valuation). The projections therefore not only reflect input from management, but have the added benefit of having been scrutinized by a reputable, outside consultant.

415. Despite Mexico's efforts to undermine the Goldman Sachs work as being a mere computation of inputs provided by Lusad's management, it is plainly much more than that. Goldman Sachs performed substantial due diligence, worked on a valuation, and performed initial outreach to a discrete list of potential buyers. In sum, Goldman Sachs DCF valuation provides powerful support for Claimants' damages claim.

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[747] **Exhibit C-0079-ENG**, p. 6 (Goldman Sachs Pre-Marketing Recap and Potential Next Steps, dated 4 October 2018).

[748] **Exhibit CL-0024-ENG**, ¶ 507 (*ADC*); **Exhibit CL-0087-ENG**, ¶ 771 (*Mobil Cerro Negro, Ltd. v. Petróleos de Venezuela, S.A., PDVSA Cerro Negro, S.A.*, ICC Case No. 15416/JRF/CA, Award, dated 23 December 2011).

[749] **Exhibit CL-0024-ENG**, ¶ 507 (*ADC*).

[750] *See* Counter-Memorial, ¶ 517.

4. Lusad Was Ready to Commence Full Scale Revenue-Producing Operations, Supporting the Use of the DCF Method for Computing Damages

416. In its Counter-Memorial, Mexico comments that the case law generally does not support the use of the DCF method for valuing non-operational businesses because "it is considered too speculative" to draw conclusions as to whether the business would become operational at all.[751] However, Mexico does not engage at all with the facts of the case and with Lusad's operational readiness as of 28 October 2018, which not only gives comfort that Lusad would in all probability have begun collecting revenue but for Mexico's unlawful conduct, but also gives comfort that Lusad's foregone cashflows can be estimated with a high degree of confidence.

417. For that reason, Claimants reemphasize in the paragraphs that follow what Mexico ignores in its submission: the facts (some of which have been addressed above and in the Claim Memorial) that show that Lusad was on the precipice of full-scale revenue-producing operations, which further supports the use of the DCF method for computing damages in this case. In summary, Lusad had the workforce, the software and hardware, the government approvals and mandates, and the infrastructure in the form of installation centers to operate its business.

a. Lusad Had Assembled a Sophisticated Workforce to Conduct Its Business

418. Mexico contends in its Counter-Memorial that Claimants did not have the adequate sector "experience" to provide any confidence that its business model could succeed.[752] Mexico attempts to portray that Lusad and L1bre were run by two friends and business partners, Mr. Zayas and Mr. León, who wishfully started an app-based tech company in their garage, with the hopes of striking it big.

419. That is far from the truth. Throughout the development of Lusad and L1bre, Mr. Zayas, Mr. León, and other stakeholders persistently looked for top talent to help drive L1bre forward. After having been awarded the Concession, for instance, Claimants engaged Egon Zehnder, which is the world's leading global management consulting and executive search firm, which is particularly active in the technology sector, to identify and recruit talent.[753]

420. Between 2016 and 2017, when the software and hardware to deliver on the obligations under the Concession were under development, the business benefited from the acquisition of very experienced people.[754] In 2018, after software and hardware development had

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[751] *See* Counter-Memorial, ¶¶ 493–495.

[752] *See* Counter-Memorial, ¶¶ 19, 22.

[753] **Exhibit C-0306-ENG** (Email from Felice Gorordo to Ramon Perez, Iñigo Domenech, Peter L. Corsell and Santiago Leon, dated 15 August 2016, enclosing two attachments from consultancy Egon Zehnder).

[754] For instance, Egon Zehnder conducted a thorough search for Chief Operating Officer, resulting in L1bre hiring Manuel Steremberg, who was a Regional General Manager for Apple in Latin America and had spent nearly a decade at the company. *See* **Exhibit C-0307-ENG** (L1bre Chief Operating Officer Interview Guide

been completed, and Lusad was preparing to enter the mandatory installation period and begin collecting revenue, it had to ensure that it had sufficient operational personnel to deliver on its installation plan. Lusad prepared an employee plan that envisaged 63 direct hires. By the time of the indefinite suspension, it had already filled 34 of those roles.[755] This included people with impressive business credentials who were more than capable of delivering on Lusad's business plan, including:

- The Manager of Operations, Manuel Tabuenca, MBA, who had worked previously at Uber and Visa, among other companies, before joining Lusad in 2017.[756]

- The Director of Installations and Client Services, Juan Carlos Silva, joined in 2017. He had started his career spending more than a decade climbing the corporate ladder at Ingram Micro, the leading multi-billion dollar American software company.[757]

- The Marketing Director, Carlos Enrique Anzola, MBA, who had worked at a number of marketing firms, and had previously held various corporate positions at Nestle and Kellogg Company before joining Lusad in 2017.[758] In 2013, he had been named one of Mexico's 50 top leaders in marketing.[759]

421. Lusad had also hired a Director of Business Development, a Head of Controlling, a Treasurer, a General Counsel, an R&D Manager, a Senior Technology Manager, a Technology Manager, an Analyst for the Treasury Department, three further employees in the Controlling Department, eleven further employees in the Operations Department, six employees in the Installation and Client Service Department, and two further employees in the marketing department.[760] In addition to its direct hires, Lusad had contracted with certain service providers who would have dedicated personnel supporting Lusad's operations. This was in particular the case at the installation centers with which Lusad contracted to manage the installation of the L1bre System in Mexico City's taxi fleet.[761] Through contractual arrangements with these service

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prepared by Egon Zehnder, dated September 2016); **Exhibit C-0308-ENG** (L1bre Role Specification for Chief Operating Officer prepared by EgonZehnder, dated September 2016); **Exhibit C-0309-ENG** (Confidential Report regarding Manuel Steremberg prepared by EgonZehnder, dated September 2016). L1bre's CEO at the time was Felice Gorordo, who had previous tech start-up experience with a venture-backed company revolutionizing the paper-based immigration process and who had been recognized by President Obama as one of fifteen 2011-2012 White House Fellows. *See* **Exhibit C-0308-ENG** p. 5 (L1bre Role Specification for Chief Operating Officer prepared by EgonZehnder, dated September 2016).

[755] **Exhibit HR-0002-SPA** (L1bre Organization Chart and Wages, dated August 2018).

[756] **Exhibit C-0310-ENG** (Resume of Manuel Tabuenca, dated 2018).

[757] **Exhibit C-0311-ENG** (LinkedIn Resume for Juan Carlos Silva, dated 2022).

[758] **Exhibit C-0312-ENG** (LinkedIn Resume for Carlos Anzola, dated 2022).

[759] **Exhibit C-0312-ENG** (LinkedIn Resume for Carlos Anzola, dated 2022).

[760] **Exhibit HR-0002-SPA** (L1bre Organization Chart and Wages, dated August 2018).

[761] **Exhibit HR-0002-SPA** (L1bre Organization Chart and Wages, dated August 2018).

providers, Lusad had an additional dedicated indirect work force of 44 individuals working on implementing the L1bre System.[762]

422. Mexico's suggestion that Claimants and Lusad lacked the experience to deliver on the business plan is not a credible argument. At every stage in the development of the business, Lusad and L1bre hired the personnel required with the appropriate experience.

b. Lusad Acquired and Fitted Out Office Space and Other Adequate Premises to Conduct Its Business

423. Lusad secured appropriate office space for its work force. In 2016, Lusad leased the 11th and 12th floors in the Torre Excellence building.[763] It engaged an architecture firm to design the offices and, on 3 July 2016, after securing the Concession, hired the contracting company Asscar Servicios to perform the work fitting out the office space.[764] Lusad also acquired the right to place L1bre signage on that same building.[765] On 1 April 2018, Lusad signed a new lease for the entire sixth floor of a different commercial building.[766]

c. Lusad Contracted with Installation Centers Across Mexico City and Prepared Detailed Instruction Manuals for Them

424. Lusad entered into contracts for the installation of the L1bre System in Mexico City's taxis.

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[762] **Exhibit C-0277-SPA**, p. 26 (Services Contract between Lusad and Jorge Alberto Avila Garcia, dated 24 October 2016) (requiring the contractor to have three supervisors and eight installers for installation activities); **Exhibit C-0278-SPA**, p. 27 (Services Contract between Lusad and Point Technologies, SA de CV, dated 24 October 2016) (requiring the contractor to have three supervisors and eight installers for installation activities); **Exhibit C-0279-SPA**, p. 32 (Services Contract between Lusad and Satelital Terrestre Y Asistencia SA de CV, dated 23 October 2016) (requiring the contractor to have three supervisors and eight installers for installation activities); **Exhibit C-0299-ENG**, p. 27 (Services Contract between Lusad and Grupo AD Xitle, SA de CV, dated 24 October 2016) (requiring the contractor to have three supervisors and eight installers for installation activities).

[763] **Exhibit C-0272-SPA** (Lease Agreement between Isaac Hanono Zonana and Lusad for lease of the 11th floor of the Torre Excellence building, dated 1 March 2016); **Exhibit C-0273-SPA** (Lease Agreement between Isaac Hanono Zonana and Lusad for lease of the 12th floor of the Torre Excellence building, dated 1 May 2016).

[764] **Exhibit C-0275-SPA** (Construction Contract between Asscar Servicios SA de CV and Lusad for renovating office space in the Torre Excellence building, dated 3 July 2016).

[765] **Exhibit C-0274-SPA** (Lease Agreement between Isaac Hanono Zonana and Lusad for lease of advertising space on the façade of the Torre Excellence building, dated 1 March 2016).

[766] **Exhibit C-0276-SPA** (Lease Agreement between Club Hípico de la Sierra, S.A. de C.V. and Lusad for lease of 6th floor at Montes Urales No. 455 Lomas de Chapultepéc, dated 1 April 2018).

425. In October 2016, Lusad entered into contracts with four different companies for the installation of the L1bre System in Mexico City's taxis in preparation for fulfilling the test period under the Concession.[767] The key terms included the following:

- Each contract provided detailed instructions on the installation of the L1bre System and specified that the drivers would not be charged.[768]
- The contracts envisaged a ramp-up in the number of installations per month, starting with 40 installations in the first week and ramping up eventually, when necessary, to a monthly installation rate of 1,200 installations.[769]
- The contracts required that each installation center employ no less than eight installers and three supervisors, and provide services from 7:30am to 2:30pm each day.[770]
- The contracts came with a minimum mandatory equipment list for the installation of the L1bre System.[771]

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767 **Exhibit C-0277-SPA** (Services Contract between Lusad and Jorge Alberto Avila Garcia, dated 24 October 2016); **Exhibit C-0278-SPA** (Services Contract between Lusad and Point Technologies, SA de CV, dated 24 October 2016); **Exhibit C-0279-SPA** (Services Contract between Lusad and Satelital Terrestre Y Asistencia SA de CV, dated 23 October 2016); **Exhibit C-0299-ENG** (Services Contract between Lusad and Grupo AD Xitle, SA de CV, dated 24 October 2016).

768 **Exhibit C-0277-SPA**, p. 20 (Services Contract between Lusad and Jorge Alberto Avila Garcia, dated 24 October 2016); **Exhibit C-0278-SPA**, p. 21 (Services Contract between Lusad and Point Technologies, SA de CV, dated 24 October 2016); **Exhibit C-0279-SPA**, p. 26 (Services Contract between Lusad and Satelital Terrestre Y Asistencia SA de CV, dated 23 October 2016); **Exhibit C-0299-ENG**, p. 20 (Services Contract between Lusad and Grupo AD Xitle, SA de CV, dated 24 October 2016).

769 **Exhibit C-0277-SPA**, p. 21 (Services Contract between Lusad and Jorge Alberto Avila Garcia, dated 24 October 2016); **Exhibit C-0278-SPA**, p. 22 (Services Contract between Lusad and Point Technologies, SA de CV, dated 24 October 2016); **Exhibit C-0279-SPA**, p. 27 (Services Contract between Lusad and Satelital Terrestre Y Asistencia SA de CV, dated 23 October 2016); **Exhibit C-0299-ENG**, p. 22 (Services Contract between Lusad and Grupo AD Xitle, SA de CV, dated 24 October 2016).

770 **Exhibit C-0277-SPA**, p. 26 (Services Contract between Lusad and Jorge Alberto Avila Garcia, dated 24 October 2016); **Exhibit C-0278-SPA**, p. 26 (Services Contract between Lusad and Point Technologies, SA de CV, dated 24 October 2016); **Exhibit C-0279-SPA**, p. 32 (Services Contract between Lusad and Satelital Terrestre Y Asistencia SA de CV, dated 23 October 2016); **Exhibit C-0299-ENG**, p. 27 (Services Contract between Lusad and Grupo AD Xitle, SA de CV, dated 24 October 2016).

771 **Exhibit C-0277-SPA**, p. 27 (Services Contract between Lusad and Jorge Alberto Avila Garcia, dated 24 October 2016); **Exhibit C-0278-SPA**, p. 27 (Services Contract between Lusad and Point Technologies, SA de CV, dated 24 October 2016); **Exhibit C-0279-SPA**, p. 33 (Services Contract between Lusad and Satelital Terrestre Y Asistencia SA de CV, dated 23 October 2016); **Exhibit C-0299-ENG**, p. 28 (Services Contract between Lusad and Grupo AD Xitle, SA de CV, dated 24 October 2016).

- The contracts came with detailed manuals and instructions on the installation of the L1bre System.[772]

426. Lusad had plans to increase its installation capacity further with additional installation centers and it prepared further instructional manuals for the installation centers, but Mexico's suspension of the Concession halted the contracting of further installation capacity.[773]

d. Lusad Had Fully Developed the Software and Hardware Necessary to Commence Revenue-Producing Operations

427. Lusad could not deliver on its obligations under the Concession without having developed the software and hardware components of the L1bre System.

428. During 2016 and 2017, Lusad's software development team developed the mobile ride-hailing application, digital taximeter software that included GPS integration, software for passengers that allowed them to follow rides and receive customized advertising during their ride, a digital "panic button" integrated with Mexico's C5 security and surveillance service, an e-wallet for passengers to pay drivers and for drivers to pay Lusad, and cloud-based back-end computing to integrate all of these systems together.[774] Lusad had signed agreements with vendors to support this software, including with Here.com, which provided geolocation for the GPS tracking in the L1bre System, and AWS and VMware, which provided processing and cloud services for the back-end system.[775]

429. Lusad had selected a vendor for the tablets and accessories to be installed in each taxi, developed hardware specifications for those devices, and had signed a contract with Ingram Micro to provide them.[776] As noted above, Lusad ordered and already had in inventory 85,000 tablet kits, which came pre-installed with the necessary Lusad software.[777] Ingram Micro was

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772 **Exhibit C-0277-SPA**, p. 29 (Services Contract between Lusad and Jorge Alberto Avila Garcia, dated 24 October 2016); **Exhibit C-0278-SPA**, p. 30 (Services Contract between Lusad and Point Technologies, SA de CV, dated 24 October 2016); **Exhibit C-0279-SPA**, p. 35 (Services Contract between Lusad and Satelital Terrestre Y Asistencia SA de CV, dated 23 October 2016); **Exhibit C-0299-ENG**, p. 30 (Services Contract between Lusad and Grupo AD Xitle, SA de CV, dated 24 October 2016).

773 *See* **Exhibit C-0302-SPA** (*Plan de escalamiento de L1bre*, dated 8 May 2018); **Exhibit C-0190-SPA** (*Plan de escalamiento de L1bre con inicio Farnell 6 de Agosto de 2018*, dated 31 July 2018); **Exhibit C-0073-SPA** (L1bre installation centers operations manual, dated 24 August 2018); **Exhibit C-0074-SPA** (Physical requirements for Installation Centers, May 2018); **Exhibit C-0314-SPA** (*Intercam Seguros y Fianzas, Evaluación de Riesgos – L1bre Talleres de instalación Ciudad de México*).

774 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 52–53, 55.

775 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 53–54; *see also* Expert Report of Joshua Mitchell (Kroll), dated 3 November 2022, Section 4 (analyzing the functionality of the L1bre mobile application).

776 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 56.

777 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 56; **Exhibit HR-0014-SPA**, Annexes A and B (Services agreement between Ingram Micro México, S.A. de C.V. and Servicios Administrativos Lusad, S. de R.L. de C.V., dated 1 September 2018); **Exhibit C-0313-SPA** (Contract

responsible for storing the tablets at their warehouse in Mexico City (depicted in the photograph below) and make deliveries directly to Lusad's designated installation sites.[778]

430. The L1bre System can be seen in action in several videos and media reports that came out around April and May 2018, including showing user and driver satisfaction. These are discussed in further detail below.[779]

e. Lusad Had Obtained All of the Government and Regulatory Approvals Required for It to Commence Revenue-Producing Operations

431. Investment tribunals are sometimes hesitant to award damages using the DCF method where it involves valuing a non-operating business that also still required regulatory approvals, licenses, environmental permits or the like, and where there is insufficient evidence that those approvals could or would be obtained.[780]

432. Here, Claimants had obtained all of the regulatory approvals that it required to proceed with its operations.

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between Ingram Micro México, S.A. de C.V. and Servicios Administrativos Lusad, S. de R.L. de C.V., dated 21 April 2017).

[778] *See* Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 56; **Exhibit HR-0014-SPA**, Annex C (Services agreement between Ingram Micro México, S.A. de C.V. and Servicios Administrativos Lusad, S. de R.L. de C.V., dated 1 September 2018); **Exhibit C-0313-SPA** (Contract between Ingram Micro México, S.A. de C.V. and Servicios Administrativos Lusad, S. de R.L. de C.V., dated 21 April 2017).

[779] *See infra*, Section V.B.4.e.

[780] *See, e.g.*, **Exhibit CL-0030-ENG**, ¶ 600 (*Bear Creek*) ("The [t]ribunal notes that the Santa Ana Project was still at an early stage and that it had not received many of the government approvals and environmental permits it needed to proceed.").

- Between 2016 and 2018, Lusad obtained a variety of necessary regulatory approvals in connection with its roll-out of the L1bre System, including government certifications relating to the accuracy of its taximeters and their authorization to operate, approval of the panic button connection to Mexico City's C5, and authorization to operate as a ride-hailing provider.[781]

- The efficacy of the L1bre software and hardware had been established and accepted by Semovi. As discussed above, Lusad successfully completed the Trial Period under the Concession by installing the L1bre System in 100 taxis, and then in an additional 1,000 taxis. Semovi confirmed in 2017 that Lusad successfully completed the Trial Period.[782]

- Lusad required the government's cooperation—in the form of the issuance of an order to Mexico City's taxi drivers to install the L1bre System—to proceed with full-scale operations. After having satisfied itself as to Lusad's ability to complete the services envisaged in the Amended Concession Agreement, Semovi issued on 17 April 2018 the Mandatory Installation Notice requiring all taxi operators to install the L1bre System by no later than March 2019.[783]

433. Mexico cannot contend that there was a single additional governmental approval, routine or otherwise, that was required before Lusad could fulfill its obligations under the Concession. All government approvals were in place.

434. Lusad had done everything required of it to prepare for full scale operations. Not only is this evident from what is outlined above, but also from how the L1bre System were being perceived publicly. Semovi's issuance on 17 April 2018 of the Mandatory Installation Notice requiring all taxis in Mexico City to install the L1bre System within the following year coincided with an outpouring of media and press attention, indicating that the public understood Lusad and the L1bre System to be ready for operations:

- On 17 April 2018, news outlet *Reporte Indigo* reported on the Semovi announcement that the installation of the L1bre System across Mexico City's taxi

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[781] *See* Claim Memorial, ¶¶ 58–62; **Exhibit C-0050-SPA** (Registration records of the Ministry of Economy, listing the Lusad taximeter as the only authorized digital taximeter, dated 9 December 2016); **Exhibit C-0011-SPA** (Oficio No. DGN.312.01.2016.1534 from the *Secretaría de Economía*, authorizing Lusad's digital taximeter, dated 18 April 2016); **Exhibit C-0048-SPA** (Certification from *Servicios Profesionales en Instrumentación*, dated 1 April 2016) (certifying that Lusad's taximeter successfully completed calibration tests); **Exhibit C-0049** (Certification from *Laboratorio Valentín V. Rivero*, dated 14 April 2016) (certifying that Lusad's taximeter successfully completed calibration tests); **Exhibit C-0012-SPA** (Certificate of Registration as taxi-hailing application provider, No. 6D6C61F32327F227C-1651180691531691, dated 1 June 2016); **Exhibit C-0015-SPA** (Oficio No. C5/CG/DGT/132/2018 from the *Dirección General de Technologías* acknowledging proper functioning of the panic button, dated 28 February 2018).

[782] **Exhibit C-0010-SPA** (Oficio No. DNRM-0626-2017 from Semovi reissuing Concession agreement, dated 21 March 2017) (confirming that Lusad successfully completed the Trial Period).

[783] **Exhibit C-0016-SPA** (Mandatory Installation Notice mandating the installation of the taximeters, published in the *Gaceta Oficial de la Ciudad de México*, dated 17 April 2018).

fleet would follow the following month. The report recognized that L1bre (which was the Lusad brand presented to the public) was part of an "American-Canadian" technology company.[784] Forbes published a similar article on the same date observing the "digitalization of CDMX's taxis." The article refers to the "modernization of the 138,000 registered taxis" in Mexico.[785]

- On 18 April 2018, news outlet *UnoCero*—which focuses on the most important news in the world of technology from around the world—published an article regarding the L1bre System. It reported that: "In addition to providing greater security to the inhabitants of Mexico City, the L1BRE technology aims to position taxi drivers as strong competitors against existing digital alternatives such as Cabify, Uber or Didi." It also reported that L1bre had successfully tested the tablets "during its pilot phase" involving more than 1,000 taxis. It reported that the system would be installed in the remainder of Mexico City's "138,000" taxis.[786]

- *UnoCero* was so interested in the L1bre System that it followed up its news article with a video blogs (so called, vlog) published on 30 April 2018. It features a *UnoCero* journalist taking a 10-minute taxi ride with Juan Carlos Silva, Lusad's Director of Operations, which shows how the L1bre System worked.[787]

- On 19 April 2018, *El Economista* reported on the new L1bre System, noting that it "would be free for taxi drivers." The article went on to note that the L1bre System was "the only system approved by the Secretariat of Mobility of the Federal District (SEMOVI), Ministry of Economy and the National Chamber of the Electronic Industry of Telecommunications and Information Technologies (CANIETI)." The article also reported that the technology would "benefit both users and taxi operators, solving issues of security, mobility, competitiveness and transparency and freedom, promoting a high quality service and experience with the most competitive rate."[788]

- On 19 April 2018, news outlet *ADN* ran a segment showing the multiple ways in which taxi drivers alter the old-style of taximeters prevailing in Mexico City to

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[784] **Exhibit C-0280-SPA** (Reporte Indigo, *¿Cómo funciona L1BRE, la aplicación con la que taxistas capitalinos buscan destronar a UBER?*, dated 17 April 2018).

[785] **Exhibit C-0281-SPA** (Forbes, *Taxistas de la CDMX se digitalizarán con la aplicación L1BRE*, dated 17 April 2018).

[786] **Exhibit C-0282-SPA** (UnoCero, *Taxis de la CDMX utilizarán app al estilo de Uber y taxímetro digital*, dated 18 April 2018).

[787] **Exhibit C-0283-SPA** (screenshot) and **Exhibit C-0284-SPA** (video) (UnoCero Tech Vlog, *L1BRE*: *Probamos los nuevos taxímetros digitales de la CDMX*, dated 30 April 2018); **Exhibit HR-0002-SPA** (L1bre Organization Chart and Wages, dated August 2018). Counsel's transcription of the video is available at **Exhibit C-0284-SPA-TRA**.

[788] **Exhibit C-0285-SPA** (El Economista, *Taxis tendrán taxímetros digitales de L1BRE*, dated 19 April 2018).

increase their fares. The segment then explains that the L1bre System is a solution to the problems that had long been plaguing Mexico City's taxi system.[789]

- On 24 April 2018, Semovi published a news release explaining that the process for the installation of the L1bre System was "*GRATUITO*" for all taxi drivers, and noting that the system was an improvement for public transportation in Mexico City.[790]

- On 27 April 2018, news outlet *ADN* ran a segment describing the L1bre System and its benefits. The segment included an interview with Lusad's Juan Carlos Silva, a taxi driver, and a user of the system. The taxi driver emphasized how convenient the system was for him, and the user emphasized the safety features that made her feel more secure.[791]

- On 17 May 2018, news outlet *ADN* published a 13-minute interview with Carlos Enrique Azola, Lusad's Marketing Director, and Juan Carlos Silva, which involves an in-depth review of the L1bre System.[792]

- On 18 May 2018, as mentioned above, *ADN* interviewed Semovi's representative Alejandra Balandrán. Ms. Balandrán expressed confidence that the L1bre System would be installed in all taxis in Mexico City within one year.[793]

435. The point is simple. Lusad was fully ready to begin collecting revenue. Lusad's stage of development provides even more comfort that, but for Mexico's unlawful acts, Lusad would have completed the mandatory installations and begun revenue-generating activities. It is therefore appropriate to use the DCF method to derive a net present value, as of the valuation date of 27 October 2018, for Lusad's foregone cashflows.

C. Claimants' DCF Valuation Requires No Adjustments as a Result of Mexico's Observations

436. Claimants' Claim Memorial and the accompanying Secretariat Report contains the details regarding all of the inputs used in Secretariat's valuation. Secretariat scrutinized each input

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789 **Exhibit C-0286-SPA** (screenshot) and **Exhibit C-0287-SPA** (video) (ADN 40, *Taximetros Alterados*, dated 19 April 2018). Counsel's transcription of the video is available at **Exhibit C-0287-SPA-TRA**.

790 **Exhibit C-0250-SPA** (Semovi Press Release on Mandatory Installation Period, dated 24 April 2018).

791 **Exhibit C-0288-SPA** (screenshot) and **Exhibit C-0289-SPA** (video) (ADN 40, *Como opera L1bre en la CDMX*, dated 27 April 2018). Counsel's transcription of the video is available at **Exhibit C-0289-SPA-TRA**.

792 **Exhibit C-0290-SPA** (screenshot) and **Exhibit C-0291-SPA** (video) (ADN Opinión, *App L1bre: Taxis Seguros en la Ciudad de México*, dated 13 May 2018). Counsel's transcription of the video is available at **Exhibit C-0291-SPA-TRA**.

793 **Exhibit C-0266-SPA** (Twitter Account of ADN Opinión, Tweet "*Alejandra Balandrán nos habla sobre la instalación de la Plataforma #L1BRE en unidades de taxi. @CDMX_Semovi*", dated 18 May 2018). The video of the interview is available at **Exhibit C-0267-SPA** and counsel's transcription of the video is available at **Exhibit C-0267-SPA-TRA**.

to its DCF valuation before adopting it. As explained in the Claim Memorial, Secretariat's DCF valuation is reliable and should be adopted by the Tribunal for the computation of damages.

437. In its Counter-Memorial, aside from disagreeing with the DCF from a methodological standpoint, Mexico provides scant comments regarding its "main criticisms", and those of its valuation experts at Credibility, regarding the inputs that Secretariat uses in its damages calculations.[794] There is one point of order to address at the outset. Credibility states in his report: "We received the Excel version of Mr. Rosen's damages model on 11 May 2022, two days before ultimately submitting this report. Criticism and analysis of Mr. Rosen's DCF valuation throughout this report is based on our review of the PDF version of Mr. Rosen's calculations attached to his report. We reserve the right to update and amend our analysis as we continue to review the Excel version of the model."[795] The suggestion that Credibility had an insufficient amount of time to review the excel version of Secretariat's damages model is a problem of Mexico's own making. Claimants' submitted the Secretariat Report and a pdf version of the damages model in September 2021. Mexico waited until 4 May 2022 to request the excel file, and Claimants provided it within one week.[796] If Credibility required additional time with the Excel version of the damages model, then it should not have waited until the eleventh hour to make that request.

438. In its second report, Secretariat provides a comprehensive response to all of the "criticisms" that Mexico and its damages experts at Credibility make in the Counter-Memorial and the Credibility Report. Claimants address below the specific points that Mexico addresses in its Counter-Memorial. In particular, Claimants address Mexico's observations on the following input estimates in Secretariat's DCF valuation: size of taxi fleet and taxi driver adoption rate, number of riders per day, Concession fee rates and advertising revenue, cost estimates, currency adjustments and discount rate.

1. Secretariat's Assumption of a Taxi Fleet of 138,000 Requires No Revision

439. The Secretariat valuation assumes that Mexico City has a total taxi fleet of 138,000 taxis and that the L1bre System would be installed in all of those taxis.[797] Mexico contends in its Counter-Memorial that "the figure of 138,000 is not consistent with Semovi's current concession data. For 2018 the correct figure would be 123,453."[798] Mexico's valuation experts at Credibility notes that the fleet of authorized taxis "could be as small as 38,000 taxis."[799]

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[794] *See* Counter-Memorial, ¶ 509.

[795] *See* First Expert Report of Timothy Hart and Rebecca Vélez, dated 13 May 2022, ¶ 170.

[796] **Exhibit C-0292** (Email from Counsel to Mexico to Counsel to Claimants, dated 4 May 2022).

[797] Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 107(a), A.32; Second Expert Report of Howard Rosen (Secretariat Advisors), dated 4 November 2022, ¶¶ 139–143.

[798] Counter-Memorial, ¶ 522.

[799] *See* First Expert Report of Timothy Hart and Rebecca Vélez, dated 13 May 2022, ¶ 65.

440. Mexico does not support its position with any contemporaneous documents. It only refers to a table in a witness statement that contains no documentary support.[800] At any rate, despite Mexico's attempts at sowing confusion, there are a number of reference points in Mexico's own documents that support Secretariat's assumption that the taxi fleet that would be implementing the L1bre System is comprised of 138,000 vehicles:

- Semovi's Declaration of Necessity, issued to explain the public need for the Concession, noted that, as of 2015, Mexico City had a taxi fleet size of 138,000 taxis.[801]

- The Concession itself states that Mexico City's fleet size is 138,000 taxis.[802] Plainly, at the time the Concession was entered into, it was Semovi (and not Lusad) that had information regarding the size of the taxi fleet.

- One of Credibility's exhibits states that 139,500 taxis were legally operating in Mexico City in 2018.[803] The suggestion that the number of taxis operating in Mexico City is somehow less than 138,000 is therefore implausible.

- Mexico's Transparency Institute addressed the number of taxis registered in Mexico City in its minutes of its session held on 30 May 2018 to address, *inter alia*, a request that was made for Semovi to provide information on the Concession. The minutes refer to the fact that the Ministry of Mobility noted that, between 1989 to 2015, the number of officially concessioned taxis operating in Mexico City grew from 55,000 to 138,000.[804]

441. Mexico emphasizes that referring to the total number of registered taxis in Mexico City is "an illusion" because it does not "assess the impact of taxi drivers' resistance to adopting the L1bre system."[805] As a result, Mexico contends that Secretariat's assumptions for the installation rate and adoption rate of the L1bre System in Mexico City taxis (95)% is too high.[806]

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800 Counter-Memorial, ¶¶ 522–523.

801 **Exhibit C-0005-SPA**, p. 14 (Declaration of Necessity issued by Semovi, dated 30 May 2016) ("*En la Ciudad de México existe un importante número de taxis ilegales, adicionales a los registrados. De 1989 a 2015 el número de taxis concesionados oficialmente que operan en la Ciudad de México creció de 55.000 a 138.000*.").

802 **Exhibit C-0007-SPA**, Article 5.2.1 (Amended Concession Agreement, dated 9 January 2017) ("*integrado hasta la fecha por 138,000 unidades aproximadamente registradas ante la Secretaría*").

803 **Exhibit CRED-0003**, p. 5 (Ride-sharing platforms in developing countries: effects and implications in Mexico City, Sigfried RJ Eisenmeier, dated 20 August 2018).

804 **Exhibit C-0238-SPA**, p. 36 (Minutes of the *Pleno del Instituto Nacional de Transparencia, Acceso a la Información y Protección de Datos Personales*, dated 30 May 2018).

805 Counter-Memorial, ¶ 505.

806 Counter-Memorial, ¶ 524.

442. While taxi drivers had to be educated regarding the L1bre System, the notion that such resistance was going to be a serious impediment to the implementation of the Concession is hyperbole and is an argument crafted for purposes of the arbitration. As is well documented in the press articles and interviews noted above, the L1bre System was beneficial to taxi drivers and so they would have been incentivized to install it.[807] Moreover, it bears recalling that all taxi drivers in Mexico City were under a legal mandate to install the L1bre System. More importantly, Semovi itself considered that resistance from the taxi drivers would not be a serious impediment. During an interview with Semovi representative Alejandra Balandrán dated 18 May 2018—less than two weeks before Semovi's first, temporary suspension of the Concession—she stated publicly that Semovi expected that the installation of the L1bre System could be completed across the taxi fleet within a year—and, notably, she confirmed in that interview that the fleet size was indeed 138,000. The interview proceeded as follows:

> Reporter: *¿Cómo van los planes y sobre todo las acciones para que esto sea realidad? ¿En cuánto tiempo, cómo lo tienen ustedes proyectado, presupuestado?*
>
> Alejandra Balandrán (Semovi): *Claro que sí, mira nosotros hemos diseñado un plan de un año para que los taxistas puedan ir sustituyendo de manera paulatina los taxímetros convencionales con los que cuentan en este momento, por nuevas tabletas que tienen la finalidad de servir como taxímetros y con la cual van a tener también acceso a otras tecnologías, como botón de pánico y fijar la geolocalización.*
>
> Reporter: *Ciento treinta y ocho mil son los taxis registrados. ¿De todos ellos, todos ellos ya van a tener este tipo de tableta?*
>
> Alejandra Balandrán (Semovi): *Así es, se prevé que en un año ellos ya cuenten con este nuevo mecanismo.*
>
> Reporter: *Ahora, se trata de un asunto si tecnológico de utilidad para el usuario, pero también un tema que pasa por el convencimiento. Hemos observado algunas protestas de algunos taxistas. ¿Cómo van en el dialogo, en la negociación con ellos, para que todos se suban, para que todos participen de esta nueva tecnología?*
>
> Alejandra Balandrán (Semovi): *Nosotros iniciamos mesas de trabajo, tenemos ya aproximadamente entre 100 y 150 organizaciones, con las cuales ya se ha iniciado el dialogo. La intención es que ellos conozcan del funcionamiento de las tabletas y que derivado del mismo funcionamiento ellos se convenzan de la utilidad.*[808]

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[807] *See supra*, ¶ Section V.B.4.e.

[808] **Exhibit C-0266-SPA** (Twitter Account of ADN Opinón, Tweet "*Alejandra Balandrán nos habla sobre la instalación de la Plataforma #L1BRE en unidades de taxi. @CDMX_Semovi*", dated 18 May 2018). The

443. In sum, there is broad evidentiary support for the number of taxis in Mexico City. It is therefore perfectly reasonable for Secretariat to continue to use that figure for valuation purposes and also for it to continue to assume that the drivers would have complied with their legal obligation to install the L1bre System.

2. Secretariat's Conservative Assumption of 2.1 Million Rides Per Day Requires No Revision

444. Secretariat's valuation model assumes that Mexico City's taxis generate approximately 2.1 million trips per day.[809] Secretariat's assumption aligns with those contained in the Goldman Sachs valuation.[810]

445. Mexico contends that the figure is premised on "unsupported or incorrect" assumptions.[811] Mexico pleads ignorance as to the number of taxi rides per day within Mexico City. However, the truth is that there are a number of sources that corroborate Secretariat's assumption that Mexico City's taxi fleet completes an average of 2.1 million trips per day:

- In July 2018, Lusad commissioned a study from UPAX, a leading Mexican marketing firm.[812] The study found that taxis in Mexico City were taking, on average, 20.3 trips per day.[813] When multiplied by the number of taxis in Mexico City (138,000), that yields a total of 2,801,400 trips per day.

- In November 2018 (very close in time to Claimants' valuation date), Semovi's Executive Director of Information Technology and Communications presented data to the National Institute of Statistics of Mexico ("INEGI") showing the average number of trips per day taken by registered taxis in Mexico City. The document shows that taxis were taking 25 to 35 trips per day, depending on the type of taxi.[814] That implies a higher daily ridership than suggested by UPAX's study.

- A 17 November 2017 press release from technology company, HERE, reported on how Mexico City was "moderniz[ing] [its] huge taxi fleet with HERE and L1bre."

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video of the interview is available at **Exhibit C-0267-SPA** and counsel's transcription of the video is available at **Exhibit C-0267-SPA-TRA**.

809 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 107(b), A.25–A.32; Second Expert Report of Howard Rosen (Secretariat Advisors), dated 4 November 2022, ¶¶ 161–167.

810 **Exhibit C-0079-ENG**, pp. 14–15, 18–20 (Goldman Sachs Pre-Marketing Recap and Potential Next Steps, dated 4 October 2018).

811 Counter-Memorial, ¶¶ 524–528.

812 **Exhibit HR-0027** (UPAX, Presentation of taxi and ride-hailing fairs for Mexico City, dated 31 July 2018).

813 **Exhibit HR-0027**, p. 12 (UPAX, Presentation of taxi and ride-hailing fairs for Mexico City, dated 31 July 2018).

814 **Exhibit HR-0040** (Officio DESIC-570-2018 from SEMOVI confirming the average taxi rides per day in 2018, dated 30 November 2018).

The news article noted that Mexico's "government-licensed fleet of 138,000 cabs -- ten times more than New York city" "makes an average of 2.2 million trips per day."[815]

- The Transparency Institute, in considering a request for information regarding the Concession, provided figures based on an INEGI study, which implied daily taxi ridership in excess of 3 million per day.[816]

- In providing information as part of [redacted] [817]

446. Mexico professes ignorance as to the number of trips taxis in Mexico City make each day. It contends in its Counter-Memorial that Semovi "does not collect information on the number of trips that taxis make per day."[818] Plainly, that is not true. Semovi's Executive Director of Information Technology and Communications has presented that very data to INEGI on more than one occasion.[819] And, as reflected above, Semovi's own data shows Secretariat's assumption of 2.1 million rides per day to b conservative.

447. Mexico then attempts to attack Secretariat's rides-per-day estimate by stating that: "Mr. Rosen does not take into account that the L1bre fees would have increased the cost of the trip for the end user, and it is a principle of basic economics that when the price goes up, the quantity demanded decreases. This reduction in the number of trips as a consequence of the transfer of the application fee or the recovery fee to the end user was simply ignored."[820] Mexico provides no support for this bald assertion, and it is not particularly credible. As noted by those in the press, the L1bre fees were considered a "minimal cost" for a much-improved experience for the user.[821] So, it is not the case that the exact same ride was now marginally more expensive. The ride now had significant benefits for the user, including certainty over cost (as it was known that the practice

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815 **Exhibit C-0293-ENG** (Here.com, Mexico city modernizes huge taxi fleet with HERE and L1bre).

816 **Exhibit C-0238-SPA**, p. 36 (Minutes of the *Pleno del Instituto Nacional de Transparencia, Acceso a la Información y Protección de Datos Personales*, dated 30 May 2018).

817 **Exhibit C-0303-SPA**, [redacted]

818 Counter-Memorial, ¶ 528.

819 **Exhibit HR-0040** (Officio DESIC-570-2018 from SEMOVI confirming the average taxi rides per day in 2018, dated 30 November 2018).

820 Counter-Memorial, fn. 675.

821 *See supra*, Section V.B.4.e; *see also* **Exhibit C-0301** (Paréntesis.com, *La tecnología L1BRE llega a los taxis de la CDMX*) ("*L1BRE es la opción de movilidad con el costo más competitivo de la ciudad…L1BRE permite a los taxistas ofrecer un servicio al mejor costo y calidad por encima de las aplicaciones de movilidad que se encuentran actualmente en el mercado y con las unidades no registradas por la SEMOVI. Para los usuarios, la tarifa seguirá siendo la más baja del mercado, sin tarifas dinámicas o alteradas, por lo que el usuario estará siempre seguro de pagar el precio justo por sus viajes*").

of manipulating the old style of taximeters to drive up the costs per ride was relatively widespread). Mexico's criticism is made without regard to the relative cost of riding in a taxi equipped with the L1bre System as compared to its competitors in the market. Lusad's market research, prepared in the ordinary course of business at a non-suspect time, showed that taxis equipped with the L1bre System would be more cost effective for users than the services provided by competitors.[822]

448. For completeness, Secretariat provides in its second report sensitivities on the number of rides per day used for the computation of damages. However, there is no justifiable basis to alter Secretariat's estimate, which it conservatively holds flat for the duration of the Concession, that there would be 2.1 million trips per day.

3. Secretariat's Projections Based on the Applicable Fee Schedule Under the Concession and Expected Advertising Revenues Should Not Be Revised

449. In the damages section of its Counter-Memorial, Mexico briefly addresses two factors concerning revenues.

450. *First*, Mexico observes that the Secretariat valuation includes revenues associated with the Recuperation Fee, which was included in the Concession as amended in 2017.[823] Mexico reiterates its view that the only valid concession agreement is the one bearing a 2018 date.[824] Mexico's position is demonstrably incorrect, as described in detail above.[825] As such, contrary to Mexico's submission, no modification needs to be made to the Secretariat valuation to reduce cash flows that Lusad would have made associated with the Recuperation Fee.

451. *Second*, Mexico observes that the Secretariat valuation relies on a proposal from Grupo TV in 2017 for purposes of computing advertising revenue.[826] Mexico contends that this "is not a reasonable assumption because proposals do not guarantee revenue and no documentation has been provided indicating that L1bre has finalized a deal."[827] Mexico's position is inconsistent with the full reparation standard.

452. Mexico's duty of full reparation requires it to pay compensation that will, as far as possible, wipe out all consequences of its unlawful conduct.[828] Lusad was entitled, under the Concession, to make revenue by selling advertisements on the passenger tablet that was part of the

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822 *See* **Exhibit HR-0027-SPA**, (UPAX, Presentation of taxi and ride-hailing fairs for Mexico City, dated 31 July 2018).

823 Counter-Memorial, ¶¶ 529–532.

824 Counter-Memorial, ¶¶ 529–532.

825 *See supra*, Section II.A.

826 Counter-Memorial, ¶¶ 533–534.

827 Counter-Memorial, ¶¶ 533–534.

828 *See supra*, Section V.A.

L1bre System. Lusad made advances prior to Mexico's measures to realize that right. Claimants never contended that they had a binding finalized contract with Grupo TV. Rather, Claimants made clear in the Claim Memorial that Lusad had entered into a memorandum of understanding with Grupo TV for the purpose of realizing its right to make advertising revenues.[829] Mexico has no factual basis to contend that, but-for its unlawful measures, Lusad would not have ultimately continued and finalized its advertising arrangements, whether with Grupo TV or with another agency on comparable terms that were being discussed.

453. In the present circumstances, the Grupo TV presentation is the best evidence that is available to reflect the revenue that Lusad likely would have enjoyed but-for Mexico's unlawful measures.[830] This presentation, reflecting a commercial arrangement that had been proposed contemporaneously to Lusad before Mexico indefinitely suspended the Concession, forecasted annual revenues ranging from MXN 75 million in the first year of operations to more than MXN 800 million in the fifth year of operations, slightly lower than amounts presented in the Goldman Sachs model. Secretariat conservatively adopts the figures shown in the Grupo TV Promo for its model.[831]

454. There is no basis to revise down Secretariat's revenue assumptions to remove the advertising revenue just because Lusad did not ultimately finalize an advertising contract prior to the suspension of the Concession.

4. Secretariat's Costs Estimates Should Not Be Revised

455. In its Counter-Memorial, Mexico criticizes Secretariat for using costs assumptions consistent with the Goldman Sachs model.[832] To the extent that Mexico contends that Secretariat just blindly adopted assumptions in the Goldman Sachs model in its own valuation without critically scrutinizing them, that is incorrect. Secretariat explains the lengths at which it went to consider and determine how to approach every single assumption in its valuation.[833]

456. Secretariat also explains in its report that the majority of Lusad's key operating costs can be estimated with certainty because Lusad had entered into firm contracts or had contemporaneous proposals from service providers.[834] It is unsurprising for there to be agreement and consistency between Secretariat and the Goldman Sachs valuation in many respects on costs

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829 Claim Memorial, ¶ 328.

830 **Exhibit HR-0048-ENG**, (Memorandum of Understanding between L1BRE Holding LLC and Grupo TV Promo, dated 4 March 2017); Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 107(d), A.33–A.40; Second Expert Report of Howard Rosen (Secretariat Advisors), dated 4 November 2022, ¶ 170.

831 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 107(d), A.33–A.40.

832 Counter-Memorial, ¶ 535.

833 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 101–106, A.15–A.23; Second Expert Report of Howard Rosen (Secretariat Advisors), dated 4 November 2022, ¶¶ 119–128.

834 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 107; Second Expert Report of Howard Rosen (Secretariat Advisors), dated 4 November 2022, ¶ 80.

because they both had the benefit of relying on the fact that Lusad was so advanced in its operational readiness that its costs structure could be forecasted with precision.

5. Secretariat's Approach on Currency Should Not Be Revised

457. In its Counter-Memorial, Mexico criticizes Secretariat's approach on the currency used to estimate cash flows. Secretariat estimates the cash flows each year in Mexican pesos and then converts them to US dollars at the end of each year in the projection period. Mexico contends that the conversion introduces "unnecessary distortion" and that Secretariat should instead have kept the cash flows in Mexican pesos and converted the resulting net present value as of the valuation date to US dollars.[835]

458. Secretariat explains in its second report that there is no "distortion" in how it has addressed currency issues in its valuation model. The choice to reflect the cash flows in US dollars was sensible in Secretariat's view because, amongst other US-dollar denominated data points, a number of large expenses (such as the cost of the tablets) were denominated in that way.[836] Secretariat explains: "The choice of currency in valuation should not materially impact valuation conclusions so long as the valuation inputs are prepared on a consistent basis, which I have done."[837]

459. Mexico's criticisms on Secretariat's approach on currency are therefore misplaced.

6. Secretariat's Approach on the Discount Rate Should Not Be Revised

460. Mexico also criticizes Secretariat's approach to computing the discount rate used to bring Lusad's lost cash flows to a net present value, calculated by reference to Lusad's weighted average cost of capital ("WACC"), as of the valuation date. None of Mexico's criticisms are sustainable. Mexico focuses on two aspects of Secretariat's discount rate calculation: the beta factor and the cost of debt.

461. *First*, Mexico contends that Secretariat's calculation of the beta factor is incorrect. The beta factor is the input to the WACC calculation that calculates the relationship between the expected returns of the investment and the returns of the market. Mexico contends that Secretariat's beta factor is incorrect because Secretariat used market inputs that are US-based as opposed to Mexico-based.[838] However, as Secretariat explains, the public companies that were used for computing the beta were ones selected carefully and thoughtfully for purposes of having a group of companies exposed to sufficiently comparable risks to Lusad.[839] Mexico and Credibility offer no evidence to suggest that Secretariat's selection of companies was flawed in that respect.

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[835] Counter-Memorial, ¶ 538.

[836] Second Expert Report of Howard Rosen (Secretariat Advisors), dated 4 November 2022, ¶¶ 51–57.

[837] Second Expert Report of Howard Rosen (Secretariat Advisors), dated 4 November 2022, ¶ 57.

[838] Counter-Memorial, ¶¶ 537–541.

[839] Second Expert Report of Howard Rosen (Secretariat Advisors), dated 4 November 2022, ¶¶ 181–184.

There is thus no basis for an adjustment to the beta factor in Secretariat's calculation of Lusad's WACC.

462. *Second*, Mexico observes that Secretariat's computed a cost of debt that was considerably lower to the cost of debt that Goldman Sachs used in its valuation.[840] Whereas Goldman Sachs calculated cost of debt by selecting a spread of 5% over a benchmark rate, Secretariat used a spread of 2.5% to remain consistent with the cost of debt actually available to Lusad, by reference to the loan agreement reached in 20 March 2018 with Banco Azteca.[841] Secretariat's calculation of the applicable cost of debt is therefore correct.

463. In sum, none of Secretariat's inputs to its valuation require any adjustment.

D. Mexico's Valuation Based on Investment Costs is Inconsistent with the Full Reparation Standard

464. Instead of the DCF method for computing damages here, Mexico argues that Claimants' damages should be computed by reference to their investment costs. Mexico contends that the "cost method" is appropriate because this case is one "where the investment has not started to generate cash flows."[842] Mexico contends that, in the circumstances, compensating Claimants in connection with the "amount invested is a way of putting the investor in the position they would have been in if the investment had never been made, which is the best possible approximation of Claimants' damages given the circumstances of this case."[843] However, incredibly, Mexico and Credibility do not actually credit all of the investment costs associated with launching the L1bre System and Lusad, but only part of those costs.

465. Mexico's position is manifestly inconsistent with the international law standard that it accepts applies for purposes of computing Claimants' damages. The relevant principle is "full reparation", which requires restoring Claimants to the position they would have in all probability occupied if the State's unlawful conduct had not taken place.[844] The relevant counter-factual scenario is to determine the value of Claimants' investment in the absence of Mexico's unlawful conduct, and not to create a counterfactual scenario placing the "investor in the position they would have been in if the investment had never been made" (as Mexico asserts). If that were the applicable standard under customary international law (or if that were a standard typically seen in treaties like NAFTA, which it is not), then investors would always be limited to the recovery of investment costs because that is the only metric to restore an investor to the position it would have been in if it had never invested in the first place.

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840 Counter-Memorial, ¶¶ 537–541.

841 Second Expert Report of Howard Rosen (Secretariat Advisors), dated 4 November 2022, ¶ 184.

842 Counter-Memorial, ¶ 545.

843 Counter-Memorial, ¶ 545.

844 *See supra*, Section V.A.

466. As discussed above, to place a claimant in the position it would have occupied but for unlawful State conduct causing a total loss to the investment, investment tribunals consider it appropriate to determine the fair market value of the investment. Simply put, the fair market value reflects the price at which a willing buyer and a willing seller would agree to buy and sell the investment. As of the date of Mexico's indefinite suspension of the Concession, Claimants had a turnkey business: it was ready for immediate revenue-producing operations, as discussed at length above. A willing buyer would receive a business that provided a fixed contractual entitlement to a fee in connection with every taxi ride in Mexico City under a government concession with a well-defined costs base. The notion that a willing buyer or a willing seller would decide against valuing the business by reference to the expected future cash flows that would be generated under the Concession, and instead look to the enterprise's historical sunk costs finds no support in economic theory. If it did, Mexico and/or Credibility would have provided that support.

467. Further, if there was any genuine possibility that market actors would have approached the valuation of Lusad and its business by reference to historical costs, Goldman Sachs would have provided that guidance in its valuation exercise. However, the only valuation approach that it considered appropriate was the DCF method.[845] Goldman Sachs also considered, subsidiarily, a comparable companies valuation methodology in connection with its first valuation (but not its second).[846] Leaving aside Goldman Sachs's valuation results, the fact that it selected the DCF method above any other method is a ringing, independent endorsement of the approach taken by Secretariat in its valuation.

468. Moreover, while it is true that (as Mexico notes) investment tribunals have on many occasions awarded sunk costs where fixing compensation in cases involving pre-operational businesses (despite the obvious and sometimes acknowledged disconnect in fixing compensation that way and the standard of full reparation), that conclusion is not an inevitability simply because a business was non-operational. Even Mexico recognizes that in its Counter-Memorial in acknowledging that investment arbitration tribunals can and have awarded damages based on the DCF method for non-operational businesses.[847] It only disputes that the present case is one that justifies the use of the DCF method. However, as a matter of principle, awarding investment costs for damages has been recognized by a number of tribunals as falling short of the standard of full reparation and not a faithful reflection of the fair market value of the relevant investments:

- For instance, in *Crystallex v. Venezuela*, the tribunal observed that "The cost approach method would not reflect the fair market value of the investment, as by definition it only assesses what has been expended into the project rather than what the market value of the investment is at the relevant time."[848]

- The Tribunal in *Hydro v. Albania* found similarly. It stated: "The Tribunal considers that awarding the Claimants their wasted costs would merely return them

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845 **Exhibit C-0077-ENG**, p. 24 (Goldman Sachs financial advisory services proposal, 14 June 2018).

846 **Exhibit C-0077-ENG**, p. 24 (Goldman Sachs financial advisory services proposal, 14 June 2018).

847 Counter-Memorial, ¶¶ 497–502.

848 **Exhibit CL-0031-ENG**, ¶ 882 (*Crystallex*).

> to the position they would have been in if the investments in Albania had never been made, rather than returning them to the position they would have been in had Albania not committed its illegal acts, which is what is called for by the Chorzów standard of full reparation."[849]

469. For completeness, it bears addressing Mexico's computation of the value of only a portion of Claimants' investment costs. Credibility only attempts to compute a figure for the costs associated with hardware and software development, but—as Secretariat explains in their second report—the investment costs comprise much more than just software and hardware development.[850] Moreover, in computing what Mexico says are Claimants' investment costs, Mexico emphasizes that it would require additional documentary support in order to provide a definitive conclusion on the total value of Claimants' investment costs.[851] During the document production phase, Mexico requested substantial documentation regarding the investment costs, including all purchase orders and invoices regarding every single cost that was spent by Claimants and/or Lusad in its pursuit of the L1bre project, bank account statements. The Tribunal denied on the request on the basis that it was "not convinced of the relevance of the documents to the outcome of the case."[852] The Tribunal further observed that "the request is overly broad, and aims to justify the producing Party's alleged failure to meet the burden of proof."[853] Indeed, it is well recognized that audited financial statements are more than adequate for establishing the value of a company's investment costs for damages purposes.[854] Secretariat has reviewed the audited financial statements and confirms that the total investment exceeds USD 90 million.[855]

470. Importantly, however, it remains the case that awarding damages based on the sunk costs associated with the L1bre project would be inconsistent with Mexico's duties to pay compensation in accordance with the principle of full reparation. The Tribunal should therefore disregard Mexico and Credibility's approach to valuation.

E. A Fully Compensatory Award Must Grant Claimants Compound Interest at a Rate Commensurate to Their Opportunity Cost

471. The parties disagree on the applicable interest late that should be applied to the compensation owing to Claimants to bring that amount current between the valuation date and the date of payment. Claimants contend that the interest rate should be no lower than a reasonable

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849 **Exhibit CL-0074-ENG**, ¶ 847 (*Hydro*).

850 Second Expert Report of Howard Rosen (Secretariat Advisors), dated 4 November 2022, ¶¶ 44, 92, 98–104.

851 Counter-Memorial, ¶ 547.

852 Procedural Order No. 4, Annex B, Mexico's Redfern Schedule (Request 28).

853 Procedural Order No. 4, Annex B, Mexico's Redfern Schedule (Request 28).

854 *See, e.g.,* **Exhibit CL-0030-ENG**, ¶¶ 658, 661 (*Bear Creek*) (relying on the claimant's annual financial statements to derive its sunk costs); **Exhibit CL-0187-ENG** ¶¶ 7.27–7.28 (*Copper Mesa*) (relying on the audited consolidated financial statements of the investor to derive sunk costs).

855 Second Expert Report of Howard Rosen (Secretariat Advisors), dated 4 November 2022, ¶¶ 225–229.

commercial rate, which Secretariat computes as 3.96%, while Mexico argues in favor of a much lower risk-free rate based on US Treasury Bonds, which are so low that Mexico could not even bring itself to present the rate figures in its Counter-Memorial. As discussed below, Mexico's position is inconsistent with the standard of full reparation.

472. In the Claim Memorial, Claimants established that they are entitled to be adequately compensated for their loss under the international law principle of full preparation. This principle requires the payment of an appropriate rate of interest in order to meet the standard of compensation required under international law.[856] An award of interest is an integral component of the full reparation principle under international law because, in addition to losing its property and other rights, an investor loses the opportunity to invest funds using the money to which that investor was rightfully entitled.[857] A State's duty to make full reparation arises immediately after its unlawful act causes harm; to the extent that payment is delayed, the claimant loses the opportunity to use the funds for productive means. That loss must be compensated in order to restore the claimant to the position that it would have occupied had the State not acted wrongfully.[858] Claimants also observed that an adequate award of interest must compensate Claimants for the opportunity cost of having been deprived of the funds in question. The focus on the investor's opportunity cost has been endorsed by a number of investment arbitration tribunals.[859]

473. In its first report, Secretariat acknowledges that the full reparation standard "might warrant a higher rate of pre-award interest", including based on Lusad's WACC, as compared to the Treaty standard of a "commercially reasonable rate."[860] Secretariat, however, conservatively computes interest in accordance with the latter "commercial reasonable rate" standard, a rate of 3.96%,[861] which reflects a floor and to which a premium should be added in order to give effect to the principle of full reparation. Secretariat computes interest from the valuation date of 27 October 2018, compounded annually.[862]

474. For its part, Mexico relies on its experts at Credibility for computing a "proper or reasonable interest rate."[863] Credibility considers that, in order to compensate Claimants for the

856 Claim Memorial, ¶¶ 351–59.

857 **Exhibit CL-0057-ENG**, ¶ 8.3.20 (*Vivendi II*) (to give effect to "the *Chorzów* principle . . . it is necessary for any award of damages in this case to bear interest"), ¶ 9.2.1 ("the liability to pay interest is now an accepted legal principle"); **Exhibit CL-0090-ENG**, ¶¶ 396–401 (*Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, dated 6 February 2007) (applying the principle of "full reparation for the injury suffered" to the interest rate, the starting date of interest, and the decision to award compound interest).

858 *See* Claim Memorial, ¶¶ 351–359.

859 **Exhibit CL-0057-ENG**, ¶ 9.2.3 (*Vivendi II*).

860 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 177–181.

861 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 177–181.

862 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 177–184.

863 *See* First Expert Report of Timothy Hart and Rebecca Vélez, dated 13 May 2022, ¶ 188.

time value of money, interest should be set at a "risk-free rate" such as "yields on government bonds or interbank rates."[864] On that basis, Credibility opines that interest should be set based on "US Treasury or LIBOR rates."[865]

475. Neither Mexico nor Credibility make any effort to engage or apply the legal standard of full reparation, which requires Mexico to pay compensation to restore Claimants to the position they would have occupied in all probability had the unlawful acts not occurred. Credibility's "risk free rate" does not give effect to that principle because there is no evidence that Claimants would have bought US Treasury bonds. Rather, Claimants were instead focused on investing in a high growth technology company in a high growth economy. Mexico and Credibility cannot credibly contend that, but for the unlawful acts that are the subject of this arbitration, Claimants would have instead subjected their capital to commercial activities that generate a "risk-free rate."

476. Notably, a failure properly to compensate the Claimants for their opportunity cost would not only undermine the principle of full reparation but would also lead to the unjust enrichment of the Respondent. By not paying compensation to the Claimants for the expropriation, Mexico has had free access to the funds that it wrongfully appropriated. As noted by Dr. F.A. Mann, "during that period [between breach and payment] the wrongdoer has enjoyed the fruits of the money withheld."[866] The inequity of providing the wrongdoer with a free, or virtually free, loan—and the moral hazard that would engender—has been aptly described by Seneschal and Gotanda:

> The second reason for awarding interest is to prevent unjust enrichment of the respondent. Respondents that retain and use the money owed to the claimants during the resolution of the dispute enjoy an unfair benefit. They are receiving the earning capacity of the borrowed money without compensating the claimants for the loss of its use. Pursuant to this rationale, the respondents should be liable for at least "the reasonable cost the [respondent] would have incurred in borrowing the amount in question for the relevant period."[867]

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[864] *See* First Expert Report of Timothy Hart and Rebecca Vélez, dated 13 May 2022, ¶ 191.

[865] *See* First Expert Report of Timothy Hart and Rebecca Vélez, dated 13 May 2022, ¶ 191.

[866] **Exhibit CL-0191-ENG**, p. 585 (F. A. Mann, Compound Interest as an Item of Damage in International Law, 21 U. C. DAVIS L. REV. 577 (1988)).

[867] **Exhibit CL-0183-ENG**, p. 496 (Thierry J. Sénéchal & John Y. Gotanda, Interest as Damages, 47 Colombia Journal of Transnational Law 491 (2009), quoting from *Sempra Metals v. Inland Revenue Commission* [2008] 1 A.C. 561 (H.L.) at ¶ 103 (House of Lords) (Lord Nicholls)); *see also* **Exhibit CL-0164-ENG**, p. 75 (Mark Beeley & Richard E. Walck, Approaches to the Award of Interest by Arbitration Tribunals, 1 Journal of Damages in International Arbitration (2014)) ("Tribunals should consider a variety of indicators of the appropriate rate, rather than simply defaulting to a risk-free or nearly risk-free rate. The alternative uses the claimant has for the monies (whether to reinvest or to pay down debt) are relevant, as are the investment returns and/or borrowing costs of the respondent who has enjoyed the use of the money. Public policy grounds should allow tribunals to reverse the unjust enrichment that a respondent has enjoyed.").

477. As discussed above, in light of the applicable legal standard, the correct analysis in determining what would have in all probability occurred but-for Mexico's unlawful conduct—which includes its failure to make payment to Claimants promptly upon having expropriated their investment—requires considering Claimants' opportunity cost associated with having been deprived of its equity interests in Lusad or the full value of their investment had Mexico lawfully expropriated Claimants' investments by promptly paying full and adequate compensation.

478. The best proxy to evaluate how Claimants would use their funds, for purposes of determining their opportunity cost of having been deprived of their funds, is by reference to Lusad's cost of capital. That rate is the minimum acceptable rate of return that Claimants would expect to make because it would make no economic sense to invest in a project where the returns are not commensurate with the risks to which a project is exposed. By not compensating Claimants since the valuation date, Mexico has also effectively kept Claimants' funds trapped in Lusad. Sénéchal and Gotanda explain this very rationale as follows:

> Thus, a claimant may argue that if a wrongful act had not occurred, it would have used its money earlier and would have invested it. According to the claimant, it would have invested the money in a manner that would earn a certain rate of return. The claim is actually a claim for damages for loss directly resulting from the respondent's conduct. The claimant is arguing that an award of these damages is necessary to reestablish the situation that likely would have existed if the respondent had not acted improperly.[868]

479. Accordingly, there is a strong economic basis for awarding interest commensurate with Claimants' WACC, which Secretariat computes as 10.5%.[869] Credibility contends that "tribunals do not typically award a WACC as a pre-award interest rate."[870] However, there are a number of examples of tribunals doing so:

- In *Vivendi v. Argentina*, the tribunal awarded interest based primarily on the claimant's cost of capital, noting that the proper interest rate should be a "reasonable proxy for the return Claimants could otherwise have earned on the amounts invested and lost in the concession."[871]

- The tribunal in *France Telecom v. Lebanon* awarded pre-award interest at 10%, noting that this rate reflected the reasonable profitability return of the capital of which the claimant was deprived as a result of Lebanon's unlawful actions.[872]

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868 **Exhibit CL-0183-ENG**, pp. 516–517 (Thierry J. Sénéchal and John Y. Gotanda, Interest as Damages, 47 Colombia Journal of Transnational Law 491).

869 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 177–181.

870 *See* First Expert Report of Timothy Hart and Rebecca Vélez, dated 13 May 2022, ¶ 192.

871 **Exhibit CL-0057-ENG**, ¶ 9.2.3 (*Vivendi II*).

872 **Exhibit CL-0154-ENG**, ¶ 209 (*France Telecom Mobile Internationa, SA FTML, SAL v. Lebanese Republic* (UNCITRAL) Award, dated 31 January 2005).

- In the context of a contractual dispute between ConocoPhillips and PDVSA, the tribunal there also observed that the interest rate should "ensure full compensation of a claimant by resorting it to the position it would have enjoyed if the contractual breach . . . had not occurred."[873] The tribunal noted that the claimant invested in the project in the expectation of a rate of return and, therefore, the "interest rate to be applied should measure the opportunity cost of capital."[874] The tribunal then noted that the opportunity cost of capital would amount to the return the claimant would have enjoyed had it had the opportunity to apply the capital to the project, or some similarly productive use.[875] On that basis, the tribunal awarded pre-award interest at a rate corresponding to the relevant project's then-existing cost of equity of 10.55%, determined using the ICAPM method.[876]

- The principle of opportunity cost was also applied in determining the applicable interest rate in *SAUR v. Argentina*. There, the tribunal adopted the rate of return of the project at issue. It identified that rate as the WACC—which the tribunal also applied as the discount rate—describing this as the rate at which the claimant "was prepared to continue its long-term investment."[877]

480. In the above circumstances, Secretariat's interest floor of 3.96% is conservative and it would be appropriate, as Secretariat acknowledges, for a premium to be applied to that in order to give effect to the principle of full reparation. Mexico's interest rate, by contrast, vastly undercompensates Claimants and is not tied to any sound economic theory nor to Claimants' opportunity cost of capital. For completeness, the parties agree that interest is to be compounded on an annual basis.

F. Conclusion on Damages

481. The summary table below shows the damages that Claimants are seeking on their individual claims for compensation (pursuant to NAFTA Article 1116) and the claim that is made on behalf of Lusad (pursuant to NAFTA Article 1117):[878]

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873 **Exhibit CL-0155-ENG**, ¶ 295(ii) (*Phillips Petroleum Company Venezuela Limited and Conocophillips Petrozuata BV v. Petróleos de Venezuela, SA, Corpoguanipa, SA and Pdvsa Petróleo, SA (PDVSA)* (ICC Case No 16848/JRF/CA (C-16849/JRF)) Award, dated 17 September 2012) (hereafter "*Phillips Petroleum v. PDVSA*"*)*.

874 **Exhibit CL-0155-ENG**, ¶ 295(ii) (*Phillips Petroleum v. PDVSA*).

875 **Exhibit CL-0155-ENG**, ¶ 295(ii) (*Phillips Petroleum v. PDVSA*).

876 **Exhibit CL-0155-ENG**, ¶¶ 294–307 (*Phillips Petroleum v. PDVSA*).

877 **Exhibit CL-0146-SPA**, ¶¶ 296–298, 430 (*SAUR International v. Argentine Republic,* ICSID Case No ARB/04/4, Decision on Jurisdiction and Liability, dated 6 June 2012).

878 Second Expert Report of Howard Rosen (Secretariat Advisors), dated 4 November 2022, ¶ 245.

Scenario 3 (USD Millions)	
Scenario 3 - Damages Conclusion (Prior to Pre-Award Interest)	1,747
Plus: Pre-Award Interest	362
Scenario 3 - Damages Conclusion for ESH, L1bre Holding or Lusad (Including Pre-Award Interest)	**2,109**

482. There are three final points that bear mention regarding the computation of damages.

483. *First*, As Claimants have previously acknowledged, their individual claims for compensation (pursuant to NAFTA Article 1116) and the claim that is made on behalf of Lusad (pursuant to NAFTA Article 1117) are overlapping in nature in that they concern the same harm. For the avoidance of doubt, Claimants have undertaken and continue to undertake to ensure that no double recovery will ensure if they are successful in their claims and are awarded damages.

484. *Second*, Claimants explained in the Claim Memorial why any Award should be made net of all applicable Mexican taxes. That is because the Secretariat valuation already incorporates all Mexican taxes.[879] Mexico has not disputed this in its Counter-Memorial, and so that position is agreed.

485. *Third*, in the Claim Memorial, Claimants explained why any Award of damages to Claimants should be based on the premise that Claimants' Concession term would extend to 30 years (which is referred to as "Scenario 3") in the Secretariat Report, which is consistent with Lusad's rights to seek extensions under the terms of the Concession and Mexican law.[880] Mexico has not disputed this in its Counter-Memorial, and so that reflects an agreed position between the parties. Secretariat has computed alternative damages figures for a 20-year Concession term ("Scenario 2") and a 10-year Concession term ("Scenario 1"), which reflect Claimants' alternative claims.[881]

VI. REQUEST FOR RELIEF

Claimants submit the following requests:

Requests:

(i) A declaration that Mexico breached Articles 1102, 1105, and 1110 of the Treaty;

(ii) An order directing Mexico to compensate Claimants for their losses, and those suffered by Lusad, resulting from Mexico's breaches of the Treaty and international law in an award of damages not less than USD $2.109 billion; such compensation to be paid without delay, be effectively

[879] Claim Memorial, ¶¶ 360–361.

[880] Claim Memorial, ¶¶ 344–350.

[881] Second Expert Report of Howard Rosen (Secretariat Advisors), dated 4 November 2022, ¶ 245.

realizable and be freely transferrable, and bear post-award interest at a compound rate sufficient to fully compensate ES Holdings for the loss of the use of this capital as from the date of Mexico's breaches of the Treaty;

(iii) A declaration that the award of damages and interest be made net of all Mexico's taxes, and that Mexico may not deduct taxes in respect of the payment of the award of damages and interest;

(iv) An order that Mexico reimburse Claimants for all costs, expenses, expert fees, and reasonable attorneys' fees incurred or paid by Claimants in connection with this arbitral proceeding, plus interest; and

(v) An order granting any further relief as the Tribunal considers appropriate.

Claimants reserve their right to alter, amend, and/or supplement their claims as necessary and in accordance with the applicable rules during the course of this arbitral proceeding. Claimants reserve the right to request the Tribunal's permission to supplement this Reply Memorial with additional fact witness testimony and accompanying documentary evidence if and when Claimants are provided appropriate access to Mr. Zayas. Given Mexico's obstruction of Claimants' access to Mr. Zayas, Claimants also ask that the Tribunal make negative inferences against Mexico, crediting Mr. Zayas's first declaration in its entirety and disregarding all of Mexico's allegations regarding Mr. Zayas in its Counter-Memorial. Claimants reserve all rights regarding relief they have sought or may seek in connection with access to Mr. Zayas and his ongoing pre-trial detention and the conditions to which he is being subjected at the *Reclusorio Sur*, as well as with their pending motion to compel.

Respectfully submitted by:

Hogan Lovells US LLP
600 Brickell Avenue
Suite 2700
Miami, Florida 33131
United States of America
+1 305.459.6500 (telephone)
+1 305.459.6550 (fax)

[Signed]
By: ______________________
Richard C. Lorenzo
Mark R. Cheskin
Omar Guerrero Rodríguez
Michael G. Jacobson
Catherine E. Bratic
Juliana de Valdenebro Garrido
Nicholas W. Laneville

Freshfields Bruckhaus
Deringer US LLP
601 Lexington Avenue
31st Floor
New York, New York 10022
United States of America
+1 212.277.4000 (telephone)
+1 212.277.4001 (fax)

[Signed]
By: ______________________
Nigel Blackaby KC
Lee Rovinescu
Maria Paz Lestido

Attorneys for Claimants