INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ESPÍRITU SANTO HOLDINGS, LP,

Claimant,

v.

UNITED MEXICAN STATES

Respondent.

(ICSID CASE NO. ARB/20/13)

CLAIMANT'S MEMORIAL

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Claimant Espíritu Santo Holdings, LP ("Claimant" or "ES Holdings") serves 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 submits 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 Claimant for its losses resulting from Mexico's breaches of the Treaty and international law in an award of damages not less than USD $2.802 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 Claimant for all costs, expenses, expert fees, and reasonable attorneys' fees incurred or paid by Claimant in connection with this arbitral proceeding, plus interest; and

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

Claimant also reserves its right to alter, amend, and/or supplement its claims as necessary and in accordance with the applicable rules during the course of this arbitral proceeding.

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I.
INTRODUCTION AND EXECUTIVE SUMMARY

1. In July 2016, Mexico City granted Servicios Digitales Lusad S. de R.L. de C.V. ("Lusad")—Claimant's wholly owned subsidiary—a concession to install a digital taximeter system across all of Mexico City's taxis (the "Concession"). Lusad and its affiliates devoted significant resources to developing the technology prior to applying for the Concession and, once it had been granted, Lusad spent the next 27 months toiling over and refining the software, hardware, and all commercial aspects of the system and the business.[1]

2. Lusad was ready to launch full-scale operations under the mandatory installation period in 2018, having received all required regulatory approvals. All that remained to enable Lusad to enter the revenue-generating phase was for Mexico City to open the reservation platform, for which it was responsible, so as to allow the taxis to schedule an appointment to have Lusad's taximeter system installed.[2]

3. Mexico City never opened the reservation platform and, before long, Claimant's investment succumbed to the whims of a new, incoming administration. In July 2018, Mexico City elected a new Mayor, Claudia Sheinbaum, who had campaigned heavily against Lusad in connection with her opposition to private investment. A few months later, the administration took steps that gave effect to the Mayor-elect's opposition against Lusad, spelling doom for Claimant's investment. On 28 October 2018, the government informed Lusad that its Concession would be indefinitely suspended because of the "political change" that had taken place. At the same time, the government also assured Lusad that the company was not to blame for the suspension, as it had complied with all of its obligations. The motivation for the suspension soon became clear: the government launched its own copy-cat digital taximeter system the following year. The suspension was a purely political decision and deprived Claimant of the entire value of its investment in breach of numerous provisions of NAFTA.[3]

4. Mexico City has the world's largest taxi fleet. In 2016, the City's more than 138,000 registered taxis made in excess of two million trips and transported more than five million passengers every day.[4] The taxi fleet is regulated by Mexico City's Secretariat of Mobility (*Secretaría de Movilidad*, commonly referred to as "Semovi").

5. Although the taxi fleet provided a vital means of transportation within Mexico City, it was run down and in dire need of improvement. The City's taxis were equipped with technologically obsolete and inefficient metering equipment. Many of the taxis' fare-calculation systems were inaccurate and lacked geolocation features; drivers could easily tamper with meters; and rides could not be hailed from smartphone applications or paid for with credit cards. Mexico City's taxi fleet was also unsafe, with public reports of violence against passengers and drivers

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1 *See infra* ¶¶ 77–112.

2 *See infra* ¶¶ 107–112.

3 *See infra* ¶¶ 113–148.

4 *See infra* ¶ 327.

commonplace. The taxi fleet also faced stiff competition from new entrant ride-sharing companies such as Uber and Cabify.[5]

6. Claimant's predecessor company saw an opportunity and began developing a plan to modernize Mexico City's taxis. They would update the taximeters for Mexico City's entire fleet with new technology that would not only contain geolocation, improved fare-calculation, and safety features, but would also improve the rider experience by allowing users to hail a taxi and pay the fare via a smartphone application and placing a paired passenger tablet in the backseat. This taximeter system was branded as the "L1bre System." They brought the idea to Semovi, which immediately took interest in the plan and requested a formal proposal.[6]

7. Semovi awarded the Concession to Lusad through a public process. After thoroughly evaluating the state of the taxi fleet, Mexico City concluded there was indeed a need for improvements to the taxi fleet and that it required private sector investment in order to fulfill that need. It therefore issued a "Declaration of Necessity for the Substitution, Installation, and Maintenance of Taximeters." In the Declaration of Necessity, Semovi recognized that the fare meters in Mexico City's taxis were "technologically obsolete," and expressed the need "to advance toward a public passenger transport system that includes different modes of physical, operational, and technological transport," including a "fare system that guarantees a service that is reliable, efficient, comfortable, safe, results in low emissions, and is of the highest quality, access, and coverage."[7]

8. Semovi also declared through the Declaration of Necessity that, to meet Mexico City's needs, it "required the substitution of the taximeters currently being used with ones that offer the public greater certainty, security and range in functionality, including geolocalization, and permits remote hailing" of a taxi. The Declaration specified that the new taximeter system needed to include: (i) a digital device capable of accurately charging fares authorized by Mexico City; (ii) a software program, registered before the competent authority, that allows the device to function as a taximeter; (iii) a geolocalization feature; (iv) a panic alert system connected to local security authorities; (v) authorizations from the government allowing the taximeter to be used as a proper measuring device; (vi) compliance with calibration and laboratory tests required by law; and (vii) uninterrupted access 365 days a year.[8]

9. Lusad, along with seven other companies, submitted proposals in an attempt to fulfill Mexico City's Declaration of Necessity. Lusad fulfilled all of Mexico City's requirements and was granted the Concession.[9]

10. The Concession conferred valuable rights to Lusad. Lusad was granted exclusive rights to install its taximeter system in all 138,000 of Mexico City's taxis and to launch its smartphone application from which passengers could hail taxis. The Concession had an initial

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5 *See infra* ¶ 34.

6 *See infra* ¶¶ 34–46.

7 *See infra* ¶¶ 70–74.

8 *See id.*

9 *See infra* ¶¶ 74–79.

term of 10 years. However, Lusad was entitled to request two 10-year extensions of the Concession, for a total Concession term of 30 years.[10]

11. Importantly, the Concession, as subsequently amended, provided Lusad with a guaranteed stream of revenue: Lusad was entitled to a fee for every single trip conducted by a taxi that had installed the L1bre System, which—once the mandatory installation had been completed—would be every single one of Mexico City's 138,000 taxis. Lusad also had no risk of non-payment of the fee because the fee would be automatically be charged through a proprietary e-wallet installed in the digital taximeter software. Beyond that, the Concession entitled Lusad to other revenue streams, including lucrative rights to sell advertisements on the passenger tablet.[11]

12. Lusad did everything required under the Concession and spent the following two years designing and refining all aspects of the L1bre System, signing vendor contracts, purchasing hardware, establishing operational readiness, and commercializing all aspects of its business.

- Lusad completed all aspects of software development. Lusad's software development team had developed a smartphone 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 City's 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.

- Lusad 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. Crucially, it stockpiled in Mexico City an inventory of more than 85,000 of these kits (each comprising two tablets and all accessories needed for installation) ready to be installed, with arrangements to acquire the remainder as installations began.

- After proving the concept worked, finalizing its hardware and software designs, and securing its vendor contracts, Lusad obtained government certifications and tested the L1bre System in trial periods in over 1,100 taxis. Mexico City confirmed that the test periods in the taxis had been successful.

- Lusad set up installation centers around Mexico City to perform the physical installation of the system in all of the 138,000 taxis. It hired personnel for these centers, developed manuals for the installation process, and conducted timed trials to ensure the mass installation would be completed as quickly as possible.[12]

13. In April 2018, Semovi issued a crucial notice to bring Lusad into the revenue-producing phase of its operations: a formal notice in the official gazette of Mexico City requiring

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10 *See infra* ¶¶ 80–87.

11 *See id.*

12 *See infra* ¶¶ 88–107.

all taxi drivers to bring their taxis in to one of Lusad's installation centers by no later than March 2019 so that Lusad could install the L1bre System in their vehicles. The government openly celebrated these steps and the upcoming implementation of the L1bre System as a major step forward to improve the safety and efficiency of Mexico City's taxi system. After years of investments, the L1bre System was ready for commercial launch.[13]

14. Claimant's investment and the guaranteed revenue streams under the Concession created substantial value, and that became well-recognized in the market. Claimant's investment began to attract interest from leading private equity investors. Indeed, later that year, and mere weeks before a fateful October 2018 suspension notice from Semovi, Claimant's investment banker, Goldman Sachs, valued the business under the Concession at USD $2.43 billion.[14]

15. In order to finally launch the L1bre System, one additional step was needed from Semovi: under the Concession, Semovi was required to open the online reservation platform to enable taxi drivers to schedule the installation of the L1bre System. Regrettably, Mexico City never took that final step for political reasons, and thus prevented the installation of the L1bre System.[15]

16. This political tension began to mount in the lead-up to the July 2018 mayoral elections in Mexico City. Then-candidate Sheinbaum had begun speaking out against private investment, including with respect to Lusad's Concession. To maintain some order during the election season, in May 2018, Semovi temporarily suspended the installation of the L1bre System. That suspension was designed to be temporary and, in issuing its suspension notice, Semovi reassured Lusad that "this suspension is not attributable to [Lusad] since to the day this writ is issued, the concessionaire has fully complied with its rights and obligations [under the Concession]."[16]

17. In July 2018, Sheinbaum won Mexico City's mayoral elections, and her new administration was scheduled to take office in December 2018. An ardent opponent of Lusad, Sheinbaum had spoken out against the company with baseless and misleading criticisms on many occasions. Her threats soon translated into action against Lusad.[17]

18. On 28 October 2018, Semovi delivered a letter to Lusad announcing the indefinite suspension of the Concession. The letter made it explicit that the suspension was brought about because of a "political change" within Mexico City and, with that change, Semovi yielded to the Mayor-elect's political will. Semovi acknowledged once again, however, that Lusad had at all times complied with all of its obligations under the Concession. The new administration, however, did not care about Lusad's compliance. It simply did not wish for Lusad to benefit from its rights under the Concession and so it brought a *de facto* end to the Concession. All the while, Mexico

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13 *See infra* ¶¶ 108–112.

14 *See infra* ¶¶ 118–121.

15 *See infra* ¶¶ 110–113.

16 *See infra* ¶¶ 113–115.

17 *See infra* ¶¶ 116–117.

City has never proffered a single legitimate reason for the suspension. The only reason on record is that it was to give effect to a "political change."[18]

19. Without any way for Lusad to earn the revenues guaranteed to it under the Concession, Claimant's investment was destroyed in its entirety. Claimant had no way to monetize its investment and, although Mexico City decided not to formally terminate the Concession, it instead left Claimant and the Concession in a perpetual state of limbo. Claimant subsequently asked for a meeting with the government. After all, more than USD $80 million had been sunk into Lusad and the L1bre System at the government's constant encouragement, and Claimant hoped to reverse its misfortunes. However, in January 2019, Claimant was informed that the Government had no intention of ever permitting Lusad to operate the business that it had developed pursuant to the Concession.[19]

20. Soon, the government's motives became clear. The Sheinbaum administration had its own plans for the City's taxi system. The government began to develop, test, and then implement a replacement service and smartphone application, called "Mi Taxi." In doing so, Mexico City appropriated Claimant's ideas, intellectual property, and plans, and proceeded with its own State-owned, inferior version of the L1bre System.[20]

21. In destroying Claimant's investment, Mexico has violated, manifestly, several provisions of NAFTA Chapter 11. Mexico has unlawfully expropriated Claimant's investment in violation of Article 1110. Mexico has treated Claimant and its investment unfairly and inequitably in breach of Article 1105. Mexico has also failed to accord Claimant and its investment the standard of national treatment promised under Article 1102.[21]

22. This is a straightforward case on the merits. Mexico's repeated violations of its Treaty obligations are easily demonstrated. In short, the Mexico City government approved, endorsed, and celebrated Claimant's investment and Lusad's innovative L1bre System every step of the way. The government entered into a legally binding Concession with Lusad. Every required license, permit, and authorization was granted. Then, due to a change of political leadership, the government breached its obligations under the Concession. Specifically, the government was required to ensure that all government-licensed taxis would have the L1bre System installed, and the Concession guaranteed Lusad revenue linked to each taxi ride using the L1bre System. Instead of allowing Claimant to launch, the government refused to even allow taxi drivers to install the L1bre System, much less to facilitate or require the L1bre System's installation.[22]

23. In taking these unlawful actions, the government has destroyed the value of Claimant's investment. The government has done so without due process, explanation, or even the slightest allegation of any wrongdoing by Claimant or Lusad. The only reason that the government has provided to Lusad for these destructive actions—and indeed the ***only*** reason for

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[18] *See infra* ¶¶ 122–126.

[19] *See infra* ¶ 130.

[20] *See infra* ¶¶ 134–148.

[21] *See infra* Section V.

[22] *See id.*

these actions—was a political one. Mexico City has not paid a penny of compensation to Lusad or Claimant for its blatant violation of the Treaty. To make matters worse—and to make the violations of the Treaty even more obvious—the Mexico City government quickly replaced the L1bre System with its own government-owned service, Mi Taxi. Mi Taxi amounts to a usurpation of Claimant's private foreign investment—a "cherry on top" of the government's complete destruction of the L1bre System.[23]

24. Claimant is entitled to compensation commensurate to the fair market value of its investment. Claimant has instructed one of the world's foremost experts on the computation of damages, Howard Rosen of Secretariat Advisors. Rosen has used for his valuation the most reliable evidence as a starting point: the reasonable expectations of the business before the government's unlawful measures. Rosen has independently evaluated, verified and, where appropriate, adjusted the inputs in the valuation to derive his own, independent valuation of the fair market value of Claimant's investment. Rosen's thorough analysis shows that Claimant's investment, but-for Mexico's unlawful conduct, was worth USD $1.8 billion, rising to USD $ 2.8 billion after considering the full compensation, including gross-up for taxes and pre-award interest, due to Claimant.[24]

25. The remaining portions of this Claim Memorial are structured as follows: Section II describes the parties to the dispute. Section III details the factual background. Section IV outlines the basis for Claimant's jurisdiction to bring this dispute and these claims. Section V describes Mexico's several breaches of the Treaty. Section VI demonstrates the damages caused by Mexico's breaches of the Treaty and the resulting compensation that should be paid to Claimant to make it whole. Section VII states the requested relief.

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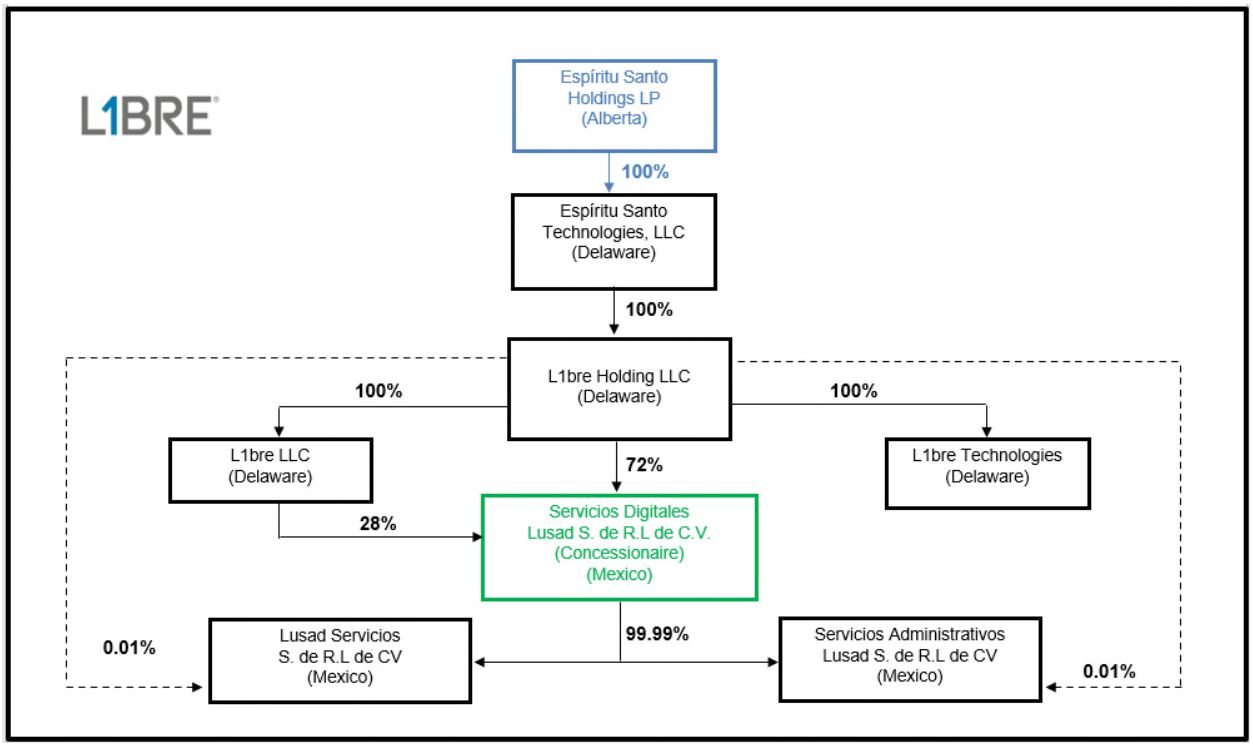
[23] *See infra* ¶¶ 131–148.

[24] *See infra* ¶¶ 287–365.

II.
THE PARTIES

A. CLAIMANT

26. Claimant is ES Holdings, a limited partnership incorporated under the laws of Alberta, Canada.[25] Claimant is the indirect 100% owner of Lusad, which at all times has held the Concession. ES Holdings' investment structure is provided in the chart below, which is the investment structure that has been in place since November 2017.[26]



27. The relevant investments in the L1bre System were carried out first under ES Investments, a Delaware company established in 2013. ES Investments incorporated Lusad in

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

26 *See infra* ¶¶ 102–106 (detailing the investment structure of ES Holdings); *see also* **Exhibit C-0069-SPA** (Lusad's Corporate Structure since November 2017).

2015 and then in 2016 transferred it to Espíritu Santo Technologies LLC ("ES Technologies"), which since 2017 is owned 100% by ES Holdings.[27]

B. RESPONDENT

28. Respondent Mexico is a sovereign State that is party to NAFTA and has consented to arbitration of this dispute.[28]

29. Mexico City (including its agencies such as Semovi) is an organ of Mexico. Mexico is responsible for the actions of organs of the State, including sub-national governments such as municipalities.[29]

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[27] *See* **Exhibit C-0069-SPA** (Lusad's Corporate Structure since November 2017).

[28] *See* **Exhibit CL-0001-ENG**, Article 1122 (North American Free Trade Agreement) ("NAFTA") (Mexico "consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement").

[29] *See* **Exhibit CL-0001-ENG**, Article 105 (NAFTA) ("The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance . . . by state and provincial governments."); **Exhibit CL-0002-ENG**, Article 4 (International Law Commission, Commentaries to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001)); *see also* **Exhibit CL-0040-ENG**, ¶ 75 (*Waste Management Inc. v. Mexico II*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004) ("*Waste Management II*") ("The Respondent [Mexico] did not deny that for the purposes of Chapter 11 of NAFTA the conduct of the City of Acapulco and the State of Guerrero was attributable to it."); **Exhibit CL-0007-ENG**, ¶ 30 (*Glamis Gold, Ltd. v. U.S.A.*, UNCITRAL, Final Award, dated 8 June 2009) ("*Glamis Gold*") ("Therefore, the complained of measures, at both the federal and state levels of government, are considered as acts of State by Respondent").

III.
FACTUAL BACKGROUND

A. THE INCEPTION AND DEVELOPMENT OF THE L1BRE SYSTEM

1. ES Investments Seeks to Develop Mobile Hotspots in Mexico City

30. In late 2014, ES Investments, a company headed by Santiago León Aveleyra ("León") and Eduardo Zayas Dueñas ("Zayas"), began exploring the idea of providing WiFi Internet access in Mexico City through mobile hotspots.[30] León and Zayas were both successful businessmen with deep knowledge of the Mexican market, and had partnered together in the past in other businesses, including a mining business and a mixed-use commercial development in Mexico City. [31]

31. After consulting with various individuals in the industry and conducting a preliminary investigation, ES Investments concluded that the WiFi access would be best implemented through satellite broadcasting by placing mobile hotspots in Mexico City's taxi fleet. Since Mexico City had the largest taxi fleet in the world, ES Investments quickly recognized the enormous potential of this business.[32]

32. In early 2015, ES Investments approached Semovi, headed by Secretary Rufino León Tovar, to discuss their business and investment project.[33] Secretary León Tovar saw the potential of placing mobile hotspots in taxis, but pointed out that, in fact, Mexico City's taxi fleet also needed a complete overhaul of its antiquated taxi-metering systems.[34]

33. ES Investments recognized the enormous potential for this expansion of the proposed services. Online ride-hailing companies like Uber and Cabify were making inroads in the transportation industry in jurisdictions around the world using new technologies. Replacing the mechanical and often tampered-with taximeters with technology that could take advantage of Internet and geolocation services provided by satellite appeared to be a tremendous opportunity. The municipal government of Mexico City and the taxi owners, however, did not have a plan, the

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[30] Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 8; Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 7.

[31] Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 7; Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 5.

[32] Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 8; Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 7.

[33] Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 9 (stating that Secretary Rufino León Tovar has no relation to Santiago León Aveleyra); Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 8.

[34] Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 9; Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 8.

money, or the know-how for such a major technology project.[35] The problem was ripe for an outside investor to solve.

2. ES Investments Explores Solutions to Mexico City's Taximeter Problems

34. The Mexico City taxi fleet had various technological problems in 2015 that had been persisting for many years. Taxis could not be hailed from smartphone applications or paid for with credit cards; nor did they have accurate fare-calculation systems that were fraud-proof or tamper-proof. There were major security issues as well. It was sometimes difficult for passengers hailing a taxi to ensure that the taxi and driver were licensed, as there were also many illegitimate, unregistered taxis. Many if not most of the registered taxis had their meters altered, which undermined public confidence.[36] And there were countless reported tragedies of crimes, disappearances, sexual assaults, and murders occurring in taxis.[37] Under the status quo, it was impossible to ensure the safety of passengers and drivers, the security of the taxi system, and that accurate rates were being charged for each ride. Any potential solution to these myriad problems needed to benefit and not over-burden the paying customer.[38]

35. ES Investments began to develop its concept, using seed money from León and Zayas and from their companies, including Fairfield Gold. ES Investments hired the respected market study firm De la Riva Group to hold focus groups with taxi drivers and to conduct market studies to better understand the taxi industry's needs and how they could be addressed through technological innovation.[39] The market studies confirmed that the problems with the taxi fleet were as big as the fleet itself. This market research also pointed to a solution: updating the taxis

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35 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 10–11; Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 8.

36 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 10; Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 9.

37 **Exhibit C-0070-ENG**, pp. 20–21, 26 (World Bank Group Report on Violence against Women and Girls in Public Transport: Policy Recommendations for Mexico City, dated February 2020) (reporting violence against women in Mexico City including in taxis); **Exhibit C-0086-ENG**, pp. 4, 10, 15 (United States Department of State OSAC Bureau of Diplomatic Security: Mexico 2015 Crime and Safety Report: Mexico City, dated 13 February 2015) (reporting frequent crimes occurring in Mexico City's taxis, particularly those hailed from the street).

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

39 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 15; Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 20.

with a technologically modern, digital taximeter system. The De la Riva Group provided its findings to ES Investments in a lengthy presentation in November 2015.[40]

36. ES Investments determined that a successful new taximeter system should have several important modernized functions and features, including:

- A digital taximeter that accepted credit cards and could not easily be tampered with;
- A geolocation Global Positioning System ("GPS");
- A wireless internet hotspot in the taxi for the use of the passenger;
- Hardware in the form of two tablets, one for the driver and one for the passenger;
- Media and targeted advertisements to provide an additional source of revenue;
- A "panic button" available in the smartphone application and on the tablets, to be used by the driver or the passenger in case of emergency; and
- Seamless functionality with smartphones through a smartphone ride-hailing application, similar to competing ride-sharing applications.[41]

37. Because internet and cellular communications in Mexico City were unreliable and inconsistent, the system would have to be able to work offline when necessary. This meant that the new taxi technology system had to be able to calculate fares, distances, and time without being constantly connected to the internet and geolocation services.[42] This digital taximeter system was an ambitious idea, but it would provide sorely needed security to the passengers and drivers, better service, increased revenue to the government, and would all be implemented at no additional cost to the taxi drivers or the government.[43] ES Investments had formulated an innovative plan to fix Mexico's taxi system.

38. ES Investments named its new digital taximeter system the "L1bre System."[44] The system would include both hardware and software. The hardware would consist of two tablets to be installed in all of Mexico City's taxis. The first tablet would be used as a digital taximeter and would be placed at the front of the taxi, with its driver. The second tablet would be placed in the

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40 **Exhibit C-0041-SPA** (Presentation of De la Riva Group on taxi focus groups, dated 19 November 2015) (summarizing the findings of the market study and the recommendations of the taxi-driver focus groups).

41 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 16–18; Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 10.

42 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 16.

43 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 19.

44 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 20.

back seat and would be used as an electronic interactive media display for the passenger.[45] The software for these tablets would include other features—including GPS, wireless internet, and a panic button. The software operating the tablets would function seamlessly with a smartphone application (or "app"), which would enable on-line hailing and other services in the palm of the hand, as well as with back-end software to integrate these different device platforms.[46] Below is an image depicting the L1bre System:

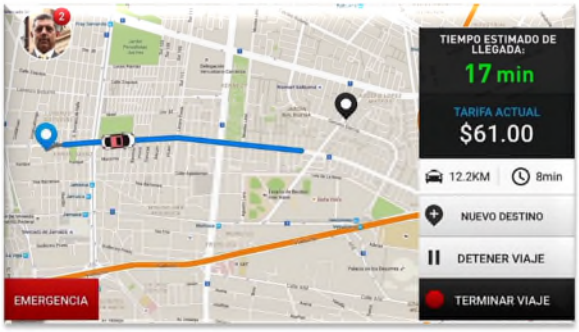
39. ES Investments engaged a marketing firm, Havas Media, to develop a logo for the L1bre trade name, which would be used to brand this new project.[47] Havas Media also prepared a video that would showcase the proposed taximeter technology and highlight the many benefits of

[45] Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 20; **Exhibit C-0003-SPA** (Multiple images concerning Lusad's technology from the L1bre official website) (depicting Lusad's technology) (depicted above); **Exhibit C-0062-SPA** (Video demonstration of platform).

[46] Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 20–21.

[47] Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 24; Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 17.

the system.[48] Below are images from the video demonstrating the L1bre trade name and functionality of the L1bre System:



B. THE PROCESS TO OBTAIN THE CONCESSION

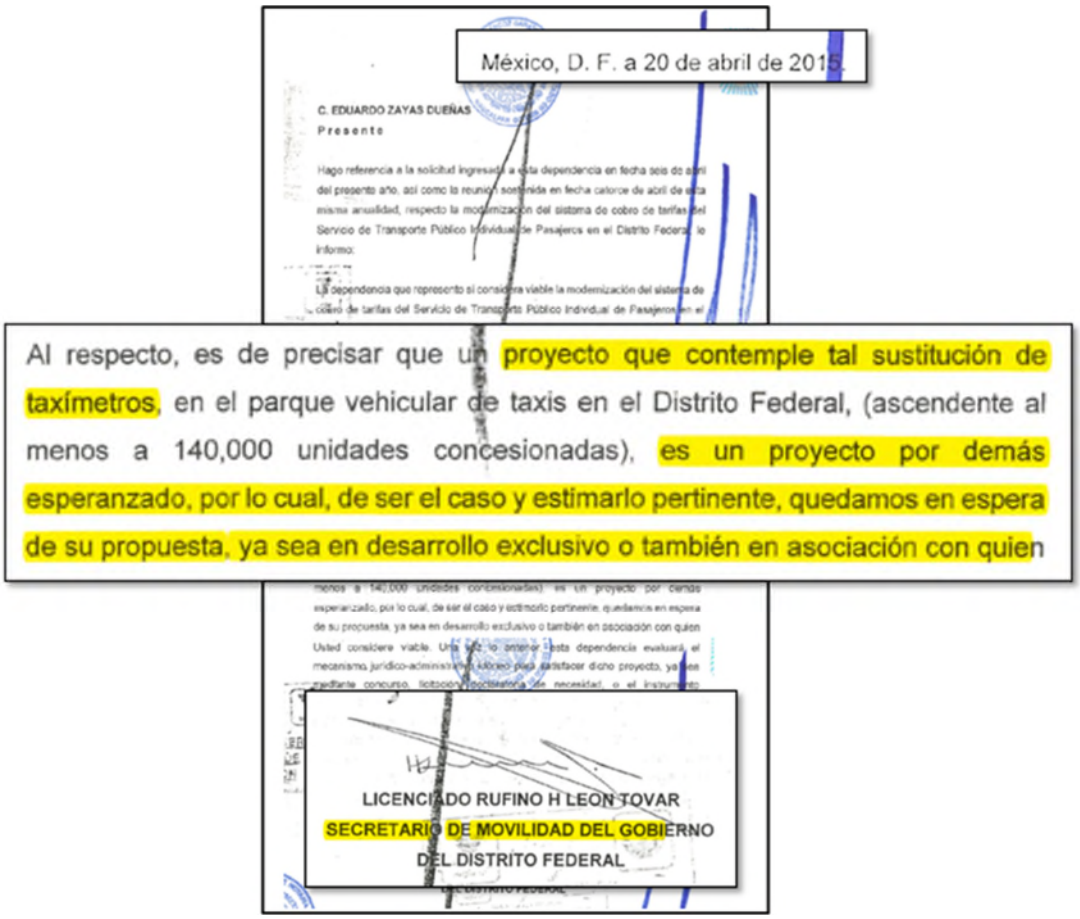
1. The Project Advances with Mexico City's Encouragement

40. On 14 April 2015, Zayas, on behalf of ES Investments, formally presented the digital taximeter idea to Semovi Secretary León Tovar, who remained highly interested in the project. Secretary León Tovar agreed that the project would provide enormous benefit to Mexico City's transport system.[49] Following the meeting, Secretary León Tovar provided ES Investments with a letter confirming that Semovi had a general interest in ES Investments' project and

[48] **Exhibit C-0040-SPA** (Video presentation of L1bre project) (demonstrating the functionality, features, and benefits of the L1bre System).

[49] Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 8.

requesting that a formal proposal be made to Semovi.[50] Below is an image of Semovi's communication:


México, D. F. a 20 de abril de 2015.

C. EDUARDO ZAYAS DUEÑAS
Presente

Hago referencia a la solicitud ingresada a esta dependencia en fecha seis de abril del presente año, así como la reunión sostenida en fecha catorce de abril de esta misma anualidad, respecto la modernización del sistema de cobro de tarifas del Servicio de Transporte Público Individual de Pasajeros en el Distrito Federal, lo informo:

La dependencia que represento sí considera viable la modernización del sistema de cobro de tarifas del Servicio de Transporte Público Individual de Pasajeros en el

Al respecto, es de precisar que un proyecto que contemple tal sustitución de taxímetros, en el parque vehicular de taxis en el Distrito Federal, (ascendente al menos a 140,000 unidades concesionadas), es un proyecto por demás esperanzado, por lo cual, de ser el caso y estimarlo pertinente, quedamos en espera de su propuesta, ya sea en desarrollo exclusivo o también en asociación con quien

Usted considere viable. Una vez lo anterior esta dependencia evaluará el mecanismo jurídico-administrativo idóneo para satisfacer dicho proyecto, ya sea mediante concurso, licitación, excepcionalidad de necesidad, o el instrumento

LICENCIADO RUFINO H LEON TOVAR
SECRETARIO DE MOVILIDAD DEL GOBIERNO
DEL DISTRITO FEDERAL

41. In July 2015, Secretary León Tovar was replaced by a new Secretary of Mobility, Hector Serrano, who had previously been the Government Secretary (*Secretario de Gobierno*).[51] Secretary León Tovar had left incoming Secretary Serrano the letter of interest, and various government officials at Semovi were already familiar with the project. At the end of July 2015, ES Investments was able to meet with Secretary Serrano to present its project to him. Like prior Secretary León Tovar, Secretary Serrano was also supportive of the digital taximeter concept and

[50] **Exhibit C-0038-SPA**, p. 1 (Oficio No. SEMOVI/OSSM/137-2016 from Semovi confirming interest in the Taxis L1bre project, dated 20 April 2015) ("La dependencia que represento **sí considera viable la modernización del sistema de cobro de tarifas** del Servicio de Transporte Público Individual de Pasajeros en el Distrito Federal . . . 'Al respecto, es de precisar que un proyecto que contemple tal sustitución de taxímetros . . . **es un proyecto por demás esperanzado**, por lo cual, de ser el caso y estimarlo pertinente, quedamos en espera de su propuesta'") (emphasis added).

[51] Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 13.

put ES Investments in contact with Semovi's legal director, Rubén García, to explore the potential legal structures to execute the project.[52]

42. In August 2015, ES Investments, Secretary Serrano, and Director García had another meeting to discuss the project.[53] At the time, Mexico City had just issued a decree authorizing Uber and Cabify to operate in Mexico City, provided that they pay 1.5% of each fare to a public fund.[54] The decree angered taxi union leaders, as taxi drivers feared they would lose business to the now-legal ridesharing companies. The entrance of competitors significantly increased the taxi sector's urgency to modernize its fleet. Without changes, the City's official taxi fleet would struggle to compete and be profitable in the face of more modern transportation options. Consequently, Semovi took an even greater interest in ES Investments' L1bre System.[55]

43. Semovi's representatives and ES Investments discussed potential legal structures to execute the project. The Secretary initially proposed a type of temporary permit known as PATR (*Permiso Administrativo Temporal Revocable*).[56] ES Investments conveyed, however, that the temporary permit was not a feasible option because it would not allow ES Investments to attract the necessary financing to support the financial investments required to develop and implement the high-tech upgrades to the taxi fleet. ES Investments explained that it needed a more stable and secure financial structure, such as a formal contract, that would adequately assure and protect investors. The Secretary understood these concerns and asked ES Investments to put together a formal proposal that could also be provided to the cabinet of the Mexico City mayor.[57]

44. In early September 2015, ES Investments made a video presentation to Semovi, using the branding and marketing materials it had commissioned, to showcase the L1bre brand name and visually explain the benefits of the proposed new technology.[58] It conveyed again that the system would provide the drivers with a safe and profitable solution that would also generate revenue for the government without additional cost—a "win-win-win" that would address competition caused by the new platforms Uber and Cabify.[59] Semovi's leaders were convinced of the benefits of the project. Secretary Serrano requested a formal proposal that would include fees,

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52 Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 14.

53 Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 15.

54 **Exhibit C-0039-SPA** (Press article "*Así Regulará el GDF a Uber y Cabify*," dated 15 July 2015) (stating that Mexico City issued a decree allowing Uber and Cabify to operate legally within the City, and discussing the conditions imposed on their operation).

55 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 12; Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 15.

56 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 12; Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 15.

57 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 12; Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 15.

58 **Exhibit C-0040-SPA** (Video presentation of L1bre project) (demonstrating the functionality, features, and benefits of the L1bre System); Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶¶ 17–19.

59 Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶¶ 17–19.

legal structure, necessary capital investment, and mechanics of the system. He further concluded that ES Investments should present the project to the Mayor of Mexico City's cabinet.[60] ES Investments made its presentation a few weeks later, and the cabinet quickly acknowledged the benefits of the L1bre System and gave the green light to the project.[61]

45. Semovi also began to make public its desire to bring the City's taxi fleet into the 21st century. In November 2015, Secretary Serrano gave a public interview in which he expressed his desire to create an "Uber" for taxi drivers to help the City's taxi fleet compete with Uber and Cabify—without additional cost to the drivers.[62]

46. At this point the project was gaining significant traction. The next steps were to formalize the investment structure, continue developing the project utilizing additional investments, design and program the technology, and ultimately prepare to install the system in Mexico City's taxis.[63]

2. ES Investments Retains Technical Advisors and Formalize an Investment Structure

47. In the fall of 2015, ES Investments hired a technology and software company called NullData to serve as technical advisor and to develop certain aspects of the L1bre System, including the software for the digital taximeter and the L1bre smartphone application.[64] The digital taximeter was a critical component because, unlike the existing taximeters being used by Mexico City, it would be fraud-proof and tamper-proof. It would also accurately calculate the distance traveled and the fare. Any measuring device would have to be approved by Mexico City. ES Investments, through NullData, began working on a beta version of the software for the new taximeter and for the L1bre application, which would be used to attract additional investment funding. [65]

48. ES Investments also sought partners to invest in the project and add expertise in the software development area. Toward the end of 2015, ES Investments was introduced to a company named Accendo Holdings LLC ("Accendo"), a Delaware limited liability company that operated as a "family office" for Moisés Cosío, the beneficiary of a Mexican banking and real estate fortune.[66] Accendo had significant software experience and a strong technology team, including

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60 Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 19.

61 Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 19.

62 **Exhibit C-0067-SPA** (Press article "*Le crea GDF su 'Uber' a taxistas*," dated 23 November 2015) (Semovi Secretary Serrano stating that we wished to update Mexico City's taxi fleet with features akin to those employed by Uber and Cabify); Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 29.

63 *See infra* Sections III.B.2–13.

64 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 23; Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 21.

65 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 23; Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 21.

66 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 25.

Peter Corsell and Richard Oh, who had a long track record of developing other software products, including a clean technology company, financial planning software, and social networking communities.[67]

49. ES Investments began to formalize an investment structure that was conducive to outside investment.[68] On 15 October 2015, ES Investments incorporated a subsidiary operating company in Mexico named Servicios Digitales Lusad S.A.P.I.,[69] which was later changed to a limited liability company on 1 March 2016, becoming Servicios Digitales Lusad S. de R.L. de C.V. ("Lusad").[70] The purpose of creating Lusad was to establish a Mexican operating company to manage local aspects of the project, interface with the Mexico City government, and ultimately to hold the concession. ES Investments also incorporated L1bre LLC on 22 December 2015[71] and L1bre Holding LLC on 7 January 2016,[72] both Delaware limited liability companies. L1bre Holding LLC owned 100% of L1bre LLC. L1bre Holding also owned 99.99% of Lusad, with L1bre LLC owning the remaining 0.01%.[73] At first, the investment in Mexico was held through ES Investments LLC, which owned 100% of L1bre Holding LLC; later through ES Technologies, a Delaware limited liability company established in August 2016,[74] and ultimately through ES Holdings, the Claimant in this arbitration.[75]

50. ES Investments formalized its business arrangement with Accendo on 7 January 2016. Accendo agreed to inject approximately USD $40,000,000 of working capital into the

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67 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 25; **Exhibit C-0087-ENG** (Press Article "*What's all the Hubub?*" dated 1 March 2015) (discussing the social network community created by Peter Corsell and his team).

68 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 27.

69 **Exhibit C-0002-SPA** (Deed of Incorporation of Servicios Digitales Lusad, dated 15 October 2015).

70 **Exhibit C-0042-SPA** (Certificate of Transformation of Servicios Digitales Lusad S. de R.L. de C.V., dated 1 March 2016).

71 **Exhibit C-0088-ENG** (Certificate of Formation of L1bre LLC, dated 22 December 2015) (stating that L1bre LLC was incorporated on 22 December 2015).

72 **Exhibit C-0089-ENG** (Certificate of Formation of L1bre Holding LLC, dated 7 January 2016) (stating that L1bre Holding LLC was incorporated on 7 January 2016).

73 **Exhibit C-0090-ENG** (Corporate Structure of the L1bre Business as of January 2016).

74 **Exhibit C-0066-ENG**, p. 1 (Amended and Restated Limited Liability Company Agreement of L1bre Holding LLC, dated 2 August 2016) (confirming ES Technologies' ownership interest in L1bre Holding LLC); Exhibit C-0026 (Certificate of Formation of ES Technologies. dated 1 August 2016).

75 The claimant in this arbitration, ES Holdings, was incorporated on 20 November 2017 and became the indirect parent company to Lusad soon thereafter. *See* **Exhibit C-0001-ENG** (Certificate of Good Standing of ES Holdings, dated 21 May 2019) (evidencing that ES Holdings was incorporated on 20 November 2017); **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).

business to further develop the L1bre System. The newly formed ES Technologies owned half of the units in L1bre Holding LLC (and thus 50% of Lusad), with Accendo holding the other half.[76]

51. The new investors' funding and expertise would be used to develop the software technology and the related hardware for the L1bre System and to recruit and build a personnel, development, and management team. Lusad retained an executive-search firm, Egon Zehnder, that identified and recruited a strong leadership team, including senior managers formerly from companies like Uber and Apple.[77] In total, over the following year, the team grew to approximately 37 full-time employees in addition to over 89 software engineers.[78]

3. The Project Continues to Make Progress with the Mexico City Government

52. By October 2015, ES Investments had met repeatedly with Semovi and obtained confirmation from the Mayor's cabinet of the government's desire to pursue this project.[79] ES Investments was invited to participate in a series of additional working meetings throughout November and December 2015. The purpose of these meetings was to determine the legal framework under which the project would be implemented. During these meetings, Mexico City proposed that ES Investments perform the project via a services contract. The parties' legal teams held multiple meetings to further the terms and the other legal aspects of the project.[80]

53. Toward the end of 2015, Mexico City's government was undergoing structural changes that were to take effect at the beginning of 2016. Under this new governmental structure, the City's various departments, including Semovi, would be empowered to grant concessions pursuant to a process known as the Declaration of Necessity (*Declaratoria de Necesidad*).[81] Semovi's legal team explained that this new process would begin with a formal request for a concession by a private company to provide a public service, demonstrating the public need for that service. Semovi would then evaluate the public need for the service and issue a Declaration of Necessity, which would open a public bidding process for any interested third party to present bids. Semovi would award the concession to the bid it deemed most appropriate. Under this new

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76 **Exhibit C-0066-ENG**, p. 1 (Amended and Restated Limited Liability Company Agreement of L1bre Holding LLC, dated 2 August 2016) ("[W]ith an effective date of August 2, 2016, ES Investments assigned 38.4 out of 79.5 united of its membership interests in the Company to ESPIRITU SANTO TECHNOLOGIES LLC . . . and 18.6 out of 79.5 units of its membership interests in the Company to ACCENDO HOLDINGS LLC, a limited liability company organized under the laws of the State of Delaware").

77 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 48.

78 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 48.

79 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 28.

80 Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 22.

81 Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 23.

process, Lusad would be able to file a request for a concession to provide a new metering system to the Mexico City taxi fleet.[82]

54. Semovi's recommendation for this process was based on the Patrimonial Regime and Public Service Law of Mexico City ("LRPSP" for its name in Spanish). Article 85 Bis of the LRPSP provides that a private entity may request a concession when there is a public service that can be provided by a private party at no cost to the government.[83] In order to request a concession, the private party must file a draft contract with the potential terms of the concession, together with a feasibility and profitability study justifying the need for the private entity to cover the public service.[84]

55. ES Investments believed that Lusad was in the best position to present a robust request and proposal, given the substantial work it had already undertaken to develop the project, as well as several high-level government officials' positive expressions of interest in ES Investments' proposal. Further, since the planned concession would be awarded for a set period of time and be revocable only under limited conditions, it would protect the significant investment already made and to be made in developing the L1bre System, and would allow Lusad to obtain additional investors. Finally, the competitive bidding stage ensured the transparency and fairness of the process. Convinced that its proposal would include all of the aspects necessary to win the concession, ES Investments agreed to initiate the Declaration of Necessity process.[85]

56. Semovi continued working with Lusad regarding the possible terms of a draft concession contract that would ultimately be awarded to the party presenting the best proposal.[86]

57. By early 2016, the project was well advanced. Lusad had commissioned market studies and focus groups to ensure the new taximeter system would be beneficial to the City's taxi drivers. It had developed a detailed plan for the hardware and software needed to modernize Mexico City's taxi fleet. Lusad had created a brand in L1bre that could be the public face of the new technology and services to the public. Lusad had hired a technology and software company to assist with the development of the beta version of the L1bre app. It had formalized a corporate structure. It had partnered with an investor that brought financial and technical resources and know-how. And it had agreed with Mexico City on a planned legal framework that was mutually

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82 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 32; Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 23.

83 **Exhibit CL-0075-ENG**, Article 85 Bis (Ley de Régimen Patrimonial y Servicio Público del Distrito Federal) ("Artículo 85 Bis. Las personas físicas o morales interesadas en obtener una concesión conforme a las fracciones II y III del artículo 77 de esta ley, podrán presentar una propuesta de proyecto de concesión, acompañando a la propuesta un estudio que contenga al menos los siguientes elementos: (i) Viabilidad, finalidad y justificación del objeto de la concesión; (ii) Análisis de la demanda de uso e incidencia económica y social de la actividad o bien de que se trate en su área de influencia; (iii) Análisis de la rentabilidad de la actividad o bien objeto de la concesión; (iv) Proyección económica de la inversión a realizarse, sistema de financiamiento de la misma y su recuperación.").

84 *Id.*

85 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 33–34; Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 24.

86 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 34.

beneficial.[87] The next steps to prepare the Request for Concession included (i) preparing a feasibility study, (ii) obtaining a certification from Mexico City certifying that the proposed digital taximeter was a lawful metering device, and (iii) preparing a more complete draft concession contract.[88]

4. Lusad Obtains Critical Certifications and Feasibility Studies

58. Before requesting the concession, Lusad achieved a critical milestone that distinguished its proposal from any possible competition. It completed a prototype of its hardware and software and had the finished digital taximeter certified by the government as an accurate measurement device.[89] Fares in Mexico City were notoriously inaccurate due to tampering, and the government could do little to halt this practice or ensure the accuracy of fares in the City's taxis.[90] Even though Uber and Cabify calculated fares electronically, neither had a taximeter that was certified by the government or any independent laboratory; there was no guarantee for drivers and passengers that the fares charged were accurate.[91]

59. Lusad, however, took its prototype digital taximeter and presented an application before Mexico City's Secretary of Economy (*Secretaría de Economía*), seeking approval for and a certification that it was accurate and complied with all applicable laws and regulations.[92]

60. On 18 April 2016, Mexico City's Secretary of Economy approved the prototype digital taximeter, authorizing Lusad to "commercialize the taximeters for installation, with the right to exploit commercially, and to use the taximeter to determine the fares to be charged by the passenger public transportation units operating as taxis."[93] Obtaining Mexico City's approval for

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87 *See supra* Sections III.B.1–3. (describing the advancements made regarding the development of the project).

88 *See infra* Section III.B.4.

89 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 23; **Exhibit C-0065-SPA** (L1bre software technical specifications from NullData, dated 11 January 2016).

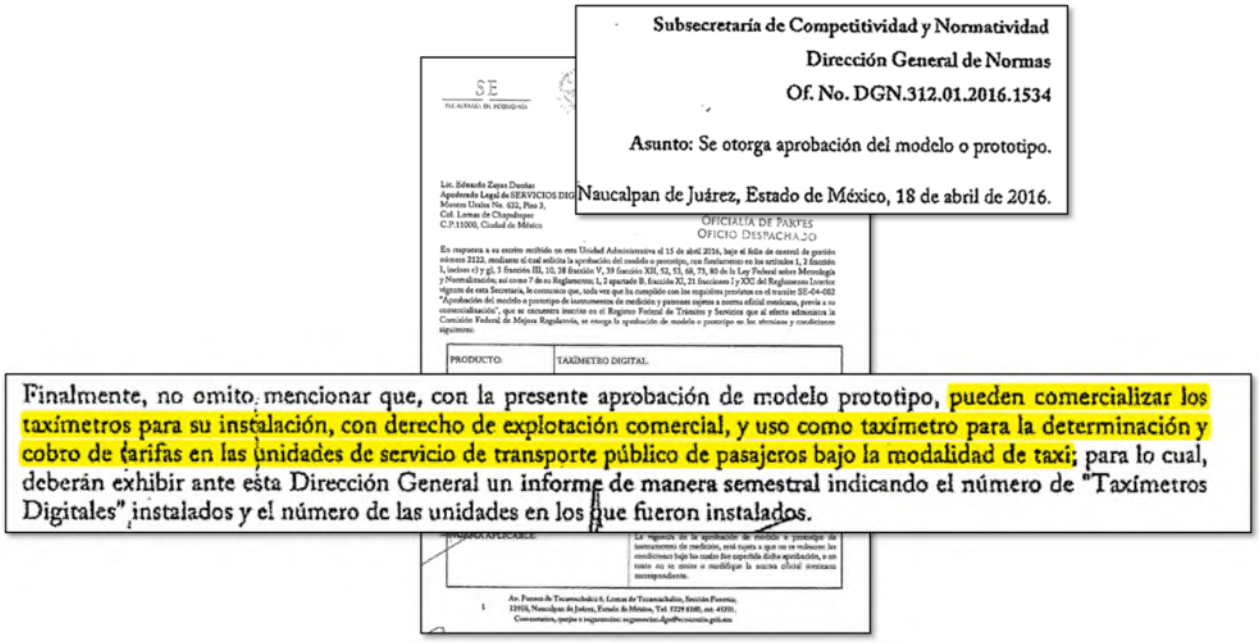
90 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 10.

91 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 36; *see also* **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) (showing that Lusad was the sole company with digital taximeters registered with the Secretary of the Economy).

92 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 36.

93 **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) (certifying Lusad's digital taximeter as a lawful measuring device and authorizing its commercial use in Mexico City's taxis).

its taximeter was a significant step forward and likely set Lusad's proposal apart from any potential competitor's. Below is an image of the certification issued by the Secretary of Economy:


Subsecretaría de Competitividad y Normatividad
Dirección General de Normas
Of. No. DGN.312.01.2016.1534
Asunto: Se otorga aprobación del modelo o prototipo.
Naucalpan de Juárez, Estado de México, 18 de abril de 2016.
SE
OFICIALÍA DE PARTES
OFICIO DESPACHADO
PRODUCTO: TAXÍMETRO DIGITAL
Finalmente, no omito mencionar que, con la presente aprobación de modelo prototipo, pueden comercializar los taxímetros para su instalación, con derecho de explotación comercial, y uso como taxímetro para la determinación y cobro de tarifas en las unidades de servicio de transporte público de pasajeros bajo la modalidad de taxi; para lo cual, deberán exhibir ante esta Dirección General un informe de manera semestral indicando el número de "Taxímetros Digitales" instalados y el número de las unidades en los que fueron instalados.

61. Lusad also obtained certifications from two independent laboratories, Laboratorio Valentín V. Rivero and Servicios Profesionales Instrumentación, S.A. de C.V., confirming that Lusad's digital taximeter successfully completed all calibration tests and was an accurate and reliable measuring device.[94] No other digital taximeter had been certified by the Secretary of the Economy or by independent Mexican laboratories at that time.[95]

62. Later that summer, on 1 June 2016, Semovi granted Lusad a certification formally registering Lusad as a taxi-hailing application provider.[96]

5. Lusad Applies for a Concession

63. On 22 April 2016, Lusad formally presented its Request for Concession to Semovi, seeking a concession to replace the taximeters in Mexico City's taxi fleet with a safer, fraud-proof

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94 **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).

95 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 37; Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 36.

96 **Exhibit C-0012-SPA** (Certificate of Registration as taxi-hailing application provider, No. 6D6C61F32327F227C-1651180691531691, dated 1 June 2016) ("SE HACE Constar que la empresa [Lusad] . . . **ha cumplido con los requisitos** para poder hacer uso de las plataformas de Control de Aplicaciones de Movilidad . . .") (emphasis added).

system, and to develop a smartphone application that would allow users to remotely request a taxi.[97]

64. Lusad's Request noted how ride-sharing applications—which were increasingly used within Mexico City and allowed passengers to remotely request a taxi, track the driver and the route using GPS, and offered various security features—placed the City's taxi drivers at a disadvantage. As the Request explained, the L1bre System would solve this problem, while at the same time increasing revenue for both taxi drivers and the City.[98]

65. The Request attached Lusad's certifications of its digital taximeter,[99] and Semovi later required that any company bidding for the concession meet the same stringent standards that Lusad had already complied with by employing a digital taximeter certified by the Secretary of the Economy.[100]

66. As required by law, Lusad's Request also included a preliminary profitability study showing that its system could be profitable and generate revenues for the Government, as well as a "feasibility, finality, and justification" study that identified the issues facing Mexico City's taxi system and demonstrated how the L1bre System could address them.[101] The study explained in

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97 **Exhibit C-0004-SPA** (Request for Concession to Semovi, dated 22 April 2016); Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 38; Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 30.

98 **Exhibit C-0004-SPA**, pp. 2, 4 (Request for Concession to Semovi, dated 22 April 2016) ("Derivado de la implementación y puesta en operación de estas aplicaciones en el sector privado, se estima resulta necesario y del mayor interés de esa Secretaría el dotar el parque vehicular de taxis que operan en la Ciudad de México al amparo de una concesión, de dichas aplicaciones o 'apps' para que, tanto los operadores del servicio público de taxis en la Ciudad de México, como sus usuarios, puedan tener acceso, entre otros, a un sistema que les permita medir y cobrar, en forma correcta y transparente, las distancias recorridas por cada unidad de taxi, y las tarifas incurridas en dichos recorridos, así como a los beneficios de geolocalización, optimización de recursos y sustentabilidad, puesto que la utilización de estas tecnologías, entre otros, transparenta y formaliza el cobro de las tarifas y reduce el consume de combustible de los taxis, al suprimir en gran medida la búsqueda de pasajeros mediante el recorrido de grandes distancias y facilitar al usuario la obtención de un servicio en menor tiempo, además de garantizar certeza, eficacia y seguridad en los traslados de pasajeros, en aras de la transparencia, seguridad y mejora de dicho servicio público. . . . [P]or medio de la presente solicitud . . . se solicita a esa Secretaría de Movilidad lleve a cabo, en favor del promovente, el otorgamiento de una concesión administrativa para: (i) la sustitución, instalación y mantenimiento de Taxímetros Digitales, como taxímetros de cada una de las unidades que integran el parque vehicular del servicio de transporte de pasajeros público individual taxi de la Ciudad de México, los cuales contarán con geolocalización satelital, y (ii) el diseño, operación y explotación de la aplicación para l[a] contratación remota de dichos taxis.").

99 **Exhibit C-0004-SPA** (Request for Concession to Semovi, dated 22 April 2016) (referring to attached certifications of Lusad's taximeter).

100 **Exhibit C-0005-SPA**, pp. 13–15 (Necessity Declaration issued by Semovi, dated 30 May 2016).

101 **Exhibit C-0043-SPA** (Feasibility, finality, and justification study, attached to Lusad's Request for Concession., dated 22 April 2016) (explaining how the L1bre System would improve the taxi transport sector in Mexico City and justifying the need for the City to award a concession); **Exhibit C-0044-SPA** (Profitability study, attached to Lusad's Request for Concession) (describing the initial investment required and including profitability projections for the first 10 years of the project).

detail the advantages offered by the L1bre System.[102] It also described step-by-step how the smartphone ride-hailing application functioned for both drivers and passengers and integrated with the features of the digital taximeter.[103] Finally, the study analyzed the taxi transport sector, its users (both passengers and taxi drivers), the demand for the sector's services, the various laws and regulations governing the sector, and how the L1bre System would improve profitability for taxi drivers without passing the cost onto the City or passengers.[104]

67. Semovi evaluated Lusad's Request and determined that the technology proposed by Lusad was appropriate and necessary to modernize Mexico City's taxi fleet. Consequently, Semovi presented 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 Sustentable*) (the "Evaluation Committee") a draft of the Declaration of Necessity that would be published in Mexico City's official gazette.[105]

68. At a meeting held on 25 May 2016, in which Mexico City's Secretary of Mobility, Secretary of Housing and Urban Development (*Secretario de Desarollo Urbano y Vivienda*), Secretary of the Environment (*Secretario de Medio Ambiente*), and Secretary of Public Works (*Secretario de Obras y Servicios*) all participated, the Evaluation Committee unanimously

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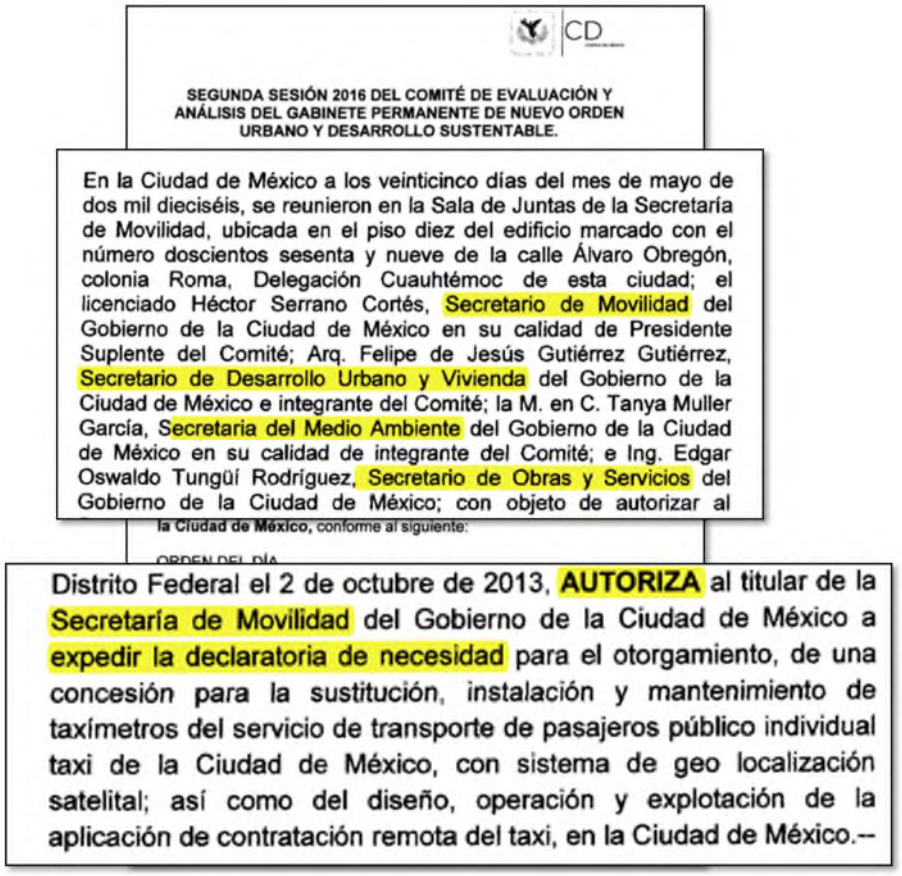
102 **Exhibit C-0043-SPA**, at pp. 7–8, 35–36 (Feasibility, finality, and justification study, attached to Lusad's Request for Concession., dated 22 April 2016) (describing the features and benefits of the proposed digital taximeters).

103 *Id.*, pp. 9–24 (describing the technical specifications of the L1bre System's hardware and software and explaining how the ride-hailing application and digital taximeter functioned).

104 *Id.*, pp. 37–50 (analyzing the taxi-transport sector in Mexico City).

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

approved the publication of the Declaration of Necessity in the official gazette.[106] Below is an image of the minutes of the meeting approving the publication of the Declaration of Necessity:[107]



SEGUNDA SESIÓN 2016 DEL COMITÉ DE EVALUACIÓN Y ANÁLISIS DEL GABINETE PERMANENTE DE NUEVO ORDEN URBANO Y DESARROLLO SUSTENTABLE.

En la Ciudad de México a los veinticinco días del mes de mayo de dos mil dieciséis, se reunieron en la Sala de Juntas de la Secretaría de Movilidad, ubicada en el piso diez del edificio marcado con el número doscientos sesenta y nueve de la calle Álvaro Obregón, colonia Roma, Delegación Cuauhtémoc de esta ciudad; el licenciado Héctor Serrano Cortés, Secretario de Movilidad del Gobierno de la Ciudad de México en su calidad de Presidente Suplente del Comité; Arq. Felipe de Jesús Gutiérrez Gutiérrez, Secretario de Desarrollo Urbano y Vivienda del Gobierno de la Ciudad de México e integrante del Comité; la M. en C. Tanya Muller García, Secretaria del Medio Ambiente del Gobierno de la Ciudad de México en su calidad de integrante del Comité; e Ing. Edgar Oswaldo Tungüí Rodríguez, Secretario de Obras y Servicios del Gobierno de la Ciudad de México; con objeto de autorizar al

la Ciudad de México, conforme al siguiente:

ORDEN DEL DÍA

Distrito Federal el 2 de octubre de 2013, **AUTORIZA** al titular de la Secretaría de Movilidad del Gobierno de la Ciudad de México a expedir la declaratoria de necesidad para el otorgamiento, de una 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 geo localización satelital; así como del diseño, operación y explotación de la aplicación de contratación remota del taxi, en la Ciudad de México.--

69. A Declaration of Necessity is a legally binding and official document published by Mexico City's government that states under force of law that the government requires private assistance in the form of, *e.g.*, investment, services, and technology, to implement a public goal. Specifically, Article 77 of the LRPSP provides that Mexico City's Mayor (*Jefe de Gobierno*) may issue a Declaration of Necessity identifying the public service that the City requires.[108] The same article provides that based on the Declaration of Necessity, the Mayor—or his or her delegate—may open a public bid process for private parties to present offers to provide the required public

106 **Exhibit C-0046-SPA**, pp. 1, 3 (Minutes of the session of the Evaluation Committee, authorizing the issuance of the Declaration of Necessity, dated 25 May 2016); *see also* Witness Statement of Eduardo Zayas Dueñas, dated 13 September 2021, ¶ 32.

107 **Exhibit C-0046-SPA**, pp. 1, 3 (Minutes of the session of the Evaluation Committee, authorizing the issuance of the Declaration of Necessity, dated 25 May 2016) (depicted above).

108 **Exhibit CL-0075-ENG**, Article 77 (Ley de Régimen Patrimonial y Servicio Público del Distrito Federal) ("Artículo 77. El Jefe de Gobierno del Distrito Federal expedirá la declaratoria de necesidad correspondiente previamente al otorgamiento de una concesión, en tal supuesto deberá publicarse una convocatoria de licitación pública en la Gaceta Oficial del Distrito Federal y en dos periódicos de los de mayor circulación en el Distrito Federal.").

service, or may award the concession directly when the concession relates to a service that a private party can provide at no cost to the government.[109]

6. Mexico City Issues a Declaration of Necessity

70. In this case, the Declaration of Necessity stated that digital taximeters and other associated technology would enhance, improve, and modernize the public service of taxi rides; expressed under Mexican law that the government required private sector investment and technology to provide such a service; and invited all qualified applicants to make proposals to meet Mexico City's needs.[110] The Declaration of Necessity for the Substitution, Installation, and Maintenance of Taximeters for Individual Public Transport Service (Taxi) of Mexico City was formally published in Official Gazette No. 82 on 30 May 2016, along with an annex listing the minimum technical specifications that any proposal needed to satisfy.[111] This official act by the Mexico City government was an acknowledgement that the government required private investment to meet the needs addressed in the Declaration of Necessity and that the party awarded the concession would have the legal right to benefits specified therein.[112]

71. In the Declaration of Necessity, Semovi recognized that the equipment of Mexico City's taxis was "technologically obsolete," and expressed the need "to advance toward a public passenger transport system that includes different modes of physical, operational, and technological transport," including a "fare system that guarantees a service that is reliable, efficient, comfortable, safe, results in low emissions, and is of the highest quality, access, and coverage."[113]

72. Semovi declared through the Declaration of Necessity that, to meet Mexico City's needs, it "required the substitution of the taximeters currently being used with one that offers the

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109 *See id.*

110 **Exhibit C-94-SPA** (Oficio No. DGJR-0997-2016 from Semovi to the General Director of Legal and Legislative Affairs of the Office of Judicial and Legal Affairs of Mexico City, dated 27 May 2016) (sending the Declaration of Necessity for publication in Mexico City's official gazette) ("[L]e remito [la] 'Declaratoria de necesidad . . .' a efecto de publicar esta Declaratoria y estudios técnicos que se acompañan en la Gaceta official de la Ciudad de México . . . .").

111 **Exhibit C-0005-SPA** (Necessity Declaration issued by Semovi, dated 30 May 2016) (including the required technical specifications required for the project).

112 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 39.

113 **Exhibit C-0005-SPA**, pp. 13–15 (Necessity Declaration issued by Semovi, dated 30 May 2016) ("Que **la prestación de los servicios de transporte de pasajeros** y de carga en la Ciudad de México en todas sus modalidades **es de orden público e interés general** y es responsabilidad de la Administración Pública de la Ciudad de México, prestar dichos servicios públicos, a fin de satisfacer las necesidades de la población en la Ciudad de México. . . . Que las innovaciones tecnológicas en el ámbito de la movilidad son soluciones apoyadas en las tecnologías de punta, para almacenar, procesar y distribuir información que permita contar con nuevos sistemas, aplicaciones y servicios que contribuyan a una gestión eficiente, tendiente a la automatización y eliminación del error subjetivo, así como a la reducción de las externalidades negativas de los desplazamientos . . . . Se requiere avanzar hacia un sistema de transporte de pasajeros público individual que articule los diferentes modos de transporte física, operativa y tecnológicamente, así como desde el punto de vista de la información y comunicación hacia los usuarios, con un esquema tarifario que garantice la prestación de un servicio confiable,

public greater certainty, security and range in functionality, including geolocalization, and permits remote hailing" a taxi. The Declaration specified that the new taximeter system needed to include the following requirements, among others: (i) a digital device capable of accurately charging fares authorized by Mexico City; (ii) a software program, registered before the competent authority, that allows the device to function as a taximeter; (iii) a geolocalization feature; (iv) a panic alert system connected to local security authorities; (v) authorizations from the government allowing the taximeter to be used as a proper measuring device; (vi) compliance with calibration and laboratory tests required by law; and (vii) uninterrupted access 365 days a year.[114]

73. The Declaration of Necessity was a public process to test whether Lusad and its proposed L1bre System were indeed the best option to fulfill Mexico City's goals to modernize its taxi fleet.[115] The Declaration of Necessity informed the public that Lusad had submitted a Request for Concession, along with a draft concession contract, in compliance with Article 85 Bis of the LRPSP.[116] The Declaration of Necessity expressly invited interested third parties to present offers

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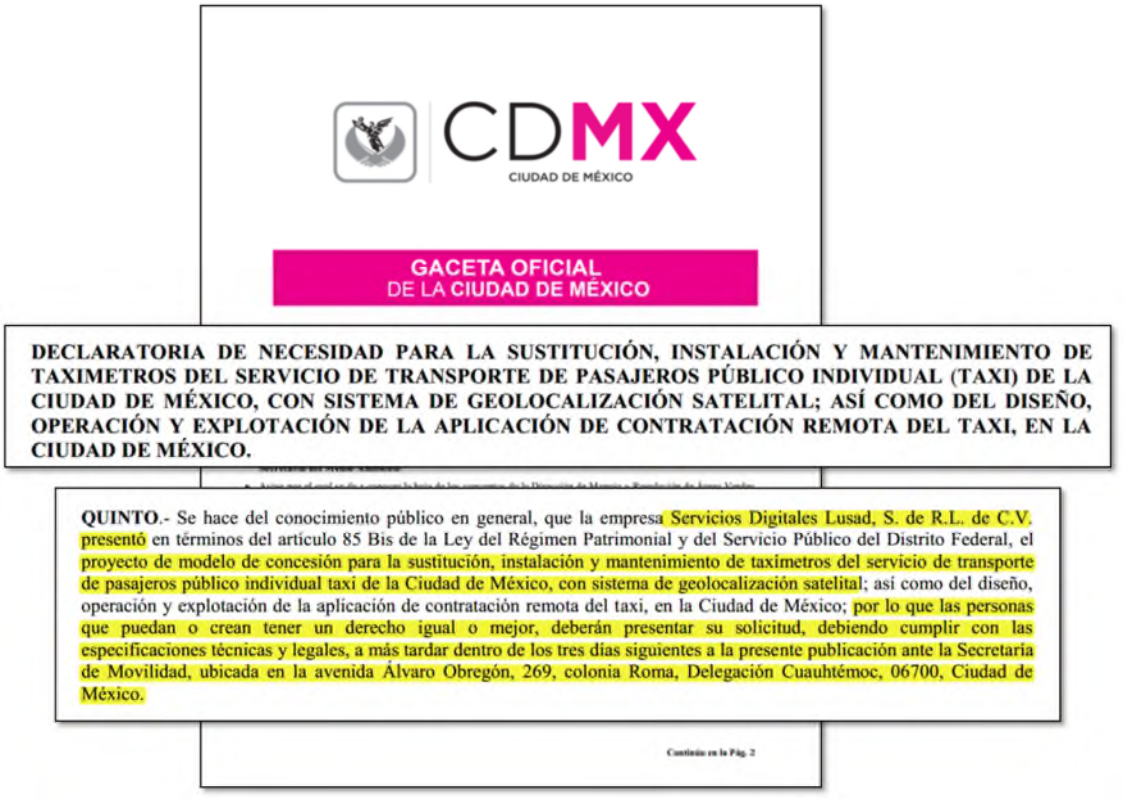
eficiente, cómodo, seguro, de bajas emisiones y con altos estándares de calidad, acceso y cobertura en toda la entidad. . . Para ello se requiere impulsar el desarrollo de un sistema de transporte inteligente y accesible que facilite a las personas usuarias del transporte público la planeación de sus viajes y optimice tiempos de traslado y costos, ampliar la calidad del servicio y la seguridad en los sistemas de cobro del transporte público individual, desarrollar un padrón actualizado del transporte público concesionado, que incluya vehículos, operadores y operadoras, los que auxiliará a erradicar el transporte público concesionado no autorizado y taxis irregulares. . . . El equipamiento de la mayor parte del parque vehicular, **son tecnológicamente obsoletos** y por tanto ineficaces para la optimización del servicio.") (emphasis added).

114 **Exhibit C-0005-SPA**, pp. 15–16 (Necessity Declaration issued by Semovi, dated 30 May 2016) ("Que en las relatadas condiciones, la Secretaría **requiere de la sustitución de los taxímetros actuales por uno que brinde a la ciudadanía mayor certeza, seguridad y amplitud en su funcionalidad, contar con localización vía satelital, además de permitir la contratación remota del servicio y escalar en su desarrollo**, por lo que es necesario otorgar una 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 el diseño, operación y explotación de la aplicación de contratación remota del taxi, en la Ciudad de México . . . . a. Ser un dispositivo digital con capacidad técnica que permita realizar el cobro de las tarifas autorizadas por el Gobierno de la Ciudad de México, para la modalidad de Servicio Público de Transporte Individual de Pasajeros (taxi). . . . c. Que el dispositivo cuente con localizador vía satélite o geo localizador. d. Que el equipo cuente con las autorizaciones correspondientes, sean locales o federales, para ser utilizado omo sistema de medición para cobro de tarifas en el servicio público de pasajeros bajo la modalidad de taxi. e. Que cumpla con las pruebas de calibración y laboratorio en términos de la Ley Federal de Metrología y Normalización. f. Que es necesario que los aplicativos; sean seguros y garanticen su funcionamiento continuo en temperatura y movimiento, y que en caso de no contar con conectividad por transitar en zonas sin conexión, sea capaz de funcionar y determinar la tarifa del recorrido de manera Offline (sin conexión). g. Que para la comunicación y transferencia de datos a los dispositivos móviles cuenten con una red celular privada para dicho servicio. . . . j. Que el servicio tenga alta disponibilidad de hasta 99.99%, los 365 días del año las 24 horas del día) (emphasis added).

115 Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 35.

116 **Exhibit CL-0075-ENG**, Article 77 (Ley de Régimen Patrimonial y Servicio Público del Distrito Federal) ("Artículo 77. El Jefe de Gobierno del Distrito Federal expedirá la declaratoria de necesidad correspondente previamente al otorgamiento de una concesión, en tal supuesto deberá publicarse una convocatoria de licitación pública en la Gaceta Oficial del Distrito Federal y en dos periódicos de los de mayor circulación en el Distrito Federal.").

that complied with each of the technical specifications included in the Declaration, as depicted below.[117]



CDMX
CIUDAD DE MÉXICO

GACETA OFICIAL
DE LA CIUDAD DE MÉXICO

DECLARATORIA DE 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.

QUINTO.- Se hace del conocimiento público en general, que la empresa Servicios Digitales Lusad, S. de R.L. de C.V. presentó en términos del artículo 85 Bis de la Ley del Régimen Patrimonial y del Servicio Público del Distrito Federal, el proyecto de modelo de 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; por lo que las personas que puedan o crean tener un derecho igual o mejor, deberán presentar su solicitud, debiendo cumplir con las especificaciones técnicas y legales, a más tardar dentro de los tres días siguientes a la presente publicación ante la Secretaría de Movilidad, ubicada en la avenida Álvaro Obregón, 269, colonia Roma, Delegación Cuauhtémoc, 06700, Ciudad de México.

74. On 1 June 2016, Lusad supplemented its Request for Concession (the "Supplemental Request").[118] Therein, Lusad demonstrated that its proposal complied with each of the technical and legal requirements specified in the Declaration of Necessity. The Supplemental Request specifically responded to every requirement listed in the Declaration and described how Lusad's proposal satisfied each one. For example, it confirmed that Lusad's digital taximeter: (i) accurately charged fares; (ii) was registered before the competent authority, allowing the device to function as a taximeter; (iii) contained a geolocalization feature; (iv) was authorized as a lawful measuring device; and (v) complied with calibration and laboratory tests.[119] In support of its Supplemental Request, Lusad attached the feasibility and profitability studies, the certification from the Secretary of Economy, and two additional certifications from calibration laboratories demonstrating that Lusad's digital taximeter was an accurate and reliable measuring device; and a proposal from Telefónica to provide continuous wireless connection to all users.[120] Lusad met all

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117 **Exhibit C-0005-SPA**, p. 17 (Necessity Declaration issued by Semovi, dated 30 May 2016).

118 **Exhibit C-0047-SPA**, pp. 1–6 (Supplemental concession application submitted by Lusad, dated 1 June 2016) (explaining how Lusad's proposal satisfied the technical and legal requirements specified in the Declaration of Necessity published on 30 May 2016).

119 *Id.*

120 **Exhibit C-0047-SPA**, pp. 1–6 (Supplemental concession application submitted by Lusad, dated 1 June 2016).

of the requirements contained in the Declaration of Necessity and was in a strong position to be awarded the concession.

7. Eight Companies, Including Lusad, Submit Proposals

75. Eight companies, including Lusad, submitted proposals in response to the Declaration of Necessity.[121] The proposals were reviewed and assessed by the Adjudication Committee for Concessions for Public Transport (the "Adjudication Committee") during a meeting on 17 June 2016, which consisted of high-ranking officials, including Mexico City's Secretary of Mobility, Secretary of Housing and Urban Development, Secretary of the Environment, Secretary of Public Works, and others. Many of the proposals were also submitted by experienced technology and communications companies.[122]

76. Lusad and its investors remained optimistic that Semovi would grant Lusad the concession given that Lusad had already obtained the necessary certifications, a certified taximeter, the feasibility study, and positive reactions and encouragement from Semovi officials throughout several meetings since first approaching Semovi one year prior.[123]

8. The Adjudication Committee Selects Lusad's Proposal

77. The Adjudication Committee evaluated each of the submissions, and concluded that of the eight proposals submitted, only Lusad's met all the legal, technical, and timing requirements set forth in the Declaration of Necessity.[124] Importantly, Lusad was, and is, the only company that had a digital taximeter approved and registered by the Secretary of Economy.[125] As such, it was the only company that met the technical requirements set forth in the Declaration of

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121 **Exhibit C-0006-SPA**, pp. 7–8 (Minutes of the Adjudication Committee for Concessions for Public Transport, dated 17 June 2016) (listing the eight companies that presented proposals in response to the Declaration of Necessity).

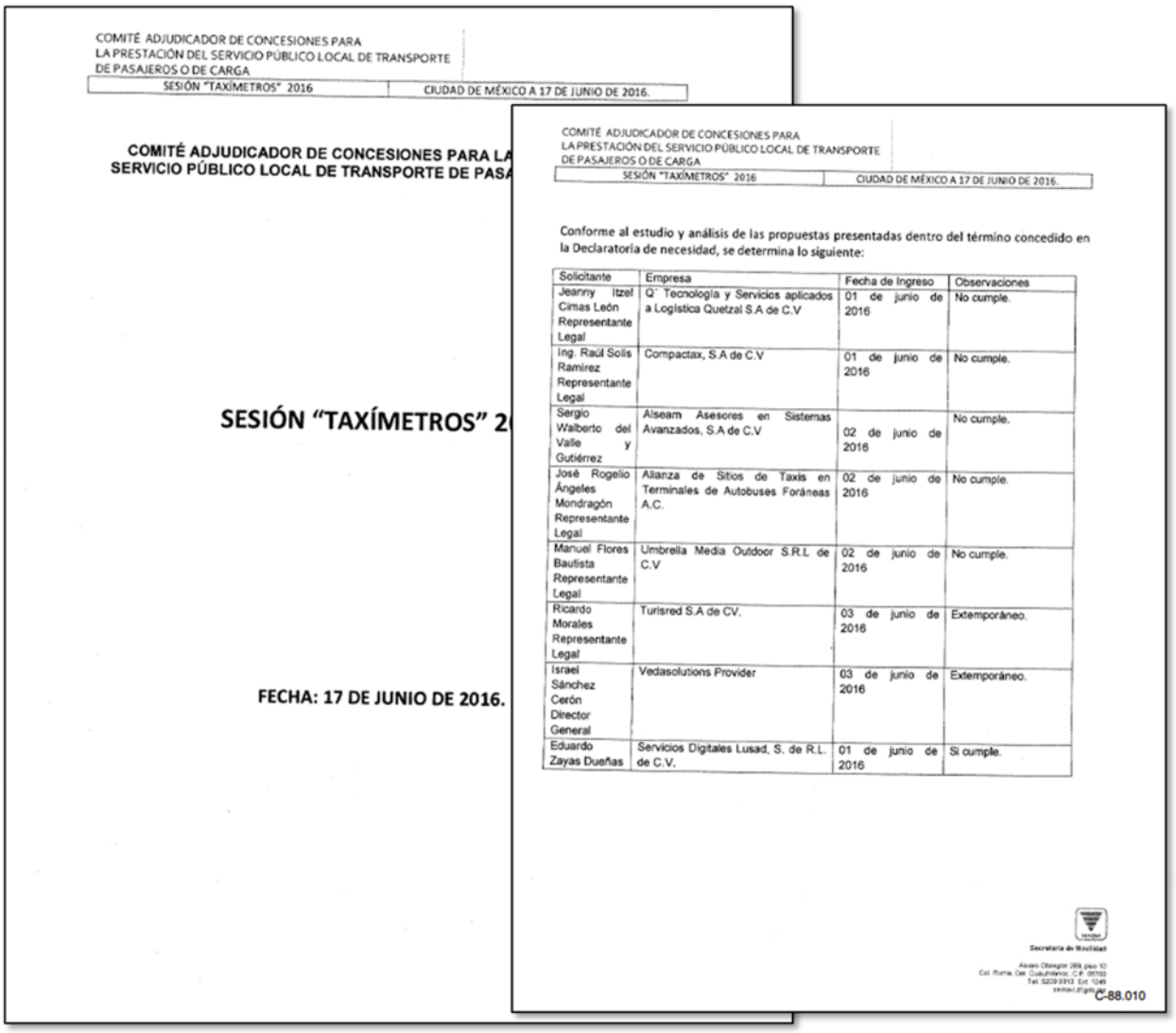
122 Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 38.

123 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 33.

124 **Exhibit C-0006-SPA**, p. 10 (Minutes of the Adjudication Committee for Concessions for Public Transport, dated 17 June 2016) (evidencing that only Lusad's proposal satisfied the technical and legal requirements set forth in the Declaration of Necessity).

125 **Exhibit C-0050-SPA** (Registration records of the Ministry of Economy, listing the Lusad taximeter as the only authorized digital taximeter., updated as of 9 December 2016) (confirming that Lusad was the only company that had a digital taximeter approved and registered with Mexico City); *see also* **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) (certifying Lusad's digital taximeter as a lawful measuring device and authorizing its commercial use in Mexico City's taxis).

Necessity.[126] Below is a summary of the Adjudication Committee's findings evidencing that only Lusad's proposal satisfied all of the technical and legal requirements:



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.

COMITÉ ADJUDICADOR DE CONCESIONES PARA LA SERVICIO PÚBLICO LOCAL DE TRANSPORTE DE PASA

SESIÓN "TAXÍMETROS" 2

FECHA: 17 DE JUNIO DE 2016.

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.

Conforme al estudio y análisis de las propuestas presentadas dentro del término concedido en la Declaratoria de necesidad, se determina lo siguiente:

Solicitante	Empresa	Fecha de Ingreso	Observaciones
Jeanny Itzel Cimas León Representante Legal	Q' Tecnología y Servicios aplicados a Logística Quetzal S.A de C.V	01 de junio de 2016	No cumple.
Ing. Raúl Solís Ramírez Representante Legal	Compactax, S.A de C.V	01 de junio de 2016	No cumple.
Sergio Walberto del Valle y Gutiérrez	Alseam Asesores en Sistemas Avanzados, S.A de C.V	02 de junio de 2016	No cumple.
José Rogelio Ángeles Mondragón Representante Legal	Alianza de Sitios de Taxis en Terminales de Autobuses Foráneas A.C.	02 de junio de 2016	No cumple.
Manuel Flores Bautista Representante Legal	Umbrella Media Outdoor S.R.L de C.V	02 de junio de 2016	No cumple.
Ricardo Morales Representante Legal	Turisred S.A de CV.	03 de junio de 2016	Extemporáneo.
Israel Sánchez Cerón Director General	Vedasolutions Provider	03 de junio de 2016	Extemporáneo.
Eduardo Zayas Dueñas	Servicios Digitales Lusad, S. de R.L. de C.V.	01 de junio de 2016	Si cumple.

Secretaría de Movilidad

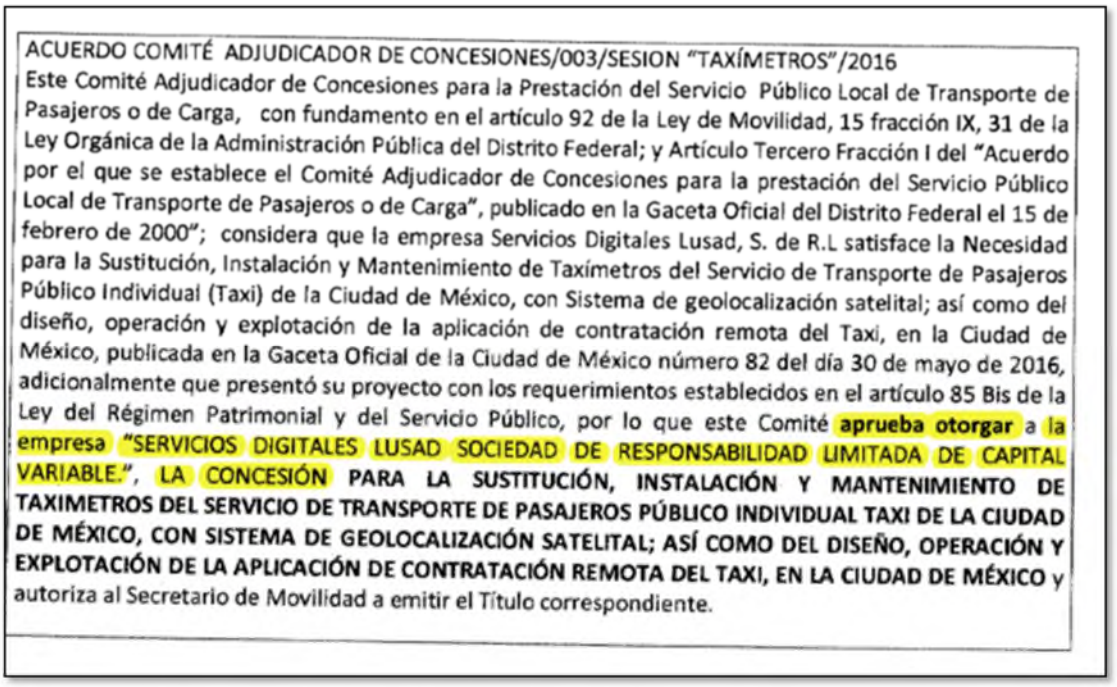
C-88.010

78. The Adjudication Committee concluded that Lusad "satis[fied] the necessity for the substitution, installation and maintenance of taximeters" in Mexico City and "presented a proposal meeting the requirements established in article 85 of the Patrimony Law."[127] The Adjudication Committee therefore awarded Lusad the concession for the "Substitution, Installation, Installation, and Maintenance of Taximeters for Individual Public Transport Service (Taxi) of Mexico City,

126 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 40; Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 39.

127 **Exhibit C-0006-SPA**, p. 11 (Minutes of the Adjudication Committee for Concessions for Public Transport, dated 17 June 2016) (evidencing that only Lusad's proposal satisfied the technical and legal requirements set forth in the Declaration of Necessity).

with Geolocalization System; as well as the Design, Operation and Exploitation of the Remote-Hailing Application,"[128] (the "Concession") as shown below:



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 92 de la Ley de Movilidad, 15 fracción IX, 31 de la Ley Orgánica de la Administración Pública del Distrito Federal; y Artículo 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 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, 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.

79. On 20 June 2016, Zayas went to Semovi to receive the Adjudication Committee's decision and to formally sign the Concession on behalf of Lusad.[129] This was a monumental moment for Lusad and its investors because it provided firm legal assurance of several important rights held by Lusad. When Mexico City awarded the Concession to Lusad, this enshrined and vested substantial legal rights and created legitimate expectations that the terms of the Concession would be fulfilled by the government.[130]

9. Terms of the Concession

80. On 9 January 2017, Semovi amended the Concession, as described below. As amended, the Concession granted Lusad the right and obligation to: (i) substitute, install, and maintain the digital taximeters, which would provide GPS location and other services to Mexico City's taxi fleet; (ii) develop and operate a remote taxi-hailing smartphone application; and

[128] **Exhibit C-0051-SPA** (Minutes of the session of the Adjudication Committee, awarding the concession to Lusad, 7 June 2016); Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 42; Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 40.

[129] **Exhibit C-0052-SPA** (Appearance of Eduardo Zayas before Semovi to sign the Concession Agreement on behalf of Lusad, dated 20 June 2016) (certifying that Zayas went to Semovi to receive and sign the Concession).

[130] **Exhibit C-0053-SPA** (Concession Agreement without amendment, dated 17 June 2016) (formally granting Lusad a concession for the substitution, installation, and maintenance of the taximeters of Mexico City's taxi fleet, as well as for the development of a remote-hailing application).

(iii) guaranteed streams of revenue arising out of the use of these technologies.[131] The installation of the taximeters was to be mandatory for all licensed taxi owners.[132] Lusad therefore had the right to install the taximeters in Mexico City's estimated 138,000 taxis, as well as in any new taxis to be licensed by the Mexico City authorities.[133]

81. The Concession was subject to a 12-month trial period to allow Lusad to demonstrate the functionality of its technology (the "Trial Period").[134] The Concession also provided for a 24-month installation period (beginning on the date Semovi notified taxi operators of the required mandatory installation of the L1bre System), during which Lusad was obligated to install the "digital taximeters" (front seat tablet) and "advertising tablets" (rear seat tablet) in Mexico City's taxi fleet.[135] This schedule reflected that the digital taximeters and advertising tablets to be installed each totaled 138,100 units (totaling 276,200 tablets).[136]

82. The Concession required Mexico City and Semovi, *inter alia*, to: (i) establish the necessary centers for the installation of the L1bre System; and (ii) inform taxi operators about the installation procedure. Consequently, Semovi's cooperation was required for Lusad to meet its obligation and right to install the L1bre System in all of Mexico City's taxis.[137] Lusad had no police power to require taxi operators to tender their vehicles for installation of the L1bre System's new technology. The Concession therefore recognized that the government's action was required to facilitate implementation of the Concession. Mexico City and Semovi's obligation to mandate

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131 **Exhibit C-0007-SPA**, Article 2.1 (Amended Concession Agreement, dated 9 January 2017) ("La Concesión que ampara el presente título, confiere a la empresa Servicios Digitales Lusad, S. de R.L de C.V. **el derecho y la obligación de manera preferencial para la sustitución, instalación y mantenimiento de taxímetros** del Servicio de Transporte de Pasajeros Público Individual (taxi) de la Ciudad de México, mediante los Taxímetros digitales, los cuales cuentan con sistema de geolocalización satelital; así como el diseño, operación y explotación de la Aplicación de contratación remota del Taxi, en la Ciudad de México y que se encuentran detallados en la Declaratoria de Necesidad y en los estudios respectivos.") (emphasis added).

132 *See id.* at Appendix 1 (providing the mandatory installation schedule).

133 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 45.

134 **Exhibit C-0007-SPA**, Article 6(b) (Amended Concession Agreement, dated 9 January 2017) ("[Y] conforme a las fechas y unidades establecidas en el **ANEXO UNO**, en el entendido de que de conformidad con lo establecido en dicho anexo los primeros 12 (doce) meses los Equipos (Taxímetros Digitales) se instalaran para la realización de pruebas de campo y funcionalidad con el objeto de garantizar la eficiencia en el servicio")

135 *Id*., Annex 1 (including a schedule for a mandatory installation period over 24 months).

136 *Id.*

137 **Exhibit C-0007-SPA**, Article 7.1(a) (Amended Concession Agreement, as reissued on 21 March 2017) ("**La Secretaria y el Concesionario habilitarán los centros de atención e instalación**, en donde se realizaran las instalaciones de los Equipos a los concesionarios del Taxis [sic], **a los cuales se les informará en forma oportuna con objeto de que los mismos acudan a que se realice la instalación** en sus respectivas Unidades a fin de que el Equipo y la Aplicación queden instalados y en operación de acuerdo al calendario contenido en el **ANEXO UNO**") (emphasis added).

and facilitate installation of the L1bre System in *all* of Mexico City's 138,000 taxis was a mandatory obligation enumerated in the Concession that created legitimate expectations.[138]

83. For its part, Lusad was required, *inter alia*, to: (i) maintain the technology and its operation in good conditions of accessibility, security, convenience, hygiene, and efficiency[139]; (ii) update the technology as required to reduce its environmental impact[140]; (iii) bear the cost of the acquisition, installation, maintenance, reparation, and repositioning of the necessary equipment[141]; (iv) guarantee GPS service 24 hours per day, every day of the year[142]; (v) operate the

138 *Id.*; *See infra* Section V.B.

139 **Exhibit C-0007-SPA**, Article 4.1 (Amended Concession Agreement, dated 9 January 2017) ("El concesionario deberá acatar los términos y condiciones señalados en la Concesión otorgada y cumplir con las disposiciones jurídicas, administrativas y técnicas aplicables, así como mantener los Equipos y la operación de los mismos en buen estado general mecánico y eléctrico, con objeto de prestar el servicio en condiciones de accesibilidad, seguridad, comodidad, higiene y eficiencia.").

140 *Id.*, Article 4.8 ("Para garantizar la eficiencia y mejorar la prestación del servicio respectivo, así como contribuir a la disminución del impacto ambiental, el Concesionario deberá mantener la tecnología acordada y realizar los ajustes necesarios para incorporar los avances tecnológicos en sus Equipos, a efecto de fomentar el desarrollo y modernización del Servicio de Transporte de Pasajeros Publico Individual (Taxi) de la Ciudad de México constantemente.").

141 *Id.*, *Article* 5 ("La inversión para la adquisición, sustitución, instalación, mantenimiento, reparación, reposición y funcionamiento de los Equipos necesarios, para cumplir el objeto de la presente Concesión, será a cargo del Concesionario, quien contará con el Plazo de Recuperación de su inversión y posteriormente, quedará obligado a destinar un porcentaje de sus ingresos para el fondo que destine la Secretaria.").

142 *Id.*, *Article* 5.1.1 ("El servicio de geolocalización vía satelital y el Taxímetro Digital que se instalara en cada Unidad deberá servir para operar las veinticuatro horas del día, todos los días del año.")

service according to the technical feasibility study[143]; and (vi) maintain the appropriate control systems to guarantee the quality of the service.[144]

84. In exchange for its services, the Concession granted Lusad the right to receive the following fees:

> Fees granted by the original Concession dated 17 June 2016, which are maintained in the amended Concession:[145]
>
> - Application Fee: Each time that a user hailed a taxi by means of the application, Lusad would receive MXN $12.00 (plus VAT) (approximately USD $0.54), the "Application Fee."[146]
>
> After an investment recovery period of 36 months, the Application Fee would be shared between Lusad and Mexico City. At the end of 36 months,[147] the Application Fee would be updated annually to account for inflation.[148]

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143 *Id.*, Article 5.1.2 ("En general, la operación del servicio, deberá ser conforme a los parámetros operativos del estudio técnico de factibilidad y demás especificaciones técnicas aplicables.").

144 *Id*., Article 5.3.1 ("El Concesionario deberá contar, con todos aquellos elementos de control, que le permitan verificar, tanto al Concesionario, como a la Secretaría, que las obligaciones a su cargo se desarrollen de conformidad con los parámetros de operación óptimos para el debido funcionamiento de los Equipos, su conectividad y de sus accesorios."); Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 45.

145 The Amended Concession is discussed *infra* at ¶¶ 86–87.

146 **Exhibit C-0007-SPA**, Article 6.c(i) (Amended Concession Agreement, dated 9 January 2017) ("Por los servicios de contratación remota, la cantidad de **$12.00 (doce pesos 00/100 M.N.) más el Impuesto al Valor Agregado respectivo, por cada viaje realizado en cada Taxi en el que se instale el Equipo** . . . . Durante un periodo de 36 (treinta y seis) meses contados a partir de la instalación total del Equipo, en las Unidades que conformen al parque vehicular del Servicio de Transporte Público Individual de Pasajeros en el Distrito Federal y/o Servicio de Transporte de Pasajeros Público Individual (taxi) en la Ciudad de México (el "Plazo de Recuperación"), el Honorario por la Aplicación será destinado en su totalidad a favor del concesionario como parte de la recuperación de su inversión inicial.") (emphasis added).

147 *Id.* ("A partir del mes siguiente a la terminación del Plazo de Recuperación, del Honorario por la Aplicación que efectivamente reciba el Concesionario se descontará el importe equivalente al 8.33% (ocho puntos treinta y tres por ciento), incluyendo el Impuesto al Valor Agregado que en su caso se cause, cantidad que se destinará por el Concesionario a favor de la Secretaría. Esta cantidad, **será depositada por el Concesionario en el fondo de recurso que para dicho efecto cree o designe la Secretaría, por lo cual esta última podrá destinar estos recursos de conformidad con los fines que se prevean en el fondo receptor**.") (emphasis added).

148 *Id*. ("Una vez concluido el Plazo de Recuperación, el Honorario por la Aplicación se actualizará en forma anual, de acuerdo al incremento que sufra ya sea la tarifa por el cobro del Servicio de Transporte de Pasajeros Público Individual (taxi) en la Ciudad de México, determinada por las autoridades competentes de la Ciudad de México, o bien, con base en la inflación acumulada en el país, en forma anual a esa fecha, según dicha información económica sea publicada, por el Banco de México o por el Instituto Nacional de Estadística, Geografía e Informática, lo que resulte mayor.").

- Wi-Fi Fee: Lusad would be entitled to charge a fee to be determined by Lusad, with authorization from Semovi.[149]

- Advertisement Fee: Lusad was entitled to receive the total income derived from the advertisements displayed on the tablets. Semovi, however, was entitled to provide 20% of the content on the tablets without being charged.[150]

Additional fee granted by the amended Concession

- Recuperation Fee: Each time that a user hailed a taxi that had the L1bre System installed, Lusad would receive MXN $12.00 (plus VAT) as a Recuperation Fee to account for, among other reasons, the maintenance costs of the technology. This Recuperation Fee is mutually exclusive from the Application Fee. Only one of the Recuperation Fee and Application Fee can be charged in a single ride, and both were to be increased annually to account for inflation.[151]

Under this fee structure, both Lusad and Mexico City would be earning substantial revenue from each taxi operating with the L1bre System.

85. The Concession's initial term was 10 years.[152] Lusad had the option to extend the term for 10 additional years if certain conditions were met, including the following: (a) Lusad has complied with the requirements of the Concession and applicable law; (b) the need for the service continued and Lusad had the technical, administrative, and financial resources to meet this need; (c) there was no conflict regarding key elements of the Concession; (d) Lusad accepted modifications for improvement of the service to benefit the general interest; and (e) the request for

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149 *Id.*, Article 6.e ("El derecho a prestar servicios, de acceso a Red Inalámbrica, asociados a la Aplicación y a cobrar por dicho uso las tarifas que periódicamente determine el Concesionario con autorización de la Secretaría.").

150 *Id., Article* 6.d ("El **derecho al uso y la explotación comercial, arrendamiento y cobro del espacio comercial y publicitario**, que se realice en la tableta que, como parte del Equipo, será instalada en el reverso del asiento derecho de cada taxi, misma que deberá cumplir con la normatividad establecida en la Ley y el Reglamento, así como las demás que resulten aplicables . . . . No obstante lo anterior, **el Gobierno de la Ciudad de México y sus dependencias tendrán derecho a utilizar, sin costo alguno, dicho espacio comercial**, en el formato, pauta y horarios que se terminan en el **ANEXO TRES**; dicha explotación se limitará a la transmisión por parte del Concesionario del contenido informativo que al efecto le entregue la dependencia periódicamente durante la vigencia de la Concesión.").

151 *Id*., Article 6.c(ii) ("Como cuota de recuperación por la calibración, mantenimiento, operatividad, aseguramiento y renovación de cada uno de los Taxímetros digitales, el Concesionario tendrá derecho a cobrar por cada viaje realizado en cada Taxi en el que se instale el Equipo la cantidad de hasta $12.00 (doce pesos 00/100 M.N.) por cada viaje (la "Cuota de Recuperación"), más el Impuesto al Valor Agregado respectivo de causarse este último.") (emphasis added).

152 **Exhibit C-0007-SPA**, Article 12 (Amended Concession Agreement, dated 9 January 2017) ("La concesión tendrá una vigencia de **10 años a partir de su expedición**.") (emphasis added).

extension was timely.[153] Lusad expected that these conditions would be met. Further, at the end of the 20-year term, Lusad could request an extension for a further 10 years under Mexican law. As such, Lusad was well positioned to benefit from the Concession for the next three decades.[154]

10. The Amended Concession

86. As referenced above, Semovi amended the Concession in January 2017. The purpose of the amendment was to include the Recuperation Fee as an additional source of income for Lusad.[155] After being awarded the Concession in June 2016, Lusad began looking for additional investors in order to fund the rollout of the L1bre System in all of Mexico City's 138,000 taxis. During that process, Lusad came to consider that the original Concession would generate substantial revenues based on a user "adoption rate" of the smartphone application that was potentially too optimistic. Taxi riders and drivers would benefit from using the L1bre platform as a whole (digital taximeter, panic button, etc.) regardless of the method (smartphone application or in-person) used to hail the service. As such, Lusad considered it important for the Concession to be amended to add a source of revenue for rides in L1bre-capable taxis hailed in-person.[156]

87. As a result, toward the end of 2016, Lusad discussed the issue with Semovi, which quickly understood the basis for the need for an additional stream of revenue, and agreed that an Application Fee of MXN $12.00 did not fairly compensate Lusad for the valuable technology and services that Lusad would provide under the Concession for rides hailed on the street. Semovi agreed to amend the Concession to include the Recuperation Fee, which Lusad would earn each time a user hailed a taxi that contained the L1bre System.[157] Importantly, Lusad could not earn both the Application Fee and the Recuperation Fee for the same trip—the fees were mutually

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153 *Id*., Article 13 ("La vigencia de la Concesión **podrá prorrogarse hasta por un periodo igual**, siempre y cuando se acredite lo establecido en el artículo 102 de la Ley de Movilidad . . . .") (emphasis added).

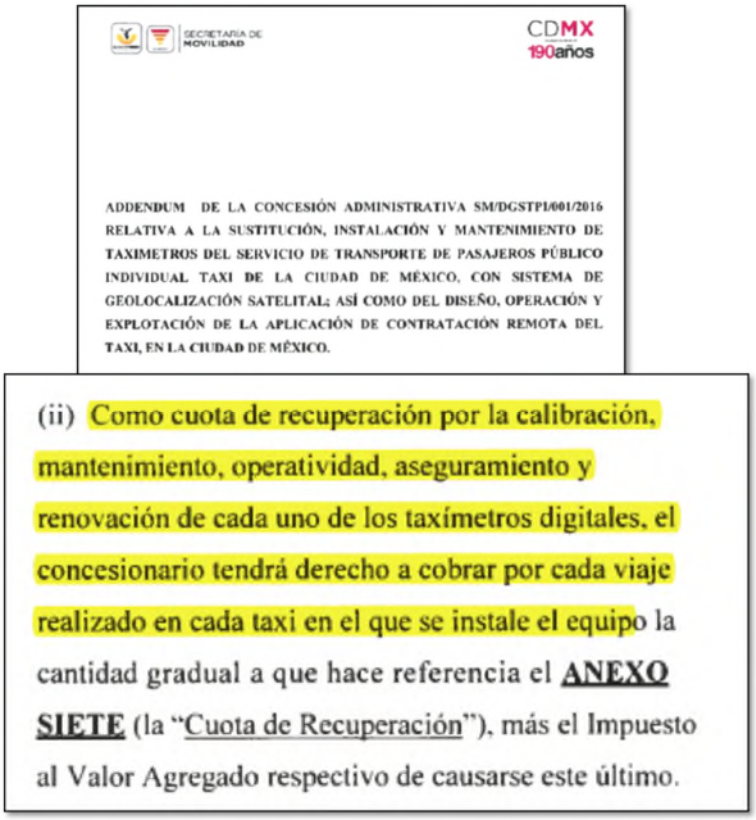
154 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 45

155 **Exhibit C-0053-SPA**, Article 6(c) (Concession Agreement without amendment, dated 17 June 2016) (stating that Lusad would be entitled to receive the Application Fee, WiFi Fee, and Advertisement Fee).

156 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 43–44; Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 45.

157 **Exhibit C-0054-SPA** (Approval of Addendum to Include MXN 12 Per Ride Recuperation Fee, dated 3 October 2016).

exclusive.[158] As such, Article 6(c)(ii) was added in the revised Concession of January 2017, as shown below:[159]



SECRETARÍA DE MOVILIDAD

CDMX 190años

ADDENDUM DE LA CONCESIÓN ADMINISTRATIVA SM/DGSTPI/001/2016 RELATIVA A 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.

(ii) Como cuota de recuperación por la calibración, mantenimiento, operatividad, aseguramiento y renovación de cada uno de los taxímetros digitales, el concesionario tendrá derecho a cobrar por cada viaje realizado en cada taxi en el que se instale el equipo la cantidad gradual a que hace referencia el **ANEXO SIETE** (la "Cuota de Recuperación"), más el Impuesto al Valor Agregado respectivo de causarse este último.

11. Lusad Further Develops the L1bre System

88. After Mexico City and Semovi awarded the Concession to Lusad in June 2016, Lusad continued working on obtaining the required certifications so it could commence the installation process of the L1bre System.[160] On 29 June 2016, Semovi issued a permit authorizing

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158 **Exhibit C-0008-SPA**, p. 5 (Amendment to Concession agreement to incorporate the Recuperation Fee, dated 9 January 2017) (depicted above).

159 **Exhibit C-0007-SPA**, Article 6.c(ii) (Amended Concession Agreement, dated 9 January 2017) ("Como cuota de recuperación por la calibración, mantenimiento, operatividad, aseguramiento y renovación de cada uno de los Taxímetros digitales, el Concesionario tendrá derecho a cobrar por cada viaje realizado en cada Taxi en el que se instale el Equipo la cantidad de hasta $12.00 (doce pesos 00/100 M.N.) por cada viaje (la "Cuota de Recuperación"), más el Impuesto al Valor Agregado respectivo de causarse este último.") (emphasis added).

160 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 47.

Lusad to display advertising and publicity content on the backseat tablet to be installed in each taxi.[161]

89. As described above, funded by new investment, Lusad poured millions of dollars into the development of the L1bre System. With an experienced technology team directing software development, Lusad expended over USD $10 million developing scaled-up versions of its software programs, including 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 the L1bre smartphone application. Lusad also developed an e-wallet, which would allow passengers to pay by credit card and would automate payment of the fees due to Lusad for each ride, reducing non-payment risk. Finally, Lusad developed back-end software to integrate all of these programs together. 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 software development was the process of connecting the L1bre System's panic button to Mexico City's Commend, 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 line. 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. Direct connection to C5 was an innovation by Lusad that further distinguished L1bre taxis as a safer option than private ride-hailing companies.[162]

90. Lusad also engaged external vendors considered the best in their class.[163] Its internal computing and database services were run on VMware and AWS, and the GPS location and navigation services used in the software were licensed from HERE Technologies, the world's leading mapping and location services company (which is owned by Audi, BMW, and Daimler). Lusad integrated payment options into its system through a proprietary e-wallet and through partnerships with Visa and MasterCard.[164]

91. Lusad tested different providers for the tablets that would be the backbone hardware of the L1bre System. After interviewing providers and testing its software on custom-made tablets designed by Ingram Micro, Huawei, and Samsung, Lusad selected Ingram Micro to manufacture

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161 **Exhibit C-0009-SPA** (Oficio No. DGJR-001291-2016 from Semovi authorizing advertising, dated 29 June 2016) ("De conformidad con lo anterior, **se tiene por autorizada su petición en los términos señalados** en el párrafo que antecede, para lo cual deberá cumplir con todos y cada uno de los requisitos contenidos en la Ley de Movilidad . . . .") (emphasis added); Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 21, 69.

162 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 21, 69.

163 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 53–56.

164 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 53–55.

the tablets, and entered into contracts for the purchase of all of the tablets that Lusad would need to complete installation of its two-tablet kits in all of Mexico City's taxis.[165]

92. Ingram Micro designed tablets, cradles, and installation kits custom-tailored to the L1bre System, and shipped its tablets to Lusad with the L1bre System pre-installed. By the end of 2018, Lusad had already purchased from Ingram Micro, and received at L1bre's warehouse, over 85,000 custom-made two-tablet kits (and accompanying accessories) at a cost of over USD $30 million.[166]

12. Lusad Successfully Completes the Trial Period

93. Lusad started installing the L1bre System in the Mexico City taxi fleet during the Trial Period, collected data from the tablets installed in the vehicles, and made adjustments as needed. Lusad conducted a first installation pilot period from 11 July to 6 August 2016, during which period it installed the L1bre System into 100 taxis using a single installation center called El Coyol.[167] Lusad collected the names and contact information of each of the drivers, the number of the tablet, and the year and make of their vehicles, all of which was later shared with Semovi. This data was used alongside diagnostic data from the tablet software itself to review the performance of the L1bre System and identify any areas for improvement. On 9 August 2016, Lusad informed Semovi that it had successfully installed the L1bre System in 100 taxis and provided Semovi with the data collected by these systems.[168]

94. Lusad conducted a second installation pilot over the next three months, in which it expanded its initial testing to 1,000 additional taxis.[169] Lusad installed the L1bre System in a variety of different makes and models of vehicles in order to reflect the diversity of Mexico City's taxi fleet, and expanded the number of installation centers from one to five, with installations

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165 *See* **Exhibit C-0071-SPA** (Sales Agreement between Ingram Micro Mexico and Lusad, dated 21 April 2017); Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 56.

166 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 56; **Exhibit C-0071-SPA** (Sales Agreement between Ingram Micro Mexico and Lusad, dated 21 April 2017); **Exhibit C-0114-SPA** (Photos of warehouse showing tablets shipped from Ingram Micro, dated 14 August 2018) (depicting pallets of the custom-made tablets in L1bre's warehouse).

167 *See* **Exhibit C-0013-SPA**, p. 1 (Communication from Lusad to Semovi confirming the installation of the L1bre System in 100 Taxis, dated 9 August 2016) (confirming that Lusad had installed the L1bre System in 100 taxis) ("[P]or medio del presente escrito le informamos a esa Secretaría que **la instalación de las primeras 100 (cien) unidades** de los Taxímetros Digitales en las unidades del servicio de transporte de pasajeros público individual (taxi) de la Ciudad de México **ha sido realizada con éxito**, como **Anexo Único** el listado de las unidades instaladas en esta etapa inicial.") (emphasis added).

168 *Id.*; Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 59; Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 42.

169 **Exhibit C-0014-SPA**, p. 1 (Communication from Lusad to Semovi confirming installation of the L1bre System in 1,000 Taxis, dated 7 November 2016) ("[P]or medio del presente escrito le informamos a esa Secretaría que la instalación de las primeras 1,000 (mil) unidades de los Taxímetros Digitales en las unidades del servicio de transporte de pasajeros público individual (taxi) de la Ciudad de México **ha sido realizada con éxito**."); Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 60; Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 42.

occurring at El Coyol, Iztapalapa, Kennedy, Mixtecas, and Ticoman centers, all of which were organized in conjunction with Semovi.[170] In November 2016, Lusad notified Semovi that it had successfully installed the L1bre System in 1,000 taxis, again providing it with the data collected on each driver's name and contact information, as well as the make and model of their vehicle, the date of installation, the installation center, and the tracing information for the specific tablets installed into each vehicle.[171] Lusad installed and tested the L1bre System on schedule, proving that the technology functioned and that it could scale up installations quickly to implement its system in all of Mexico City's taxis once given the green-light to begin the mandatory installation period.[172]

95. In early 2017, Semovi inspected the progress made by Lusad during the Trial Period. On 21 March 2017, Semovi's Legal Director of the General Directorate of Regulation confirmed that the inspection had generated "favorable and satisfactory" results, which meant that Lusad had successfully completed the Trial Period.[173]

96. In the same communication, Semovi re-issued the Concession, formally incorporating the January 2017 amendment that allowed Lusad to charge the Recuperation Fee.[174]

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170 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 61.

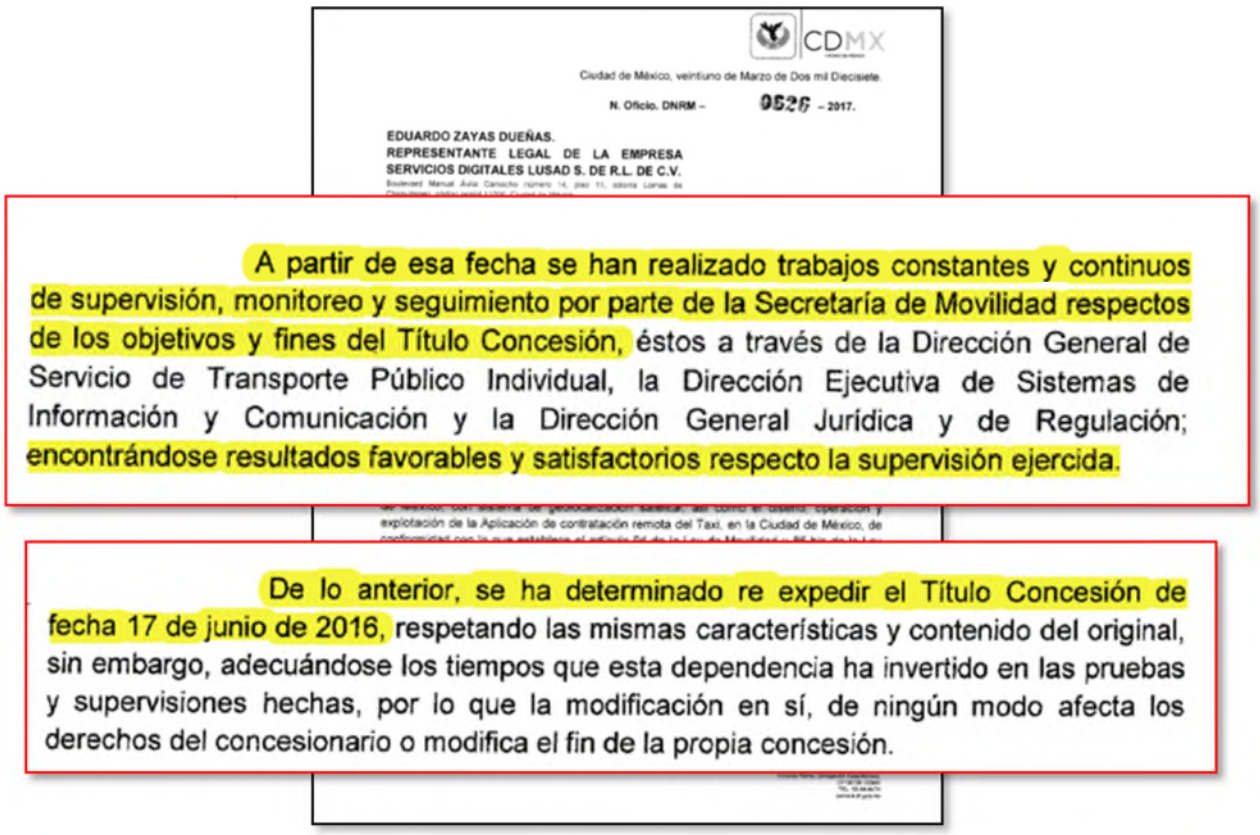
171 **Exhibit C-0014-SPA**, p. 1 (Communication from Lusad to Semovi confirming installation of the L1bre System in 1,000 Taxis, dated 7 November 2016, dated 7 November 2016).

172 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 61.

173 **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).

174 **Exhibit C-0010-SPA** (Oficio No. DNRM-0626-2017 from Semovi reissuing Concession agreement, dated 21 March 2017); *see also* **Exhibit C-0007-SPA**, Article 12 (Amended Concession Agreement, dated 9 January 2017) ("La concesión tendrá una vigencia de 10 años a partir de su expedición.").

Below is an image of Semovi's communication confirming the successful completion of the Trial Period and re-issuing the concession title:



CDMX

Ciudad de México, veintiuno de Marzo de Dos mil Diecisiete.

N. Oficio. DNRM – 0526 – 2017.

EDUARDO ZAYAS DUEÑAS.
REPRESENTANTE LEGAL DE LA EMPRESA
SERVICIOS DIGITALES LUSAD S. DE R.L. DE C.V.

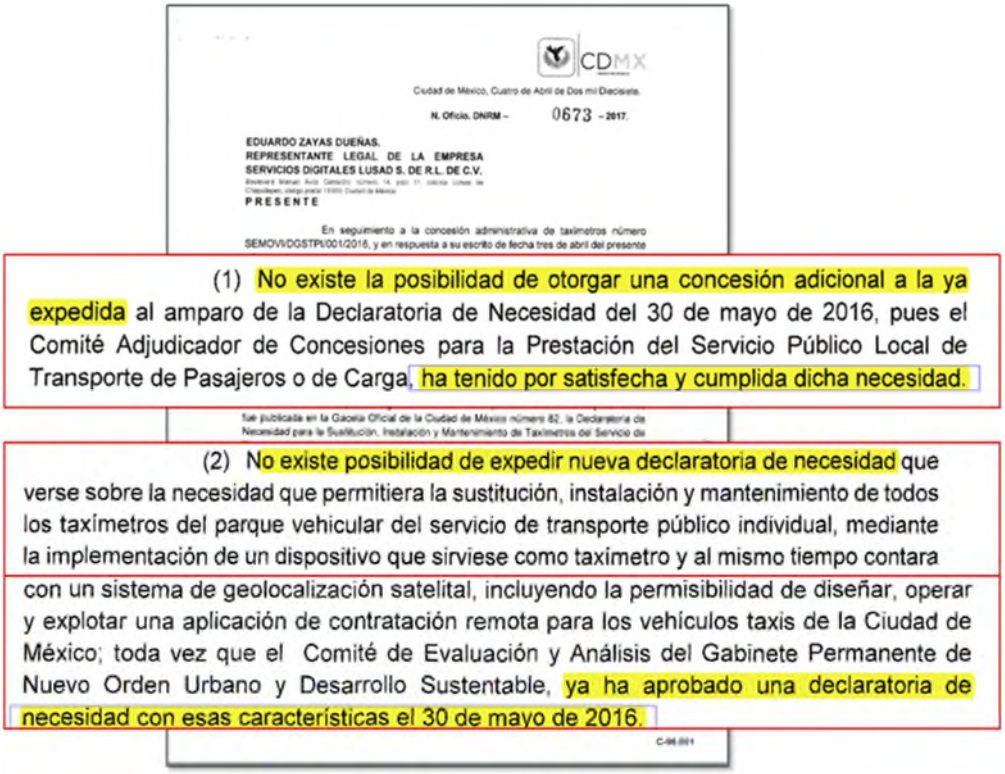
A partir de esa fecha se han realizado trabajos constantes y continuos de supervisión, monitoreo y seguimiento por parte de la Secretaría de Movilidad respectos de los objetivos y fines del Título Concesión, éstos a través de la Dirección General de Servicio de Transporte Público Individual, la Dirección Ejecutiva de Sistemas de Información y Comunicación y la Dirección General Jurídica y de Regulación; encontrándose resultados favorables y satisfactorios respecto la supervisión ejercida.

De lo anterior, se ha determinado re expedir el Título Concesión de fecha 17 de junio de 2016, respetando las mismas características y contenido del original, sin embargo, adecuándose los tiempos que esta dependencia ha invertido en las pruebas y supervisiones hechas, por lo que la modificación en sí, de ningún modo afecta los derechos del concesionario o modifica el fin de la propia concesión.

97. Importantly, through the life of the Concession, Semovi ratified not once, but multiple times the validity of the Concession Agreement and Lusad's rights under it. In addition to Semovi's recognition of Lusad's successful installation of the L1bre System in 1,100 taximeters, on 4 April 2017, Semovi issued another communication reaffirming Lusad's rights under the Concession.[175] In fact, in this communication Semovi confirmed that Lusad's rights under the

[175] **Exhibit C-0056-SPA**, p. 2 (Oficio No. DNRM-0673-2017 from SEMOVI confirming the validity of the Concession Agreement, dated 4 April 2017) ("**No existe la posibilidad de otorgar una concesión adicional a la ya expedida** al amparo de la Declaratoria de Necesidad del 30 de mayo de 2016, pues el Comité Adjudicador de Concesiones para la Prestación del Servicio Público Local de Transporte de Pasajeros o de Carga, **ha tenido por satisfecha y cumplida dicha necesidad**.") (emphasis added).

Concession were exclusive, as it was not legally possible to issue a new Declaration of Necessity for the same public service, nor to grant another concession to a third party replacing Lusad.[176]



Ciudad de México, Cuatro de Abril de Dos mil Diecisiete.

N. Oficio. DNRM – 0673 – 2017.

EDUARDO ZAYAS DUEÑAS.
REPRESENTANTE LEGAL DE LA EMPRESA
SERVICIOS DIGITALES LUSAD S. DE R.L. DE C.V.
PRESENTE

En seguimiento a la concesión administrativa de taxímetros número SEMOVI/DGSTPI/001/2016, y en respuesta a su escrito de fecha tres de abril del presente

(1) No existe la posibilidad de otorgar una concesión adicional a la ya expedida al amparo de la Declaratoria de Necesidad del 30 de mayo de 2016, pues el Comité Adjudicador de Concesiones para la Prestación del Servicio Público Local de Transporte de Pasajeros o de Carga, ha tenido por satisfecha y cumplida dicha necesidad.

fue publicada en la Gaceta Oficial de la Ciudad de México número 82, la Declaratoria de Necesidad para la Sustitución, Instalación y Mantenimiento de Taxímetros del Servicio de

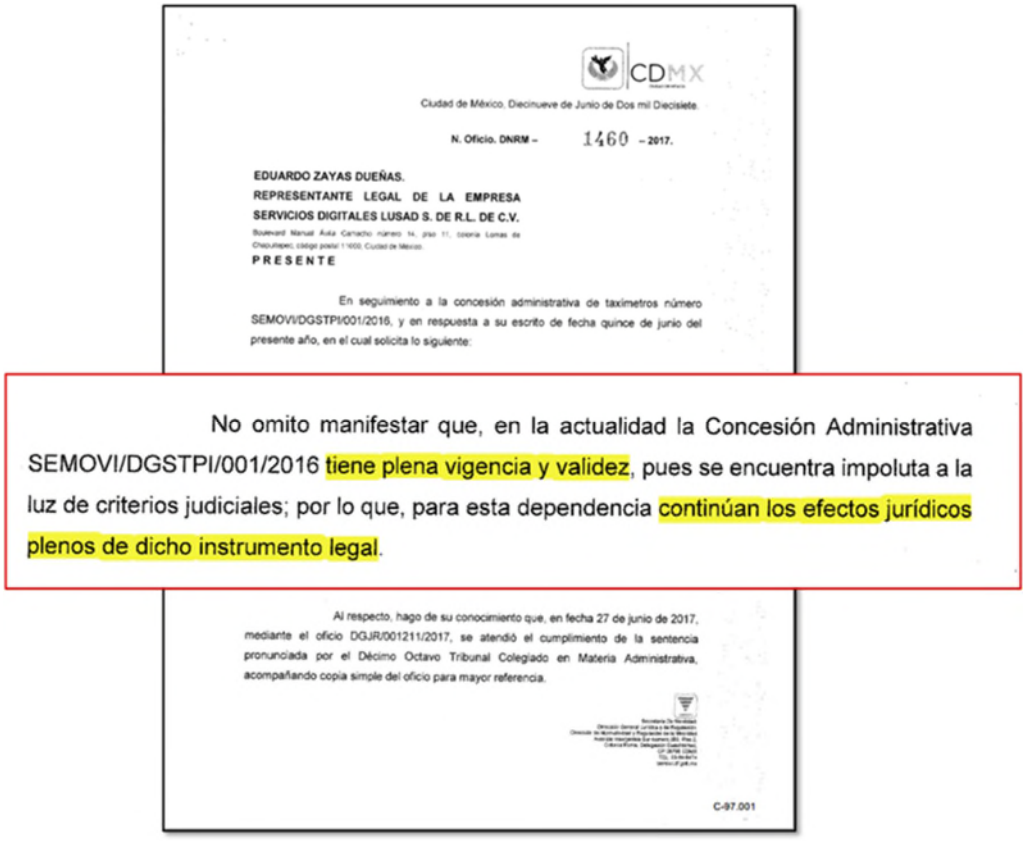
(2) No existe posibilidad de expedir nueva declaratoria de necesidad que verse sobre la necesidad que permitiera la sustitución, instalación y mantenimiento de todos los taxímetros del parque vehicular del servicio de transporte público individual, mediante la implementación de un dispositivo que sirviese como taxímetro y al mismo tiempo contara con un sistema de geolocalización satelital, incluyendo la permisibilidad de diseñar, operar y explotar una aplicación de contratación remota para los vehículos taxis de la Ciudad de México; toda vez que el Comité de Evaluación y Análisis del Gabinete Permanente de Nuevo Orden Urbano y Desarrollo Sustentable, ya ha aprobado una declaratoria de necesidad con esas características el 30 de mayo de 2016.

98. Similarly, on 19 June 2017, Semovi once again confirmed that the Concession was "***in force and valid . . . and the legal rights granted remain in effect***."[177] These communications provided additional assurances and induced additional legitimate expectations that the

[176] *Id.*, pp. 2–3 ("**No existe [la] posibilidad de expedir nueva declaratoria de necesidad** que verse sobre la necesidad que permitiera la sustitución, instalación y mantenimiento de todos los taxímetros del parque vehicular del servicio de transporte público individual . . . toda vez que el Comité de Evaluación y Análisis del Gabinete Permanente de Nuevo Orden Urbano y Desarrollo Sustentable, **ya ha aprobado una declaratoria de necesidad con esas características del 30 de mayo de 2016**.") (emphasis added).

[177] **Exhibit C-0057-SPA**, p. 2 (Oficio No. DNRM-1460-2017 from Semovi confirming the validity of the Concession Agreement, dated 19 June 2017) ("No omito manifestar que, en la actualidad la Concesión Administrativa SEMOVI/DGSTPO/001/2016 **tiene plena vigencia y validez**, pues se encuentra impoluta a la luz de criterios judiciales; por lo que, para esta dependencia **continúan los efectos jurídicos plenos de dicho instrumento legal**.") (emphasis added).

Concession's implementation was on track and would proceed according to the schedule and obligations contained in the Concession.[178]



CDMX

Ciudad de México, Diecinueve de Junio de Dos mil Diecisiete.

N. Oficio. DNRM – 1460 – 2017.

EDUARDO ZAYAS DUEÑAS.
REPRESENTANTE LEGAL DE LA EMPRESA
SERVICIOS DIGITALES LUSAD S. DE R.L. DE C.V.
Boulevard Manuel Ávila Camacho número 14, piso 11, colonia Lomas de Chapultepec, código postal 11000, Ciudad de México.
PRESENTE

En seguimiento a la concesión administrativa de taximetros número SEMOVI/DGSTPI/001/2016, y en respuesta a su escrito de fecha quince de junio del presente año, en el cual solicita lo siguiente:

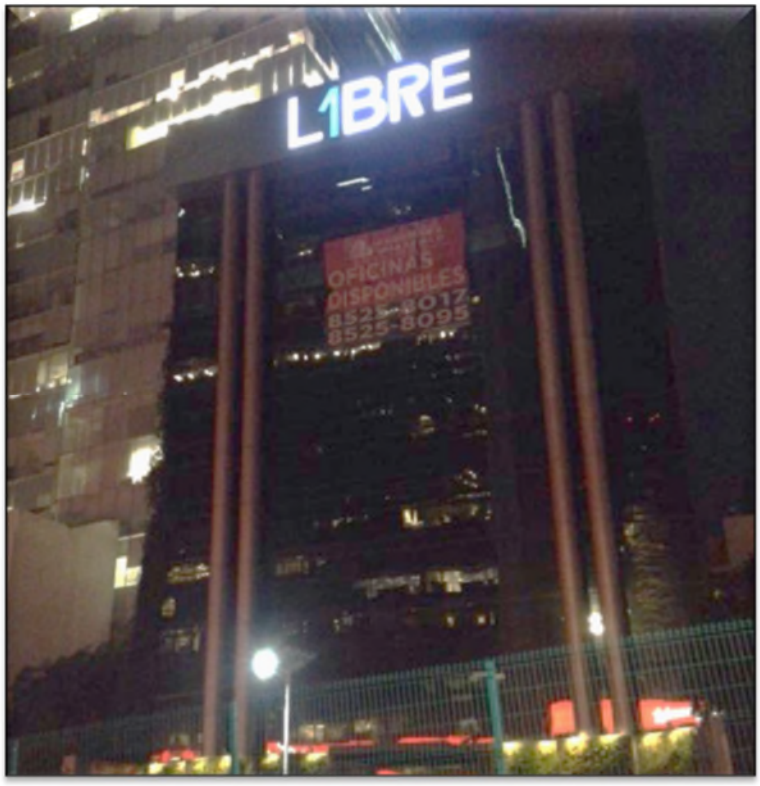
No omito manifestar que, en la actualidad la Concesión Administrativa SEMOVI/DGSTPI/001/2016 tiene plena vigencia y validez, pues se encuentra impoluta a la luz de criterios judiciales; por lo que, para esta dependencia continúan los efectos jurídicos plenos de dicho instrumento legal.

Al respecto, hago de su conocimiento que, en fecha 27 de junio de 2017, mediante el oficio DGJR/001211/2017, se atendió el cumplimiento de la sentencia pronunciada por el Décimo Octavo Tribunal Colegiado en Materia Administrativa, acompañando copia simple del oficio para mayor referencia.

C-97.001

[178] **Exhibit C-0057-SPA** (Oficio No. DNRM-1460-2017 from Semovi confirming the validity of the Concession Agreement, dated 19 June 2017) (depicted above); Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 46; Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 50.

99. Soon thereafter, Lusad opened the L1bre offices in Mexico City, as depicted below, and registered the L1bre trademark.[179]



100. By mid-2017, Lusad had already spent tens of millions of dollars inventing, developing, and implementing the L1bre System. It had, among other tasks: (i) conducted focus group and market studies to understand the needs of taxi drivers and passengers; (ii) prepared feasibility and profitability studies; (iii) held numerous meetings with Semovi to develop the best legal framework to implement the project; (iv) prepared a robust, detailed Request for Concession that met the technical and legal requires set forth in the Declaration of Necessity; (v) obtained the necessary certifications, permits, and licenses from the relevant Mexico City authorities; (vi) built the technical team and completed the software to operate the L1bre System; (vii) successfully installed the system in more than 1,100 taxis, successfully completing the Trial Period ahead of schedule; (viii) began the process of connecting the "panic button" to the Mexico City authorities;

[179] **Exhibit C-0059-SPA** (Photos of L1bre's Mexico City office) (depicted above); **Exhibit C-0058-SPA** (Registration of the L1bre Trademark, dated 16 May 2017) (confirming the registration of the L1bre trademark); Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 50–51; Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 51.

(ix) acquired tens of millions of dollars of hardware (tablets); and (x) prepared to conduct the final testing and subsequent installation of the L1bre System in all 138,000 taxis.[180]

13. Lusad Secures a New Investor

101. In the middle of 2017, Accendo decided to exit the Lusad business.[181] ES Technologies purchased Accendo's interest in the venture (held at that time in L1bre Holding LLC), such that ES Technologies directly owned 100% of L1bre Holding and indirectly held 100% of Lusad.[182] ES Technologies, through two other entities—L1bre Holding LLC and L1bre LLC (each 100% owned by ES Technologies)—was then the 100% indirect owner of Lusad and the

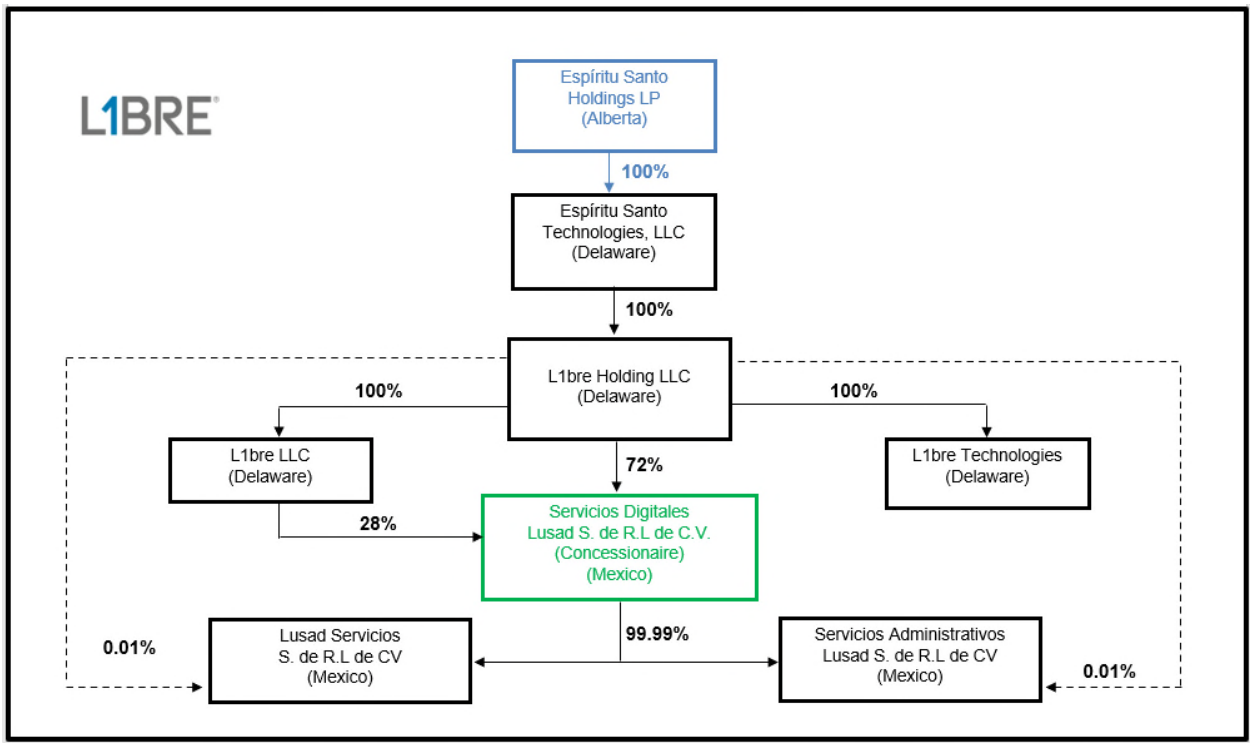
180 *See supra* ¶¶ 88–100.

181 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 63.

182 **Exhibit C-0095-ENG**, § 1.1 (Unit Purchase Agreement between ES Technologies, L1bre Holding LLC, and Accendo Holdings, LLC, dated 13 October 2017) ("At the Closing and subject to and upon the terms and conditions of this Agreement, [Accendo] agrees to sell to [ES Technologies] and [ES Technologies] agreed to purchase from [Accendo], that number of units of [L1bre Holding] and the classes specified in Exhibit A . . . .").

Concession. Then, on 22 November 2017, ES Holdings acquired 100% of ES Technologies from León and Zayas, causing ES Holdings to hold 100% of the indirect interest in Lusad.[183]

102. Below is the ownership structure of ES Holdings following its acquisition of ES Technologies in November 2017[184]:



103. Lusad sought further outside investment and considered several potential investors.[185] Ultimately, they came to focus on Ricardo Salinas Pliego ("Salinas"), a prominent and well-known Mexican businessman.[186] Salinas's investment group committed to investing in Lusad (through an updated investment structure) and procuring and guaranteeing over USD $100

183 **Exhibit C-0001-ENG** (Certificate of Good Standing of ES Holdings, under the laws of Alberta, Canada, dated 21 May 2019) (evidencing that ES Holdings was incorporated on 20 November 2017); **Exhibit C-0091-ENG** (Assignment and Acceptance of Units between ES Holdings and Eduardo Zayas Dueñas, dated 22 November 2017); **Exhibit C-0092-ENG** (Assignment and Acceptance of Units between ES Holdings and Santiago León Aveleyra, dated 22 November 2017).

184 **Exhibit C-0069-SPA** (Lusad's Corporate Structure since November 2017).

185 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 64.

186 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 65–66; *see* **Exhibit C-0096-ENG** (Press article "*Mexican Billionaire Ricardo Salinas' U.S. Subsidiary Donated $250K to Trump's Inagural, FEC Shows*," dated 9 May 2017); **Exhibit C-0097-ENG** (Press article "*Forbes List of Billionaires #106: Ricardo Salinas Pliego & family*," dated 7 April 2020).

million of loans to finance the costs of purchasing additional hardware and installing the L1bre System in Mexico City's entire taxi fleet.[187]

104. Following ES Holdings' acquisition of a 100% indirect interest in Lusad, and as part of Salinas's planned indirect investment in Lusad, ES Holdings agreed to sell 50% of the shares of ES Technologies to L1bero Partners, LP ("L1bero Partners"), an Alberta Canada limited partnership and an entity in which Salinas was represented as having an ownership position.[188] This transaction was to be effected through a Unit Purchase Agreement. After the transaction was completed, L1bero Partners would, in principle, own 50% of the interest in ES Technologies, and ES Holdings, also an Alberta, Canada limited partnership, would own the remaining 50%.[189]

105. L1bero Partners provided significant funding to the venture over the next several months to support actualizing and commercializing the L1bre System. ES Holdings and L1bero Partners were proceeding via the understanding that L1bero lawfully acquired a 50% indirect interest in Lusad pursuant to the Unit Purchase Agreement. However, in October 2019, ES Holdings learned that L1bero Partners did not fulfill a condition precedent to its acquisition of shares in ES Technologies: namely Salinas never became a partner in or owned a stake of L1bero Partners.[190] This was contrary to the express conditions of L1bero Partners' investment, which required that Salinas own 50% equity in L1bero Partners. Thus, L1bero Partners' acquisition of 50% of ES Technologies—never had legal effect. ES Holdings issued a notice to L1bero Partners on 10 October 2019 terminating the Partners Agreement.[191]

106. Ownership of ES Technologies was subject to a legal dispute between ES Holdings and L1bero Partners in an arbitration under the rules of the International Chamber of Commerce ("ICC").[192] On 24 May 2021, 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"

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187 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 65.

188 *Id.*

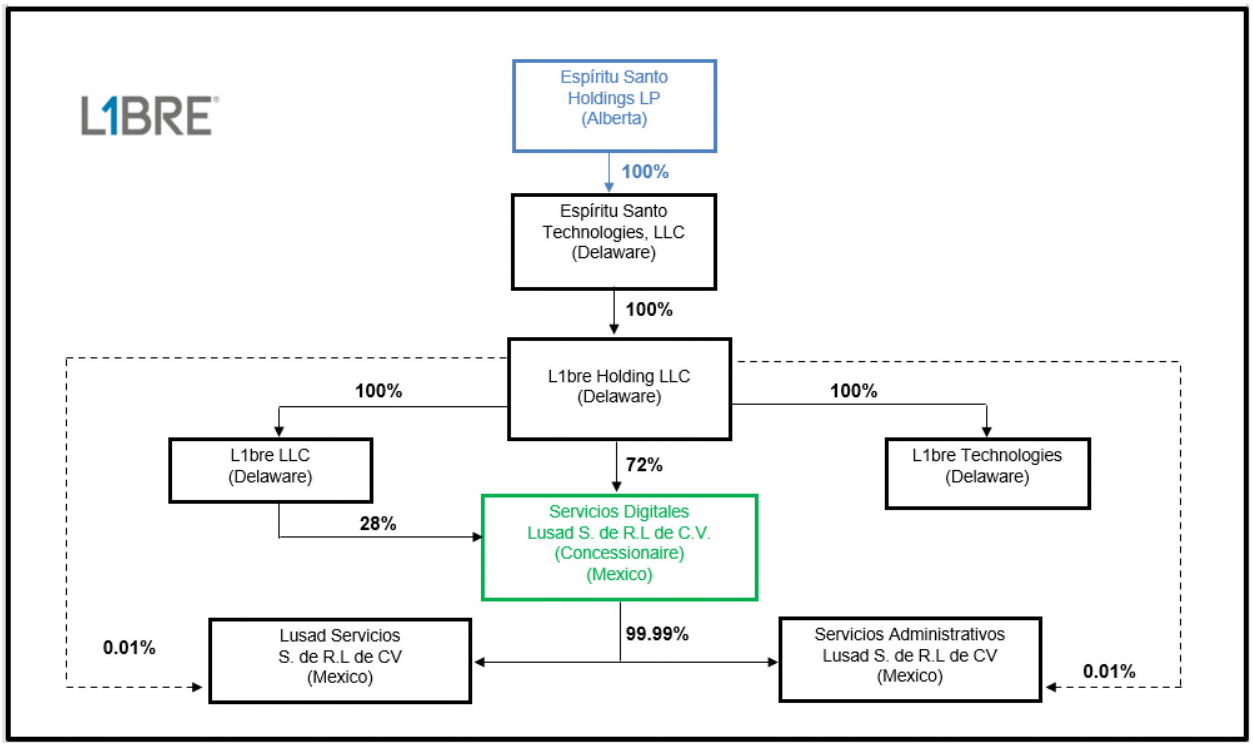
189 *Id.*; **Exhibit C-0099-ENG** (Unit Purchase Agreement between L1bero Partners, LP, ES Technologies, and ES Holdings, dated 23 November 2017).

190 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 67.

191 **Exhibit C-0025-ENG** (Letter from ES Holdings to L1bero Partners terminating the Partners Agreement, dated 10 October 2019); Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 67.

192 Because L1bero Partners did not satisfy the conditions precedent for acquiring the 50% shares of ES Technologies, the share transfer never became effective, and as a result, L1bero Partners never owned any part of ES Technologies. As a result of the ICC Arbitration, L1bero Partners ultimately conceded this fact and agreed with ES Holdings in the ICC consent award that ES Holdings held 100% of ES Technologies at all times since November 2017, including from 2017 to 2019. In its Request for Arbitration in this matter, ES Holdings informed the Tribunal that L1bero Partners' shares had been cancelled, but given the status of the ICC arbitration at that time, the ICC Arbitration would determine whether ES Holding owned 100% of ES Technologies or whether L1bero Partners possessed a 50% interest in ES Technologies at any point from November 2017 to present. See Request for Arbitration, fn. 3. The ICC consent award resolved that arbitration and confirmed that L1bero Partners never held any interest in ES Technologies.

and "[a]s a result, ***ES Holdings is deemed to have been the owner of 100% of the units of ES Technologies at all time 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.[193] Accordingly, ES Holdings, the claimant in this NAFTA arbitration, has lawfully held a 100% direct share of ES Technologies and a 100% indirect share in Lusad since 22 November 2017. Below is a chart showing the current corporate structure of ES Holdings, which has remained the same since November 2017.[194]



14. Mexico City's Issuance of the Mandatory Installation Notice

107. Meanwhile, Lusad continued to implement the Concession. In February 2018, Semovi confirmed the panic button connected to Mexico City's C5 was functioning satisfactorily.[195] Lusad thus had the government's confirmation that L1bre-enabled taxis would be safer and more secure by connecting directly with the government's command center in case of emergency.[196] Lusad could also distinguish L1bre-enabled taxis from any other ride hailing

193 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 67.

194 **Exhibit C-0069-SPA** (Lusad's Corporate Structure since November 2017).

195 **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) ("Al respecto le informo que, durante el mes de enero y febrero del año en curso, se realizaron nuevamente pruebas exhaustivas sobre ambiente de producción para la funcionalidad del botón de auxilio, **siendo el resultado de las mismas satisfactorias**) (emphasis added).

196 *Id.* ("Dado lo anterior esta Dirección General a mi cargo **emite el Visto bueno técnico para el lanzamiento de la plataforma L1bre**, validando únicamente el módulo de botón de auxilio) (emphasis added).

application through this enhanced safety feature, which was an important commercial advantage to attract riders.[197]

108. The final step would be to install the L1bre System in all of Mexico City's taxis. Under the Concession, installation was to be mandatory and would be facilitated by Semovi. However, the actual installation would be paid for and managed by Lusad.[198] In anticipation of this final stage, Lusad rented spaces to be used as the initial installation centers, which initially included the test installations of the L1bre System in 100 and then 1,000 taxis. Lusad developed manuals for the installation centers, studied their layouts, and conducted timed test runs to decrease the time needed to install the system in each vehicle, with plans to increase the number of installation centers once the mandatory installation process began.[199]

109. Semovi acknowledged one more time that the Concession was in place by issuing the official notice to all taxi drivers to make an appointment to get the new digital taximeter installed.[200] Accordingly, on 17 April 2018, Semovi issued a Mandatory Installation Notice to all taxi operators stating that the installation of the L1bre System would occur via an electronic appointment system between April 2018 and March 2019.[201] The mandatory installation notice also required Lusad to complete the installation of the taximeters by 31 March 2019.[202] This notice is depicted below. Semovi and Mexico City were the parties responsible—indeed obligated by law under the Concession—to facilitate installation of the L1bre System into all of Mexico City's taxis. Semovi's electronic appointment system was dependent on Semovi's implementation of a

197 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 21, 69; Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 52.

198 *See supra* ¶¶ 80–87 (describing Lusad's rights and obligations under the Concession and referencing the relevant provisions of the Amended Concession Agreement).

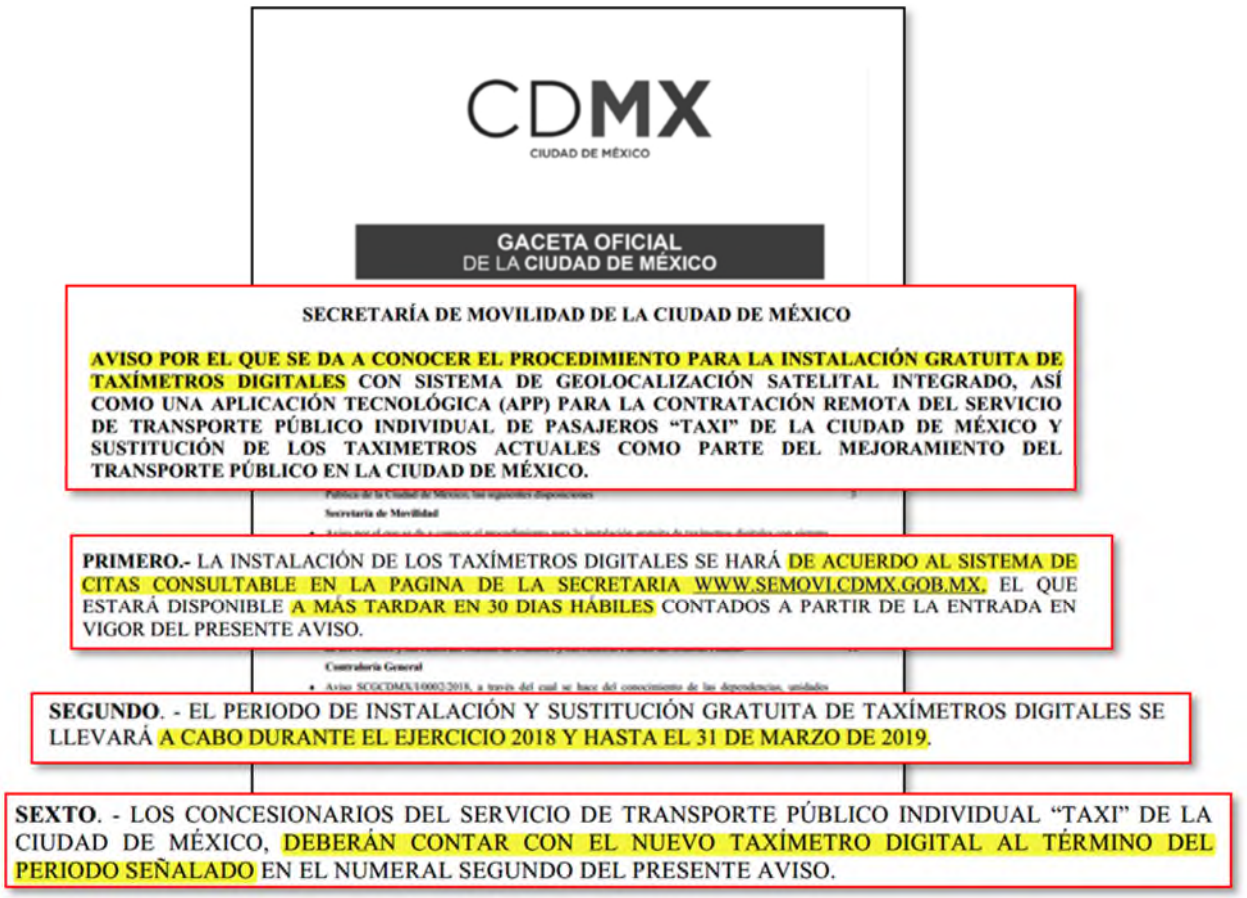
199 **Exhibit C-0073-SPA** (L1bre installation centers operations manual, dated 24 August 2018); **Exhibit C-0074-SPA** (Physical requirements for Installation Centers, May 2018).

200 **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).

201 *Id.*

202 *Id.* at pp. 9–10.

platform on its website that would allow taxi operators to request an appointment to have the L1bre System installed in their taxis.[203]



CDMX
CIUDAD DE MÉXICO

GACETA OFICIAL
DE LA CIUDAD DE MÉXICO

SECRETARÍA DE MOVILIDAD DE LA CIUDAD DE MÉXICO

AVISO POR EL QUE SE DA A CONOCER EL PROCEDIMIENTO PARA LA INSTALACIÓN GRATUITA DE TAXÍMETROS DIGITALES CON SISTEMA DE GEOLOCALIZACIÓN SATELITAL INTEGRADO, ASÍ COMO UNA APLICACIÓN TECNOLÓGICA (APP) PARA LA CONTRATACIÓN REMOTA DEL SERVICIO DE TRANSPORTE PÚBLICO INDIVIDUAL DE PASAJEROS "TAXI" DE LA CIUDAD DE MÉXICO Y SUSTITUCIÓN DE LOS TAXIMETROS ACTUALES COMO PARTE DEL MEJORAMIENTO DEL TRANSPORTE PÚBLICO EN LA CIUDAD DE MÉXICO.

PRIMERO.- LA INSTALACIÓN DE LOS TAXÍMETROS DIGITALES SE HARÁ DE ACUERDO AL SISTEMA DE CITAS CONSULTABLE EN LA PAGINA DE LA SECRETARIA WWW.SEMOVI.CDMX.GOB.MX, EL QUE ESTARÁ DISPONIBLE A MÁS TARDAR EN 30 DIAS HÁBILES CONTADOS A PARTIR DE LA ENTRADA EN VIGOR DEL PRESENTE AVISO.

SEGUNDO. - EL PERIODO DE INSTALACIÓN Y SUSTITUCIÓN GRATUITA DE TAXÍMETROS DIGITALES SE LLEVARÁ A CABO DURANTE EL EJERCICIO 2018 Y HASTA EL 31 DE MARZO DE 2019.

SEXTO. - LOS CONCESIONARIOS DEL SERVICIO DE TRANSPORTE PÚBLICO INDIVIDUAL "TAXI" DE LA CIUDAD DE MÉXICO, DEBERÁN CONTAR CON EL NUEVO TAXÍMETRO DIGITAL AL TÉRMINO DEL PERIODO SEÑALADO EN EL NUMERAL SEGUNDO DEL PRESENTE AVISO.

110. Lusad had been preparing for months for the commencement of the mandatory installation period. It was establishing installation centers throughout the City, and it prepared training and protocols to install the L1bre System in taxis as quickly as possible.[204] Lusad also established a call center to provide support for users, including hiring personnel to ensure that it was continuously staffed, and establishing protocols for the repair and replacement of L1bre System hardware.[205]

111. The Mandatory Installation Notice was a momentous occasion that was celebrated by Semovi and the Mexico City government. The government was excited to announce the modernization of Mexico City's taxi fleet with the L1bre System in a manner that would increase safety and security, allow better competition with private ridesharing companies, and increase revenue without any additional cost to taxi drivers. The Mexico City government held a public

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203 *Id.* (depicted above); Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 71; Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 53.

204 **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).

205 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 49, 70.

event in Mexico City's "Zocalo" main square to announce the launch of the L1bre System.[206] The Mayor, Semovi's directors, and other government officials were present to celebrate the launch of the L1bre System. Below are images from this event.

206 **Exhibit C-0036-SPA** (Pictures from L1bre Systems Official Launch Event) (depicted above).

112. This was also a momentous time for Lusad and its investors. Mexico City's publication of the mandatory installation notice was a clear statement, backed by force of Mexican law, that every single Mexico City taxi would install the L1bre System. This ensured that Lusad could benefit from the revenues that were guaranteed in the Concession. The vision, innovation, and hard work of Lusad's founders, investors, and employees that led to the creation of the L1bre System was about to become a reality.

C. THE INDEFINITE SUSPENSION OF IMPLEMENTATION OF THE CONCESSION AND DESTRUCTION OF CLAIMANT'S INVESTMENT

1. Mexico City Politicizes the Concession

113. Following the publication of the mandatory installation notice, the vast majority of taxi drivers were supportive of the L1bre System.[207] However, the manufacturer of existing physical taximeters opposed the L1bre System, and led a relatively small but vocal group of taxi drivers in protesting against it.[208] Semovi's initial response was to make clear that the installation of the tablets would not increase costs for taxi drivers and highlighted the benefits of the panic

207 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 77.

208 *Id.*

button for greater security to drivers and passengers. Semovi also reaffirmed the timeline for installation, with the end date of 31 March 2019. However, those opposed to the L1bre System caught the attention of some politicians. Certain mayoral candidates in the then upcoming Mexico City municipal elections used these protests as an opportunity to try to court taxi drivers as potential voters.[209] One of these candidates, Claudia Sheinbaum, promised, in relation to the L1bre System, that she would "put an end to abuses on taxi drivers."[210] Sheinbaum's statements were based on the false premise that the taxi operators would be responsible for the costs associated with installing the tablets. This premise was wrong, of course.[211] Under the clear and express terms of the Concession, Lusad bore the costs of installing and maintaining the L1bre System, not the taxi operators. Even so, Sheinbaum continued to pursue this political position going into the 1 July 2018 election.[212]

2. Mexico City Government Temporarily Suspends the Concession Pending the Results of the 1 July 2018 Election

114. On 30 May 2018, reacting to the sudden change in political rhetoric around the L1bre System's implementation, Semovi temporarily suspended the installation of the L1bre

209 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 78.

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

211 *See, e.g.*, **Exhibit C-0101-SPA** (Press article "*Semovi descarta aumentar tarifa por taximetros digitales*," dated 25 April 2018); Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 78.

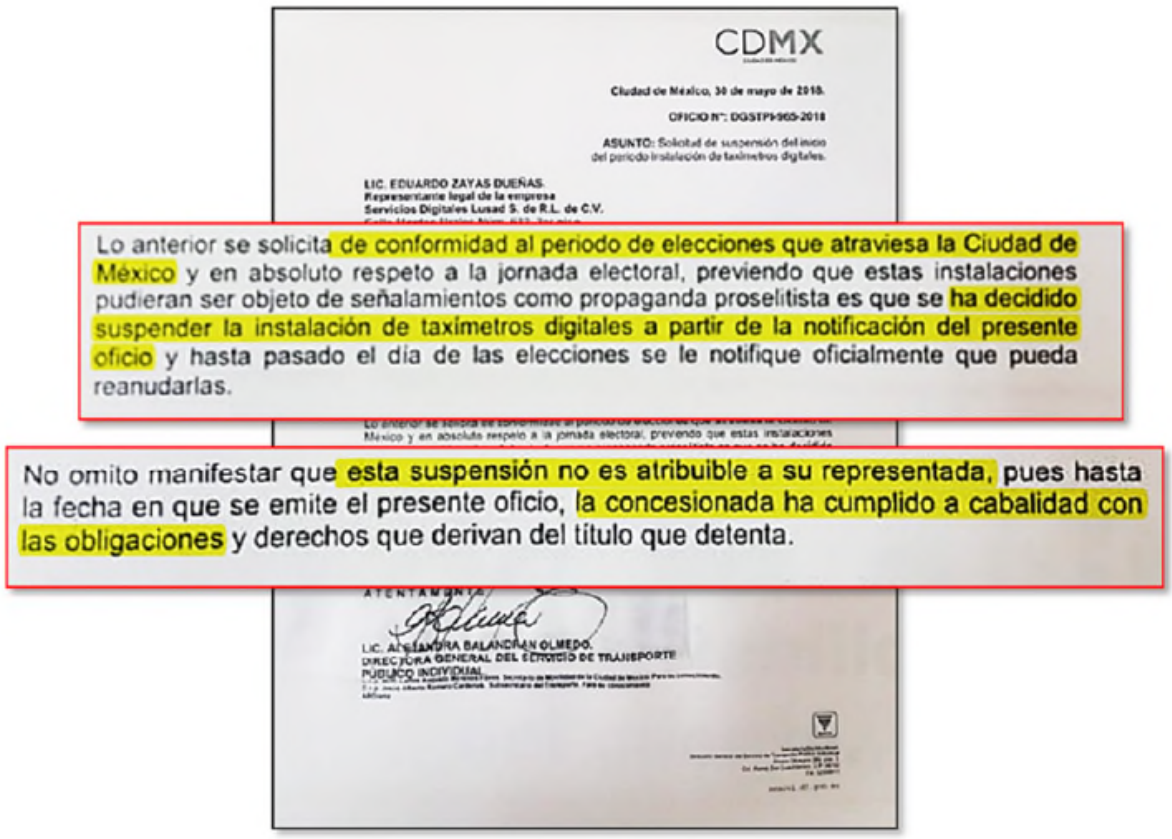
212 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 78.

System in the remaining taxis until after the election.[213] Semovi justified this temporary suspension by claiming that the Concession had become a political issue in the electoral campaign. Specifically, the suspension pointed to "the electoral period [in] Mexico City and in absolute respect for the electoral day." Notably, Semovi also expressly acknowledged that "***this suspension is not attributable to [Lusad] since to the day this writ is issued, the concessionaire has fully complied with its rights and obligations [under the Concession]***."[214] Through these statements,

[213] **Exhibit C-0018-SPA** (Oficio No. DGSTPI-965-2018 from Semovi announcing suspension of the Concession, dated 30 May 2018) ("**[S]olicito suspenda el inicio del periodo de instalación** de taxímetros digitales en las unidades concesionadas taxi de la Ciudad de México. . . . 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.") (emphasis added); Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 79; Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 56.

[214] **Exhibit C-0018-SPA** (Oficio No. DGSTPI-965-2018 from Semovi announcing suspension of the Concession, dated 30 May 2018) ("No omito manifestar que esta suspensión n**o es atribuible a su representada**, pues hasta la fecha en que se emite el presente oficio, la concesionada h**a cumplido a cabalidad con las obligaciones y derechos que derivan del título que detenta**.") (emphasis added).

Semovi expressly acknowledged that the decision to suspend implementation was not made for legal reasons, but rather for political reasons. Semovi's suspension notice is shown below.[215]


CDMX

Ciudad de México, 30 de mayo de 2018.

OFICIO N°: DGSTPI-965-2018

ASUNTO: Solicitud de suspensión del inicio del periodo instalación de taxímetros digitales.

LIC. EDUARDO ZAYAS DUEÑAS.
Representante legal de la empresa
Servicios Digitales Lusad S. de R.L. de C.V.

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.

No omito manifestar que esta suspensión no es atribuible a su representada, pues hasta la fecha en que se emite el presente oficio, la concesionada ha cumplido a cabalidad con las obligaciones y derechos que derivan del título que detenta.

ATENTAMENTE

LIC. ALEJANDRA BALANDRAN OLMEDO.
DIRECTORA GENERAL DEL SERVICIO DE TRANSPORTE PÚBLICO INDIVIDUAL

115. Because the notice was not a permanent act and was expressly tied to the upcoming 1 July 2018 election, Lusad's representatives were hopeful and optimistic that the political controversy would subside and that Semovi would resume after the election the process of facilitating the mandatory installation of the L1bre System, in order to allow Lusad to install the tablets in all of Mexico City's taxis by the 31 March 2019 deadline.[216] Lusad continued to prepare for mass installation of the L1bre System, including by acquiring further hardware, training personnel at its installation centers, and refining protocols for its installation centers in order to reduce installation times and streamline processes.[217] Lusad also continued to obtain critical certifications of its system by the Mexican authorities during this time.[218] These efforts were

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

216 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 80.

217 *Id.*; *see, e.g.*, **Exhibit C-0080-SPA** (Presentation on results of pilot program on 6 June 2018 at L1bre installation centers, dated 19 June 2018).

218 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 80; *see, e.g.*, **Exhibit C-0060-SPA** (Measurement Report from the Centro Nacional de Metrología, dated 13 September 2018); **Exhibit**

designed to ensure that once the temporary suspension was lifted, Lusad would be able to install its L1bre System in all of Mexico City's taxis in as short a time as possible, preventing any further delay in the roll-out of its revenue-producing phase.[219]

3. Mexico City Elects a New Government Hostile Towards Private Investment, Including This Concession

116. In July 2018, Sheinbaum was elected mayor of Mexico City.[220] Her election coincided with changes at the national level of government with the election of Andrés Manuel López Obrador as President. The newly elected government was very hostile towards private investment, including towards Lusad and the L1bre System.[221] After the election, Sheinbaum, a member of the newly elected President's political party, made several derogatory statements regarding Lusad's Concession.[222]

117. Notwithstanding Mayor Sheinbaum's election and the temporary suspension that was still in place, the government continued to support Lusad in its preparations, with the expectation that the suspension would soon be lifted, and the mandatory installation procedure would soon begin. The Centro Nacional de Metrología ("CENAM"), Mexico's measurement and calibration authority, which is required to certify all measuring devices used in commercial transactions in the country, received a final version of the L1bre digital taximeter system and subjected it to testing.[223] On 26 September 2018, CENAM confirmed that Lusad's digital taximeter was an accurate measurement device and was authorized for use in commercial transactions.[224] Subsequently, on 28 September 2018, the Secretary of the Economy of Mexico recognized CENAM's testing and authorization of the taximeter, and issued a formal authorization permitting the use of the L1bre digital taximeter.[225]

4. On 4 October 2018, Goldman Sachs Valued the Concession at USD $2.43 Billion

118. In the summer of 2018, Lusad's representatives engaged a team of financial and industry experts from the world's foremost investment bank, Goldman Sachs, to value the business

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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).

219 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 80.

220 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 81; Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 57.

221 *See, e.g.*, **Exhibit C-0029-SPA** (Video showing Sheinbaum's hostility towards Lusad's Concession).

222 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 81.

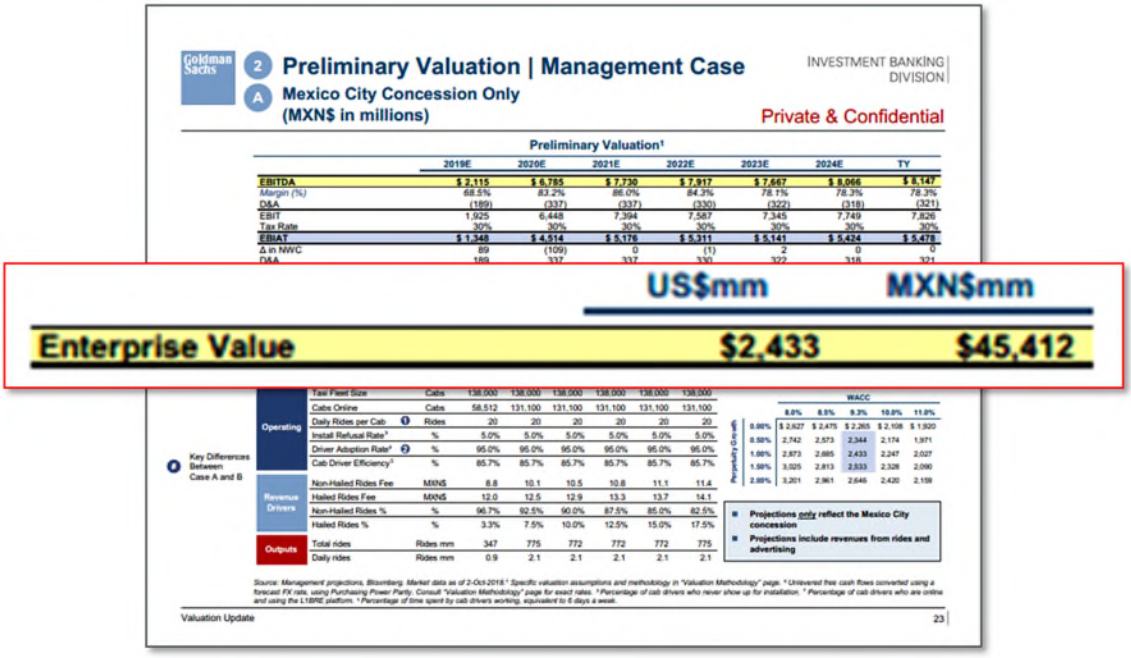
223 *See* **Exhibit C-0060-SPA** (Measurement Report from the Centro Nacional de Metrología, dated 13 September 2018); Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 80.

224 **Exhibit C-0063-SPA** (Verification Report from the Centro Nacional de Metrología, dated 26 September 2018).

225 **Exhibit C-0064-SPA** (Certification from the Dirección General de Normas, dated 28 September 2018).

under the Concession.[226] Goldman Sachs's team included seasoned financial advisers who had experience in performing valuation work for similar transactions in the technology, automotive, and ride-hailing sectors.[227] The goal of this analysis was to value Lusad's business under the Concession, as Lusad had already been approached by several interested outside investors.[228] At the time, Lusad still believed that with the election over, Semovi would honor the Concession and lift the suspension.[229]

119. Goldman Sachs analyzed Lusad and its parent company, L1bre LLC; the L1bre System; and the Concession, collecting troves of data regarding L1bre's finances, corporate documents, and vendor files. Goldman Sachs relied on its industry expertise as well as independent market data to analyze the market size and expected growth rates, and developed revenue and costs projections based on those growth models, Lusad's third-party agreements, the Concession, and local laws.[230] On 4 October 2018, Goldman Sachs concluded that the existing Concession business had an ***enterprise value of USD $2.433 billion dollars***[231], as shown below:



226 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 73; **Exhibit C-0077-ENG** (Goldman Sachs financial advisory services proposal, 14 June 2018); **Exhibit C-0078-ENG** (Goldman Sachs engagement letter, dated 30 August 2018).

227 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 73; **Exhibit C-0077-ENG** (Goldman Sachs financial advisory services proposal, 14 June 2018).

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

229 *Id.*

230 **Exhibit C-0079-ENG**, pp. 14–15, 18–20 (Goldman Sachs Pre-Marketing Recap and Potential Next Steps, dated 4 October 2018) (providing an impartial and timely analysis of the value of Lusad and the Concession just weeks before Semovi permanently suspended implementation of the Concession).

231 *Id.* at p. 23.

120. Notably, this valuation only included the value of the Concession itself. Goldman Sachs separately valued the expansion possibilities that a potential investor would consider when deciding whether to invest, including Lusad's planned expansion into the food delivery and package delivery business, as well as expansions of the L1bre System to additional locations throughout Mexico. These values were reasonably foreseeable to Goldman Sachs (and ES Holdings) because of the inroads already made in these other markets and the value in Lusad's ability to prove the benefits of the L1bre System in Mexico City.[232] Goldman Sachs determined that these additional sources of business, not included in its base evaluation, could generate additional revenue streams comparable to the existing Concession business.[233]

121. This impartial and reputable valuation by Goldman Sachs occurred ***just prior*** to Mexico City's 28 October 2018 indefinite suspension of the implementation of the Concession.[234] At this stage, Lusad was proceeding in accordance with its expectation, supported by law, that it would be able to install 138,000-plus of tablets and accompanying software and smartphone application in the very near future.[235]

5. Semovi Indefinitely Suspends the Implementation of the Concession

122. However, on 28 October 2018, Semovi issued a notice indefinitely suspending the installation of the L1bre System in the remaining taxis based solely on the fact that a new administration was coming to power in Mexico City.[236] Semovi did not even attempt to legally justify the indefinite suspension of the Concession in the notice. Instead, Semovi affirmed that the

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232 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 75–76.

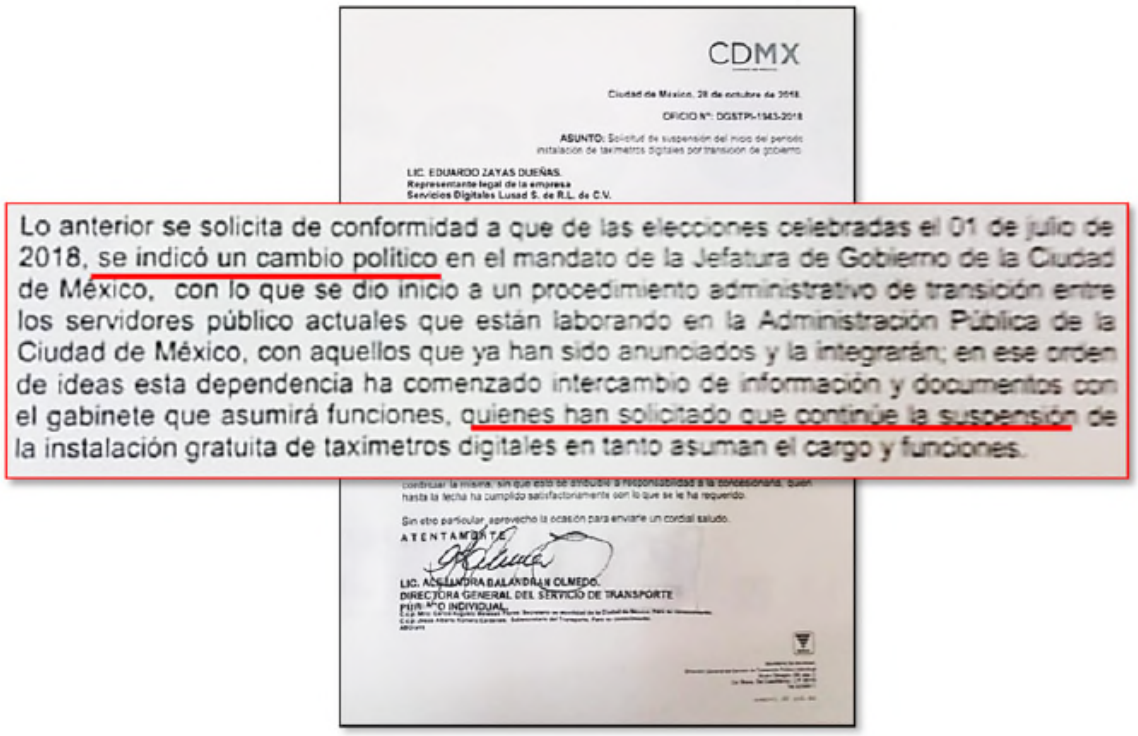
233 **Exhibit C-0079-ENG**, p. 15 (Goldman Sachs Pre-Marketing Recap and Potential Next Steps, dated 4 October 2018).

234 *Id.* at 1.

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

236 **Exhibit C-0019-SPA** (Oficio No. DGSTPI-1943-2018 from Semovi announcing indefinite suspension of the Concession, dated 28 October 2018) ("[S]olicito c**ontinúe suspendido el inicio del periodo de instalación** de taxímetros digitales en las unidades concesionadas taxi de la Ciudad de México . . . . Lo anterior **se solicita de conformidad a que de las elecciones celebradas el 01 de julio de 2018, se indicó un cambio político en la mandado de la Jefatura de Gobierno de la Ciudad de México**, con lo que se dio inicio a un procedimiento administrativo de transición entre los servidores público actuales . . . con aquellos que ya han sido anunciados y la integrarán . . . quienes han solicitado que continúe la suspensión de la instalación gratuita de taxímetros digitales en tanto asuman el cargo y funciones.") (emphasis added).

Concession's suspension was precipitated by a "political change" in light of the change in government administrations.[237] Semovi's 28 October 2018 notice is excerpted below:



CDMX

Ciudad de México, 28 de octubre de 2018

OFICIO N°: DGSTPI-1943-2018

ASUNTO: Solicitud de suspensión del inicio del periodo instalación de taxímetros digitales por transición de gobierno

LIC. EDUARDO ZAYAS DUEÑAS.
Representante legal de la empresa
Servicios Digitales Lusad S. de R.L. de C.V.

Lo anterior se solicita de conformidad a que de las elecciones celebradas el 01 de julio de 2018, se indicó un cambio político en el mandato de la Jefatura de Gobierno de la Ciudad de México, con lo que se dio inicio a un procedimiento administrativo de transición entre los servidores público actuales que están laborando en la Administración Pública de la Ciudad de México, con aquellos que ya han sido anunciados y la integrarán; en ese orden de ideas esta dependencia ha comenzado intercambio de información y documentos con el gabinete que asumirá funciones, quienes han solicitado que continúe la suspensión de la instalación gratuita de taxímetros digitales en tanto asuman el cargo y funciones.

continuar la misma, sin que esto se atribuible a responsabilidad a la concesionaria, quien hasta la fecha ha cumplido satisfactoriamente con lo que se le ha requerido.

Sin otro particular, aprovecho la ocasión para enviarle un cordial saludo.

ATENTAMENTE

LIC. ALEJANDRA BALANDRAN OLMEDO
DIRECTORA GENERAL DEL SERVICIO DE TRANSPORTE
PÚBLICO INDIVIDUAL

123. This indefinite suspension signaled the government's intention to abandon the Concession. Because of the suspension Semovi failed to take the necessary steps to facilitate the mandatory installation of the L1bre System.[238] Semovi failed to create a website with the promised sign-up platform so that drivers could schedule a time to have the L1bre System installed in their vehicles. Semovi failed to even notify drivers that Lusad was ready and willing to install the system in their vehicles. Through their inaction, Mexico City and Semovi failed to uphold their end of the bargain under the Concession. Without the government facilitating installation, it was impossible for Lusad to install the L1bre System, and therefore impossible for Lusad to commercialize the system.[239]

124. The suspension of the mandatory installation process violated both the Concession and Mexican law. Article 18 of the Concession (as amended) provides the only grounds for potential suspension of service and, as expected, does not allow the Concession to be suspended

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237 *Id.* ("Esta suspensión de instalación de taxímetros digitales continuará a partir de la notificación del presente oficio, y se reanudará en tanto se le notifique oficialmente que podrá continuar la misma, **sin que se atribuible a responsabilidad a la concesionaria, quien hasta la fecha ha cumplido satisfactoriamente con lo que se le ha requerido**.") (emphasis added); Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 81; Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 57.

238 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 85.

239 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 85; Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 59.

for political reasons.[240] Nor does Mexican electoral law permit a governmental entity to suspend a public service based on an election or a change in political leadership.[241]

125. After the second suspension letter was issued, Semovi has never reactivated the Concession—this indefinite suspension has in effect become permanent and has deprived the Concession of all value to Lusad, as officials confirmed to ES Holdings in meetings.[242] By choosing to violate its legal obligations under the Concession, the government halted Lusad's opportunity to earn revenue and profits, as guaranteed under the Concession and the Treaty. This suspension notice extinguished Lusad's value, including L1bre's brand equity and goodwill.[243]

126. This devastating and unlawful act by the Mexico City government was expropriatory, violative of the legitimate expectations conveyed through the Concession and many other government communications to Lusad and its representatives over the course of the investment, and was a blatant violation of the Concession.[244] Lusad and its representatives did nothing wrong, nor took any action to merit this harsh and unlawful treatment. Instead, Lusad was a casualty in the crossfire of Mexico City's politics.[245] The L1bre System was on the cusp of final implementation and monetization after years of substantial technological innovation and development in hardware and software technology, related intellectual property, testing, obtaining of permits, hiring and employment of many people, branding, and approximately USD $80 million dollars of financial investment. But due to the government's unlawful act, Claimant's investment (including Lusad) was now worthless.[246]

6. After the Suspension, Senior Government Officials Mislead Lusad into Signing a False Amended Concession

127. Incredibly, after the mayoral election, in November 2018, Semovi took steps to attempt to unilaterally alter the Concession to Lusad's detriment and to artificially devalue Claimant's investment. During that time period, Claimant's representatives were seeking to obtain a permit from Semovi to operate privately chauffeured vehicles.[247] This was an entirely separate

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240 *See* **Exhibit C-0007-SPA**, Article 18 (Amended Concession Agreement, as reissued on 21 March 2017).

241 **Exhibit CL-0076-SPA**, Article 209 (Ley General de Instituciones y Procedimientos Electorales) ("Artículo 209. Durante el tiempo que comprendan las campañas electorales federales y locales, y hasta la conclusión de las jornadas comiciales, deberá suspenderse la difusión en los medios de comunicación social de toda propaganda gubernamental, tanto de los poderes federales y estatales, como de los municipios, órganos de gobierno del Distrito Federal, sus delegaciones y cualquier otro ente público. Las únicas excepciones a lo anterior serán las campañas de información de las autoridades electorales, las relativas a servicios educativos y de salud, o las necesarias para la protección civil en casos de emergencia.").

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

243 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 85; Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 58.

244 *See infra* Section V (discussing Mexico's violations of NAFTA).

245 *Id.*

246 *Id.*; *see infra* Section VI (discussing Claimant's damages).

247 Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 61.

matter from the Concession.[248] Zayas and Lusad representatives were summoned to a meeting at Semovi's offices on 7 November 2018 for the purpose of inquiring about the status of the private chauffeur permits.[249]

128. Semovi's meeting was called under false pretenses. Lusad's representatives soon learned that they were walking into an ambush. Lusad's representatives, to their surprise, were informed that the purpose of the meeting was not to discuss the outstanding permits for privately chauffeured vehicles, but instead to fraudulently procure Zayas's signature on an altered Concession.[250] Only after signing the document, Zayas learned that what he had signed was not in fact identical to the Amended Concession, but was instead a revised concession document that purported to remove two important sources of revenue, namely the Recuperation Fee that granted Lusad MXN $12.00 each time a user hailed a taxi with the L1bre System installed, and the fee Lusad could charge for providing WiFi.[251]

129. This entire facade at Semovi's office had no legal ramifications relating to Lusad's rights under the Concession. The revised "draft" documents and the backdated documents are not binding under Mexican law, nor are they representative of any change in Claimant's rights under the Treaty. Indeed, any value in Claimant's investment under the Concession (which remains "on the books" today) was destroyed prior to this 6 November 2018 meeting at Semovi due to the government's indefinite suspension notice of 28 October 2018. Instead, Semovi's ruse amounts to further bad faith on the part of Semovi and the post-election Mexico City government. Having just taken action to block implementation of the Concession, Semovi sought to dupe Lusad's representatives into altering the Concession to make it facially less valuable. If there was any question about Semovi's motivations in issuing its 28 October 2018 notice, the events of 6 November 2018, less than two weeks later, make abundantly clear that those motivations were to harm Lusad.[252]

7. The Mexico City Government Confirmed That It Would Never Honor the Concession

130. After the new Mexico City government took office in December 2018, Claimant was still hopeful that Mexico City's suspension of the Concession might be lifted at some time in the future.[253] After all, Lusad was ready to deploy the new L1bre technology as required and promised by the Concession, and the government still had not formally cancelled the Concession. But during meetings Lusad's representatives had with Mayor Sheinbaum and with Semovi in early January 2019, Mexico City's government officials stated, with total certainty, that the Sheinbaum

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248 *Id.*

249 *Id.*

250 *Id.*

251 *Id.*; *see* **Exhibit C-0020-SPA** (Forged Concession Agreement, dated 13 April 2018) (attempting to eliminate the Recuperation Fee Lusad received each time a user hailed a taxi containing the L1bre System).

252 Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 61.

253 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 82; Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 63.

government would never honor the terms of the Concession.[254] These meetings confirmed that the government had made the Concession valueless and would not pay fair compensation (or any compensation) for this harm.[255]

8. Mexico City's Actions Destroyed the Entire Value of the Investment, Including the L1bre Brand and Goodwill

131. The Mexico City government's actions made Claimant's investment in Lusad entirely worthless.[256] Lusad was a company with a Concession valued by Goldman Sachs at more than USD $2.43 billion on 4 October 2018.[257] As detailed in the attached expert report on damages, the entire value of the Concession as of October 2018, including tax gross-up and pre-award interest, was USD $2.802 billion.[258] This Concession, along with Lusad, is now worth zero as a direct result of the government's unlawful actions.[259]

132. In addition, the government's actions destroyed the L1bre brand and Lusad's goodwill. The L1bre brand and the reputation of Lusad and its founders was very strong at the time of Mexico City's destruction of the investment. For example, in late 2018, Lusad was invited to participate in a panel discussion at the United Nations in New York regarding sustainable development in Latin America.[260] León, as Chairman of the Board, participated on Lusad's behalf.

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254 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 83–84; Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 63.

255 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 83–84; Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 63.

256 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 83–84; Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 63.

257 **Exhibit C-0079-ENG**, p. 23 (Goldman Sachs Pre-Marketing Recap and Potential Next Steps, dated 4 October 2018) (providing an impartial and timely analysis of the value of Lusad and the Concession just weeks before Semovi permanently suspended implementation of the Concession).

258 *See* Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 29.

259 *See* Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 163; Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 85.

260 *See* **Exhibit C-0098-SPA** (News report of Santiago León's appearance before the United Nations, dated 12 December 2018); **Exhibit C-0103-SPA** (News report of Santiago León's appearance before the United Nations, dated 12 December 2018); *see also* **Exhibit C-0102-ENG** (Lusad Press Release: "L1bre: The Guiding Principle of its Business Model Is Prioritizing Social Responsibility," dated 13 December 2018) (discussing León's appearance before the United Nations and that "[Lusad] is a great example of how the successful model of a cross-cutting alliance between government, private initiative and drivers and taxi users throughout Latin American can be replicated).

Lusad issued a press release and video of this United Nations panel.[261] A depiction of this appearance is below:

133. Due to Mexico City's destructive and unlawful actions, Lusad went from a highly respected and valued business with rights to install its system in the largest taxi market in the world, to a destroyed venture that would never have the opportunity to yield any return on the Claimant's investment.[262] Mexico City's government was well aware of all of this at this time, but decided that the political advantages were better for the new government than respecting the law or fairly compensating an investment for this unlawful political act.

9. After Destroying Claimant's Investment, Mexico City Stole L1bre's Vision and Implemented the L1bre System by Another Name, Mi Taxi

134. Following its unlawful decision of 28 October 2018 to block implementation of the Concession, Semovi and the Mexico City government chose to replace the L1bre System with its own government-run service that it ultimately named "Mi Taxi." In June 2019, Mayor Sheinbaum announced on behalf of the Mexico City government that the Digital Agency of Public Innovation ("DAPI")—a government instrumentality—was developing a taxi application.[263] Semovi

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261 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 82; **Exhibit C-0102-ENG** (Lusad Press Release titled: "L1bre: The Guiding Principle of its Business Model Is Prioritizing Social Responsibility," dated 13 December 2018); **Exhibit C-0098-SPA** (News Report of S. León's Appearance before the United Nations, dated 12 December 2018); **Exhibit C-0103-SPA** (News Report of S. León's Appearance before the United Nations) (still image from video depicted above).

262 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 85.

263 **Exhibit C-0021-SPA** (Press article "*Mexico City's Government will Create app for Taxis*," dated 14 June 2019).

announced that the application was intended to be similar to that used by other ride-hailing companies.[264]

135. In August 2019, the government announced pilot testing of the Mi Taxi system.[265] On 5 September 2019—less than one year after indefinitely suspending the Concession—Mayor

264 *Id.*

265 **Exhibit C-0082-SPA** (Press article "*Sheinbaum Presents First Phase of Digital Application 'Mi Taxi,'*" dated 5 September 2019).

Sheinbaum and the new Secretary of Semovi announced details of the new, expropriated Mi Taxi system.[266]

136. The government's description demonstrated that Mi Taxi was a (lower-quality) rip-off of the L1bre System. The government announced that Mi Taxi would have at least the following functions, all of which had been innovated and developed by ES Holdings (Lusad) in the L1bre System: (i) GPS service for taxi drivers; (ii) a platform for users to hail taxis using a

266 **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) (stating that the Mexico City government developed Mi Taxi and that Mi Taxi was connected to C5 with a panic button and the ability to look up a taxi driver's plates in the application to increase taxi safety following taxi drivers' links to sex crimes, kidnappings, and disappearances, and that Mi Taxi would allow credit card and digital payment for taxi rides); **Exhibit C-0104-SPA** (Press article "*Presentan app Mi taxi para garantizar seguridad y calidad en taxis de la CDMX*," dated 5 September 2019) (stating that the Mi Taxi application would seek to guarantee security and quality for taxi services including connection to C5); Witness Statement of Eduardo Zayas, 13 September 2021, ¶¶ 64–65.

smart phone; and (iii) a panic button connected to C5 for passenger and driver safety.[267] The Mi Taxi system would include a Mi Taxi smartphone application that could be used to hail rides, provide GPS, and which would feature the signature panic button.[268]

137. The government's stated goals behind the launch of the Mi Taxi system were the same as its goals in issuing the Declaration of Necessity, issuing the Concession to Lusad, and mandating that all taxis install the Mi Taxi system. Specifically, the government desired for Mi Taxi to increase taxi safety in light of sex crimes, kidnappings, and disappearances connected to taxi trips; to increase technology and data in the taxi sector; to allow digital and credit card payment for rides; and to deploy smartphone application technology to the taxi fleet.[269] In short, Mi Taxi was intended to be a replacement of the L1bre System, in blatant violation of Lusad's rights under the Concession.[270]

10. Mi Taxi Officially Replaces the L1bre System

138. On the same day as Mayor Sheinbaum and the new Semovi Secretary's announcement of Mi Taxi, 5 September 2019, Eduardo Clark, the director of the Center of Technological Development of Mexico's Digital Agency of Public Innovation, stated during a radio interview that Lusad's Concession was no longer in effect and that Mi Taxi was replacing the L1bre System.[271] If there was any doubt whether Mexico City would ever live up to its promises in the Concession, the events and government statements to the public on 5 September 2019 reconfirmed that the L1bre System was destroyed, the Concession would not be

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267 **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).

268 **Exhibit C-0022-SPA** (Press article "*Launch of 'Mi Taxi' app that Includes a Panic Button*," 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).

269 **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) (stating that the Mexico City government developed Mi Taxi and that Mi Taxi was connected to C5 with a panic button and the ability to look up a taxi driver's plates in the application to increase taxi safety following taxi drivers' links to sex crimes, kidnappings, and disappearances, and that Mi Taxi would allow credit card and digital payment for taxi rides); **Exhibit C-0104-SPA** (Press article "*Presentan app Mi taxi para garantizar seguridad y calidad en taxis de la CDMX*," dated 5 September 2019) (stating that the Mi Taxi application would seek to guarantee security and quality for taxi services including connection to C5).

270 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 88; Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 67.

271 **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).

implemented, and Claimant's investment had been replaced with the government's own service and technology, Mi Taxi.[272]

139. Following these events, Lusad's representative sent a letter to Semovi requesting an update on the status of the Concession and explaining that the launch of Mi Taxi constitutes a clear violation of the Concession and Lusad's rights conferred therein.[273] Lusad explained that it had invested tens of millions of dollars to develop the technology and know-how behind its software programs and to fulfill its obligations under the Concession—including acquiring tablets, obtaining permits, already installing the system in over 1,200 taxis, and successfully completing the Trial Period.[274] Semovi failed to respond.

140. On 16 February 2020, Mayor Sheinbaum held another press conference, this time to formally announce the deployment of the Mi Taxi system.[275] Mayor Sheinbaum's administration again confirmed that Mi Taxi had replaced the L1bre System developed by the "prior administration."[276] Mayor Sheinbaum claimed that Mi Taxi was developed by app

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272 **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); Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 64.

273 **Exhibit C-0105-SPA** (Letter from Lusad to Semovi regarding status of the Concession, dated 30 September 2019).

274 *Id.*

275 **Exhibit C-0030-SPA** (Video recording of Mayor Sheinbaum's 16 February 2020 press conference).

276 **Exhibit C-0033-SPA** (Press article *"Taxi Drivers Will Operate via App as of 15 March 2020,"*dated 16 February 2020) (The government stated that taxi drivers would begin to operate with the Mi Taxi app that was developed by the government beginning 15 March 2020. The government also made false statements about L1bre, including that L1bre would have charged taxi drivers up to 12 pesos per trip to use the tablet—at the same time it announced a fee of 13.10 peso fee associated with Mi Taxi); **Exhibit C-0106-SPA** (Press article "*'Mi Taxi' de la CDMX es mejor que aplicaciones de transporte privadas: Sheinbaum,*" dated 28 March 2021) (Sheinbaum continues to attribute L1bre to the prior administration and make false statements about L1bre including that "it was the business of a few and they were forcing the taxi driver to pay (a tablet)").

developers, engineers, mathematicians, and computer experts within the Mexico City government.[277] The government, however, did not provide the specifics of how this supposedly internal technology innovation had occurred so quickly. Based on the apparent functions of the application and its close similarities to the L1bre System's smartphone application and technology, the government clearly did not start from scratch to develop Mi Taxi.[278]

11. Semovi Promotes the Mi Taxi System

141. On 16 April 2020, Semovi issued a resolution formally inviting all taxi drivers in Mexico City to install Mi Taxi and not the L1bre System.[279] This notice occurred just two years after a similar notice requiring installation of the L1bre System. The Mi Taxi installation notice had a notable difference from the L1bre System's mandatory installation notice—it provided for greater fees to be charged for rides hailed through Mi Taxi than was planned for the L1bre System. The resolution imposed a minimum fee of MXN $13.10 per ride—which is higher than the maximum fee of MXN $12 fee per ride that was awarded to Lusad under the Concession.[280] Despite all of Mayor Sheinbaum's political rhetoric concerning the costs of the L1bre System, Mi Taxi was actually charging a higher fee per ride than the L1bre System was granted under the Concession.[281]

142. The Mi Taxi installation notice demonstrated that Mexico City was making good on its promise to replace the L1bre System. This was not merely political rhetoric or a press conference stating aspirations. This was an official government publication, "on the books," encouraging the use of the Mi Taxi system.[282] Although the Sheinbaum government had already buried L1bre on 28 October 2018, this act was the Sheinbaum government's proverbial "nail in

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277 **Exhibit C-0083-SPA** (Press article "*Convocan a trabajadores del volante sumarse a la plataforma digital Mi Taxi*," dated 16 April 2020) (stating that Semovi developed the technology for Mi Taxi); **Exhibit C-0107-SPA** (Press article "*Mi Taxi, mucho mejor que qualquier otra aplicacion: Sheinbaum*," dated 28 March 2021) (Sheinbaum continues to attribute L1bre to the prior administration and make false statements about L1bre including that "it was a business of a few and it was forcing the taxi driver to pay for it, and it was associated with a type of model." Sheinbaum also explains that Mi Taxi was developed by the Mexico City government including "engineers, mathematicians, and young people who have studied computing").

278 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 87.

279 **Exhibit C-0032-SPA** (Call to public individual transport services concessionaires to adhere to the "Mi Taxi" application, published in the Gaceta Oficial de la Ciudad de México, dated 16 April 2020); *see also* **Exhibit C-0083-SPA** (Press article "Convocan a trabajadores del volante sumarse a la plataforma digital Mi Taxi," dated 16 April 2020) (stating that Semovi issued in Mexico City's Official Gazette a call to the taxi drivers to register in Mi Taxi to provide ride-hailing services).

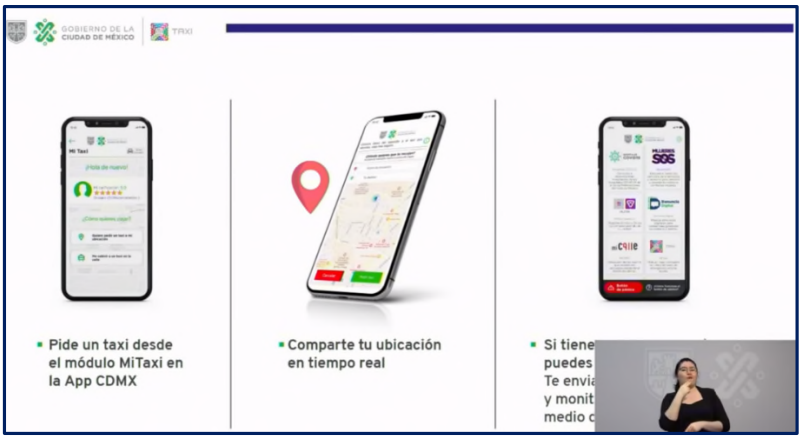
280 *See* **Exhibit C-0032-SPA** (Call to public individual transport services concessionaires to adhere to the "Mi Taxi" application, published in the Gaceta Oficial de la Ciudad de México, dated 16 April 2020) at 3 ("TERCERO.- Para los concesionarios que se adhieran a esta plataforma, se prevé que la tarifa para el banderazo sea de $13.10 pesos (Trece pesos 10/100 M.N.), y por cada 250 metros o 45 segundos se cobrará $1.30 pesos (un peso 30/100 M.N.).").

281 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 89; Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 66.

282 **Exhibit C-0032-SPA** (Call to public individual transport services concessionaires to adhere to the "Mi Taxi" application, published in the Gaceta Oficial de la Ciudad de México, dated 16 April 2020).

the coffin" of the L1bre System, Lusad, the Concession, and Claimant's investment. The government had not only destroyed the L1bre System—but it had also replaced it with its own. Claimant filed its Request for Arbitration under the Treaty soon thereafter, on 1 May 2020.[283]

143. Since Claimant filed its Request for Arbitration, the government has rolled out additional details about Mi Taxi's functionality and revenue streams. On 9 September 2020, the Mexico City government held a press conference presenting the updated version of Mi Taxi.[284] This upgraded version includes a panic button connected to C5, the ability to request a ride from any location, and location tracking during the entire trip.[285] Key portions of the government's demonstration of the updated application and some of the government's adoption and usage statistics are below.



283 ES Holdings' Request for Arbitration, dated 1 May 2020.

284 **Exhibit C-0108-SPA** ("Video of press conference of Claudia Sheinbaum regarding Mi Taxi," dated 9 September 2020) (Mayor Sheinbaum and other high-level officials presented the new version of Mi Taxi and its features, including the panic button and the ability to request a taxi from anywhere).

285 *Id.*; Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 88.

12. Mi Taxi Takes off While the Concession Remains Worthless

144. While Mi Taxi is not mandatory, the government has strongly encouraged its adoption, lending its reputation and public relations machine to the promotion of the Mi Taxi system. Mayor Sheinbaum has promoted Mi Taxi dozens of times via her official Twitter account from September 2019 to present.[286] The government reported that as of the press conference on 9 September 2020, Mi Taxi had registered 788,558 downloads, 156,277 visits, and 5,345 requested rides.[287] In addition to a fee of MXN $13.10 per ride, the government was also requiring that drivers charge MXN $1.30 for every 250m or 45s riding in the taxi hailed using Mi Taxi.[288]

145. As of 4 December 2019, the Mexico City government had enabled the ability for Mi Taxi users to verify a driver's and taxi's information before starting a ride. More than 65,000 taxi drivers had registered their taxi data in the government's system at that point, with the remainder required to register by 10 September 2020.[289] As of 23 July 2020, the government reported that more than 40,000 users had registered for the Mi Taxi app, allowing for passengers to hail a taxi using the app and to use its functionality.[290]

146. The government has also stated that it would be using the same technology as Mi Taxi for "Mi Ruta," a similar system for bus rides.[291] This is a derivative service that relies upon the L1bre System's original innovation and technology in providing the government with additional benefits.[292]

147. The government has already shown that drivers and passengers are using Mi Taxi with greater frequency—and it predicts continued expansion. For her part, Mayor Sheinbaum

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286 **Exhibit C-0112-SPA** (Tweets from Mayor Sheinbaum promoting Mi Taxi, dated 5 September 2019 – 5 May 2021).

287 **Exhibit C-0108-SPA**, minute marker 16:09 ("Video of press conference of Claudia Sheinbaum regarding Mi Taxi," dated 9 September 2020).

288 **Exhibit C-0032-SPA** (Call to public individual transport services concessionaires to adhere to the "Mi Taxi" application, published in the Official Gazette on 16 April 2020) ("TERCERO.- Para los concesionarios que se adhieran a esta plataforma, se prevé que la tarifa para el banderazo sea de $13.10 pesos (Trece pesos 10/100 M.N.), y por cada 250 metros o 45 segundos se cobrará $1.30 pesos (un peso 30/100 M.N."); **Exhibit C-0109-SPA** (Press article "*¿Ya sabes cómo usarás la app Mi Taxi CDMX_ Aquí te explicamos el paso a paso*," dated 25 February 2020) (stating that the Mi Taxi base fee would be MXP $13.10).

289 **Exhibit C-0110-SPA** (Press article "*Mi Taxi de la App CdMx ¿cómo utilizarla para viajar Seguro*," dated 4 December 2019) (the Mexico City government stated that more than 65,000 drivers had registered in Mi Taxi).

290 **Exhibit C-0111-SPA** (Press article "*Mi taxi ¿Cómo pedir un vehículo desde la app de CDMX*," dated 23 July 2020) (stating that more than 40,000 taxi drivers had registered in the app and that there was a deadline of 10 September 2020 to register in the system or else be subject to sanctions).

291 **Exhibit C-0082-SPA** (Press article "*Así funciona la app del gobierno de Ciudad de México para dar más seguridad a mujeres en los taxis*," dated 5 September 2019) (stating that the same technology would be available for the app "Mi Ruta" for bus drives).

292 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 89.

continues to focus on the Mi Taxi's ability to favorably compete with other platforms.[293] Although taxi transportation dropped during the COVID-19 pandemic, and the Mexico City government also suspended training taxi drivers on the use of Mi Taxi in March 2020 as a result of safety concerns during the pandemic, Mi Taxi has still experienced a successful launch.[294] As of 30 March 2021, more than 1.9 million users had downloaded the app, and more than 12,000 taxi drivers had used the app.[295] The Mexico City government estimates that at least 79,000 taxi drivers would use the app.[296]

148. Mayor Sheinbaum stated again on 28 March 2021 that she intended for Mi Taxi to compete directly with other ride hailing platforms (such as Uber).[297] Mayor Sheinbaum continues to actively promote Mi Taxi, stating that it is the best app for hailing a ride because it is free to download and because it has a panic button that directly connects users to Mexican authorities—two of the most prominent features of the L1bre System.[298] There is additional room for adoption and use of Mi Taxi to continue to grow, particularly because there has been reported poor initial training of drivers, some of whom did not receive instruction other than downloading the app.[299]

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293 *See, e.g.*, **Exhibit C-0112-SPA** (Tweets from Mayor Sheinbaum promoting Mi Taxi, dated 5 September 2019 – 5 May 2021); **Exhibit C-0072-SPA** (Press article "*Mi Taxi CDMX– así funciona la app que está vinculada al C5 y cuenta con botón de pánico*," dated 28 March 2021) (stating that Mayor Sheinbaum and her government want Mi Taxi to compete with other platforms in the best conditions for the government); **Exhibit C-0107-SPA** (Press article "*Mi Taxi, mucho mejor que qualquier otra aplicacion: Sheinbaum*," dated 28 March 2021) (reporting that Mayor Sheinbaum stated Mi Taxi is "much better" than private ride hailing applications in major part due to the panic button connecting directly to authorities).

294 *See* **Exhibit C-0113-SPA** (Press article "*Presume CDMX app Mi Taxi... ¡pero no funciona!*" dated 15 March 2021) (stating that the Mexico City government did not provide taxi drivers fulsome instruction on Mi Taxi's features).

295 **Exhibit C-0093-SPA** (Presentation by Mayor Sheinbaum and Semovi on Mi Taxi, dated 28 March 2021) (explaining the benefits and successes of Mi Taxi and providing key statistics and information, including that 12,119 taxi drivers use Mi Taxi, 78,810 drivers have registered, 1,908,350 users have downloaded the app, and that there is evidence of the panic button functioning properly); **Exhibit C-0081-SPA** (Press article "*¿Cómo funciona la app "Mi Taxi" en la CDMX?*" dated 30 March 2021) (stating that more than 1.9 million users have download the Mi Taxi app, more than 12,000 taxi drivers are actively using the app, the Mexico City government expects approximately 79,000 taxi drivers to download the app, and that Semovi will be increasing training to teach taxi drivers how to use the app) (Mayor Sheinbaum again emphasizing that Mi Taxi is better than other ride hailing apps because it is free and has a panic button directly connecting users and authorities)

296 **Exhibit C-0093-SPA** (Presentation by Mayor Sheinbaum and Semovi on Mi Taxi, dated 28 March 2021); **Exhibit C-0081-SPA** (Press article "*¿Cómo funciona la app "Mi Taxi" en la CDMX?*" dated 30 March 2021).

297 **Exhibit C-0106-SPA** (Press article "*'Mi Taxi' de la CDMX es mejor que aplicaciones de transporte privadas: Sheinbaum*," dated 28 March 2021).

298 *Id.*; **Exhibit C-0112-SPA** (Tweets from Mayor Sheinbaum promoting Mi Taxi); **Exhibit C-0072-SPA** Press article "*Mi Taxi CDMX– así funciona la app que está vinculada al C5 y cuenta con botón de pánico*," dated 28 March 2021); **Exhibit C-0107-SPA** (Press article "*Mi Taxi, mucho mejor que qualquier otra aplicacion: Sheinbaum*," dated 28 March 2021) (stating that Mi Taxi is "much better" than private ride hailing applications in major part due to the panic button connecting directly to authorities).

299 *See* **Exhibit C-0113-SPA** (Press article "Presume CDMX app Mi Taxi... ¡pero no funciona!" dated 15 March 2021) (stating that the Mexico City government did not provide taxi drivers fulsome instruction on Mi Taxi's features).

As drivers and passengers become more accustomed to the new technology, its adoption will continue to increase. Mi Taxi is already a success, thanks in major part due to Lusad's years of work and technology innovation to create the L1bre System. A L1bre System that has been utterly destroyed by Mexico's politics.[300]

[300] Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 85.

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

149. As discussed in the Request for Arbitration, this dispute is within the competence of the Tribunal. All requirements for jurisdiction have been met. Claimant and Mexico have both consented to arbitration of this dispute, and all requirements under the Treaty and the ICSID Convention for submission of this dispute to arbitration have been met. Each element is discussed below.[301]

A. Mexico Is a Party to the Treaty

150. NAFTA came into effect on 1 January 1994 and remained in effect until it was replaced by the U.S.-Mexico-Canada Agreement ("USMCA") on 1 July 2020.[302] The Request for Arbitration was filed on 1 May 2020, while NAFTA was still in force.[303] Thus, NAFTA is the applicable treaty for purposes of the present proceedings.[304]

B. Claimant Is an Enterprise of Canada, Which Is a Party to the Treaty, and Thus Is an "Investor" Under the Treaty

151. ES Holdings is the Claimant in this arbitration.[305] NAFTA Article 1116 authorizes an "investor of a Party" to submit claims to arbitration under NAFTA Chapter 11.[306] NAFTA Article 1139 defines an "investor" 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."[307] An "enterprise of a Party" is defined to mean "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."[308] Claimant is a limited partnership incorporated under the laws of the province of Alberta, Canada.[309]

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301 *See infra* Sections IV.A–F.

302 **Exhibit CL-0001-ENG**, Article 2203 (NAFTA).

303 ES Holdings' Request for Arbitration, dated 1 May 2020; **Exhibit CL-0001-ENG**, Chapter 11 (NAFTA).

304 *See also* **Exhibit CL-0009-ENG**, Annex 14-C. (United States-Mexico-Canada Agreement) (enabling investors to submit claims of breaches under NAFTA for three years after the enactment of the USMCA).

305 ES Holdings' Request for Arbitration, dated 1 May 2020.

306 **Exhibit CL-0001-ENG**, Article 1116 (NAFTA).

307 **Exhibit CL-0001-ENG**, Article 1139 (NAFTA).

308 *Id.*, Article 1116 (NAFTA).

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

This makes Claimant an enterprise of Canada, and thus an "investor" of Canada. Because Canada is a NAFTA Party, this makes ES Holdings an investor of a Party (the "Investor").

C. Claimant Holds a Protected "Investment" Under the Treaty

152. NAFTA Article 1139 defines "investment" in relevant part as:

> (a) an enterprise;
>
> (b) an equity security of an enterprise;
>
> (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;
>
> (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
>
> (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory.[310]

153. Claimant's investment satisfies the definition contained in NAFTA Article 1139. As discussed above, Claimant owns 100% of ES Technologies, a company incorporated under the laws of the state of Delaware, United States.[311] ES Technologies is the only shareholder of L1bre Holding LLC, a Delaware corporation.[312] L1bre Holding LLC and its wholly owned subsidiary, L1bre LLC, also a Delaware corporation, together own 100% of Lusad, the Mexican entity that held the Concession.[313] Therefore, ES Holdings indirectly owns 100% of Lusad and 100% of the interest in the Concession. 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.[314]

154. Claimant's investment includes, without limitation:

- (a) "an enterprise" (Lusad);
- (b) "an equity security" (ES Holdings' indirect shareholding in Lusad);
- (e) "an interest in an enterprise that entitles the owner to share in income or profits of the enterprise" (ES Holdings' indirect shareholding in Lusad);

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310 **Exhibit CL-0001-ENG**, Article 1139 (NAFTA).

311 **Exhibit C-0069-SPA** (Lusad's Corporate Structure since November 2017).

312 *Id.*

313 *Id.*

314 ES Holdings' Request for Arbitration, dated 1 May 2020

- (e) “an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution” (ES Holdings’ indirect shareholding in Lusad);

- (g) “intangible property” (the technology developed by Lusad);

- (h) “interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor’s property in the territory of the Party, including turnkey or construction contracts, or concessions” (the Concession granted to Lusad and related commitment of capital and resources in Mexico); and

- “Claims to money” arising from the interests detailed sections (a) to (h) of NAFTA Article 1139 (claims to money arising from the Concession).

ES Holdings’ investments in Lusad satisfy, among others, subsections (a), (b), (e), (g), and (h) of Article 1139, and fall within the definition of “investment” under the Treaty.[315]

D. The Parties Have Consented to Arbitrate This Dispute

155. Claimant has consented to arbitration of this dispute in its Notice of Intent to Submit Claims to Arbitration dated 30 May 2019 and reiterated in its Request for Arbitration dated 1 May 2020.[316] Mexico has consented to arbitrate this dispute in Article 1122(1) of NAFTA, which states: “Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.”[317]

E. The Requirements of the ICSID Convention Have Been Met

156. The parties have consented to submit the dispute under the ICSID Convention. Claimant has elected to arbitrate this dispute under the ICSID Convention. This is expressly

315 **Exhibit CL-0001-ENG**, Article 1139 (NAFTA).

316 **Exhibit C-0024-ENG** (ES Holdings’ Notice of Intent, dated 30 May 2019); ES Holdings’ Request for Arbitration, dated 1 May 2020.

317 **Exhibit CL-0001-ENG**, Article 1122 (NAFTA).

permitted under NAFTA Article 1120(1)(a), provided that both the disputing Party (here, Mexico) and the Party of the investor (here, Canada) are parties to the ICSID Convention.[318]

157. Both Canada and Mexico have ratified the ICSID Convention.[319] Mexico's ratification entered into force on 26 August 2018, and Canada's ratification entered into force on 1 December 2013.[320]

158. All other jurisdictional requirements of the ICSID Convention have been met. Article 25(1) of the ICSID Convention states: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment."[321] In accordance with ICSID Convention, Article 25(1), and as described herein, there is a legal dispute arising directly out of Claimant's investment. Claimant has brought claims concerning Mexico's breaches of its obligations under NAFTA and Claimant is seeking compensation for damages as a consequence of these breaches. This legal dispute arises directly out of Claimant's investments, which are detailed above.[322] Further, ES Holdings is a "juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration" in accordance with Article 25(2)(b) of the ICSID Convention.[323] Therefore, this is a legal dispute involving a Contracting State (Mexico) and a National of another Contracting State (ES Holdings, a National of Canada).

F. Claimant Has Satisfied the Other Procedural Requirements to Bring Claims Under the Treaty

159. Claimant's claims are timely under NAFTA Articles 1116(2) and 1117(2) because Claimant notified Mexico of its claims less than three years after the date on which Claimant first acquired knowledge of Mexico's breach(es) of NAFTA and knowledge that the investor had incurred loss or damage.[324] Specifically, indefinite suspension of the Concession occurred on 28 October 2018,[325] and Claimant's 30 May 2019 Notice of Intent to Submit Claims to Arbitration was less than three years after either date.[326] Claimant also submitted its claims to arbitration more

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318 **Exhibit CL-0001-ENG**, Article 1120(1)(a) (NAFTA).

319 **Exhibit CL-0006-ENG** (ICSID List of Contracting States and Other Signatories of the Convention, as of June 9, 2020).

320 *Id.*; *see also* **Exhibit CL-0003-ENG** (ICSID Convention).

321 **Exhibit CL-0003-ENG**, Article 25 (ICSID Convention).

322 *See infra* ¶¶ 162–286 (describing Mexico's breaches of NAFTA and Claimant's claims arising therefrom).

323 *Id.*

324 *See* **Exhibit CL-0001-ENG**, Articles 1116(2), 1117(2) (NAFTA) (requiring that an investor make a claim of a breach of NAFTA Chapter 11 within three years of acquiring knowledge of the breach).

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

326 **Exhibit C-0024-ENG** (ES Holdings' Notice of Intent to Submit Claims to Arbitration, dated 30 May 2019).

than six months after the events giving rise to the claims, when Claimant filed its Request for Arbitration on 1 May 2020.[327]

160. Along with its Request for Arbitration, Claimant also submitted a waiver in accordance with NAFTA Article 1121.[328] This waiver was submitted on behalf of Claimant as well as the subsidiaries it owns or controls directly or indirectly, and waived the right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measures of Mexico that are alleged to be a breach of Section A of Chapter 11 of the Treaty, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of Mexico. Claimant has thus fulfilled the requirements of NAFTA Article 1121.[329]

161. Claimant thus has fulfilled all procedural requirements for bringing these claims.

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327 ES Holdings' Request for Arbitration, dated 1 May 2020.

328 *See* **Exhibit CL-0001-ENG**, Article 1121 (NAFTA) (requiring an investor claiming loss or damage under NAFTA Article 1116 to waive certain procedural rights).

329 ES Holdings' Request for Arbitration, dated 1 May 2020.

V.
MEXICO BREACHED ITS OBLIGATIONS UNDER NAFTA AND UNDER INTERNATIONAL LAW

162. Mexico City's actions, including those of Semovi, are unlawful under the Treaty and international law. Mexico is responsible for the actions of its state and provincial governments, including Mexico City, in accordance with international law and Article 105 of the Treaty, which provides that: "The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance . . . by state and provincial governments."[330] Article 201(2) includes local governments within the definition of "state and provincial governments."[331] Thus, violations by Mexico City (including Semovi) are assimilable to violations by Mexico in its capacity as a party to NAFTA.[332]

163. Specifically, Mexico has violated NAFTA Articles 1110 (Expropriation and Compensation); Article 1105 (Minimum Standard of Treatment); and Article 1102 (National Treatment). These breaches are detailed below.[333]

A. Mexico Unlawfully Expropriated Claimant's Investment Without Compensation in Violation of NAFTA Article 1110

1. NAFTA's Protection Against Expropriation Includes Protection Against Indirect Expropriations

164. Article 1110 of NAFTA prohibits NAFTA Parties (such as Mexico) from expropriating outright or taking measures "tantamount" to expropriation against a qualified investor's investment unless certain cumulative and express conditions are met. The relevant provisions of Article 1110 state:

> 1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment except:
>
> for a public purpose;
>
> on a non-discriminatory basis;

330 **Exhibit CL-0001-ENG**, Article 105 (NAFTA).

331 **Exhibit CL-0001-ENG**, Article 201 (NAFTA).

332 *See also* **Exhibit CL-0002-ENG**, Article 4 (International Law Commission, Commentaries to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2007) ("Conduct of organs of a State 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.").

333 *See infra* Sections V.A–C.

> in accordance with due process of law and Article 1105(1) [(*i.e.*, "in accordance with international law, including fair and equitable treatment."]); and
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> on payment of compensation in accordance with paragraphs 2 through 6 below.
>
> 2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.
>
> 3. Compensation shall be paid without delay and be fully realizable.
>
> . . . .
>
> 6. On payment, compensation shall be freely transferable as provided in Article 1109.[334]

165. Where an expropriation takes place and these stated conditions are not met, the expropriating party is deemed to have committed an unlawful expropriation in violation of Article 1110 of NAFTA.[335]

166. Investment treaty tribunals have determined that government actions that rise to the level of an expropriation have certain hallmarks. These include a significant impairment of

334 **Exhibit CL-0001-ENG**, Article 1110 (NAFTA).

335 *Id.*

economic use and enjoyment of the investment, which was not temporary, and which effectuated a major loss of value.[336]

167. Article 1110 of NAFTA expressly prohibits Mexico from directly or indirectly expropriating covered investments.[337] Direct expropriations include formal acts of outright seizure or transfer of property to the State. Indirect expropriations include State measures that harm the investment of an investor, which have the same practical effect as a direct expropriation—specifically, the substantial deprivation of the use or economic benefit of the investment.[338] Both direct and indirect expropriations violate Article 1110.

168. Indirect expropriations prohibited under NAFTA's Article 1110 include not only forced transfers of title, but also other types of interference with an investor's investment.[339] The United Nations Conference on Trade and Development ("UNCTAD") 2000 publication on Taking

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336 See, e.g., **Exhibit CL-0010-ENG**, ¶ 116 (*Técnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSID Case No. ARB(AF/00/2), Award, dated 29 May 2003) (hereafter "*Tecmed*") ("Under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary."); **Exhibit CL-0011-ENG**, ¶ 107 (*Middle East Cement Shipping and Handling Co. S.A. v. Egypt*, ICSID Case No. ARB/99/6, Award, dated 12 April 2002) (hereafter "*Middle East Cement*") (finding that an expropriation results when "measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment."); **Exhibit CL-0012-ENG**, ¶ 103 (*Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, dated 30 August 2000) ("*Metalclad*") ("Thus, expropriation under NAFTA includes not only open, de-liberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.") (the Supreme Court of British Columbia partially set aside the Award in *Metalclad* on the grounds that the tribunal made decisions on matters beyond the scope of the submission to arbitration. In particular, the court took issue with the tribunal finding violations of NAFTA's investment protections based on Mexico's failures to act transparently. The court disagreed that NAFTA provided a guarantee of transparency to investors. Other NAFTA tribunals have since recognized that NAFTA does provide investors some guarantee of transparency, as discussed elsewhere in this memorial. The Award remains intact outside of the tribunal's transparency findings).

337 **Exhibit CL-0001-ENG**, Article 1110, (NAFTA).

338 *See, e.g.*, **Exhibit CL-0013-ENG**, ¶ 240 (*Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. Mexico*, ICSID Case No. ARB (AF)/04/5, Award, dated 21 November 2007) (hereafter "*Archer Daniels Midland*"), ¶ 240) (providing that an indirect expropriation occurs if the interference is "substantial and deprives the investor of all or most of the benefits of the investment."); *see also* **Exhibit CL-0011-ENG**, ¶ 107 (*Middle East Cement*) (explaining what constitutes an indirect expropriation as "[w]hen measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as a "creeping" or "indirect" expropriation or, as in the BIT, as measures "the effect of which is tantamount to expropriation").

339 **Exhibit CL-0001-ENG**, Article 1110 (NAFTA).

of Property as part of that organization's Series on Issues in International Investment Agreements explains:

> The taking of property by Governments can result from legislative or administrative acts that transfer title and physical possession. ***Takings can also result from official acts that effectuate the loss of management, use or control, or a significant depreciation in the value, of assets.*** Generally speaking, the former can be classified as 'direct takings' and the latter as 'indirect takings.' . . . . Direct takings are associated with measures that have given rise to the classical category of takings under international law. They include the outright takings of all foreign property in all economic sectors, takings on an industry-specific basis, or takings that are firm specific . . . . In contrast, ***some measures short of physical takings may amount to takings in that they result in the effective loss of management, use or control, or a significant depreciation of the value, of the assets of a foreign investor*** [internal citation omitted] Some particular types of such takings have been called 'creeping expropriations', while others may be termed 'regulatory takings'. All such takings may be considered 'indirect takings'
>
> . . . .
>
> It is not the physical invasion of property that characterizes nationalizations or expropriations that has assumed importance, but the ***erosion of rights*** associated with ownership by State interferences.[340]

169. NAFTA tribunals have construed Article 1110 consistent with UNCTAD's interpretation. For example, the tribunal in *Metalclad v. Mexico* explained:

> [E]xpropriation . . . includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also covert or incidental ***interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of***

[340] **Exhibit CL-0014-ENG**, pp. 3–4, 20 (United Nations Conference on Trade and Development, *Taking of Property*, UNCTAD/ITE/IIT/15, 2000) (emphases added)); *see also* **Exhibit CL-0015-ENG**, p. 553 (L. Sohn and R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 1961 (55) AM. J. Int'l L. 545 (1961)) ("[a] 'taking of property' includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.").

> ***property*** even if not necessarily to the obvious benefit of the host State.[341]

170. The tribunal in *S.D. Meyers v. Canada* similarly determined that a State action which deprives an investor of the economic benefits of its investment amounts to an expropriation under NAFTA's Article 1110 standard.[342] The *Archer Daniels Midland v. Mexico* tribunal[343] likewise found that an indirect expropriation occurs if the State's interference is "substantial and deprives the owner of all or most of the benefits of the investment." [344]

171. NAFTA unambiguously protects investors from indirect expropriations—State policies, acts, measures, or omissions which have affect a "lasting removal of the ability of an owner to make use of its economic rights."[345] As confirmed by the tribunal in *Middle East Cement*, an expropriation results when "measures are taken by a State the effect of which is to deprive the

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341 **Exhibit CL-0012-ENG**, ¶ 103 (*Metalclad*) (emphasis added).

342 **Exhibit CL-0016-ENG**, ¶ 283 (*S.D. Myers, Inc. v. Canada*, (UNCITRAL) Partial Award, dated 13 November 2000) (hereafter "*S.D. Myers*") ("An expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights although it may be that, in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if it were partial or temporary").

343 **Exhibit CL-0013-ENG**, ¶ 240 (*Archer Daniels Midland*).

344 *See also, e.g.*, **Exhibit CL-0010-ENG**, ¶¶ 114–15 (*Tecmed*) ("[g]enerally, it is understood that the term ' . . . equivalent to expropriation . . . or 'tantamount to expropriation' included in the Agreement and in other international treaties . . . refers to so-called 'indirect expropriation' . . . [which] is generally understood [to] materialize through actions or conduct, which do not explicitly express the purpose of depriving one of rights or assets, but actually have that effect. This type of expropriation does not necessarily take place gradually or stealthily — the term "creeping" refers only to a type of indirect expropriation—and may be carried out through a single action, through a series of actions in a short period of time or through simultaneous actions.") **Exhibit CL-0017-ENG**, ¶¶ 64–65 (*Telenor Mobile Communications A.S. v. Hungary*, ICSID Case No. ARB/04/15, Award, dated 13 September 2006) (hereafter "*Telenor*") ("[t]he conduct complained of must be such as to have a major adverse impact on the economic value of the investment,' . . . as substantially to deprive the investor of the economic value, use or enjoyment of its investment."); **Exhibit CL-0018-ENG**, ¶¶ 329 (*Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1 Award, dated 7 December 2011) (hereafter "*Roussalis*") (citing Exhibit CL-0029 (*Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL ad hoc Tribunal, Award on Jurisdiction and Liability, dated 27 October 1989, 95 ILR 183, 209)) (hereafter "*Biloune*") ("[e]xpropriation may occur in the absence of a single decisive act that implies a taking of property. It could result from a series of acts and/or omissions that, in sum, result in a deprivation of property rights." Referring to the Biloune case, the tribunal acknowledged that "a series of governmental acts and omissions which 'effectively prevented' an investor from pursuing his investment project constituted a 'constructive expropriation.' Each of these actions, viewed in isolation, may not have constituted expropriation. But the sum of them caused an 'irreparable cessation of work on the project.'").

345 **Exhibit CL-0016-ENG**, ¶ 283 (*S.D. Myers*).

investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment."[346]

172. A State can expropriate concession rights, even if there is no direct taking of physical property and even if the expropriated rights are intangible.[347] A finding of an indirect expropriation does not require that the State seize legal title to an investment.[348] The bundle of rights that are subject to protection includes the right to earn a commercial return.[349]

2. Mexico's Actions Violate NAFTA's Protection Against Expropriation

173. Claimant made substantial investments in Mexico, which are subject to the protections contained in NAFTA Article 1110. At the time of the investments, Claimant's investments were fully supported by the Mexico City government. Mexico City awarded Lusad the Concession through a public, transparent, and fair bid process.[350] This Concession granted Lusad the right to install and maintain technology in Mexico City's massive taxi fleet of 138,000 taxis that would (i) improve public confidence in Mexico City's taxis with improved technology and safety features, (ii) facilitate use of these taxis through an easy-to-use smartphone application and accompanying in-taxi tablets with custom software, and, critically, (iii) guarantee Lusad the collection of guaranteed streams of revenue for an initial period of 10 years, automatically renewable for 10 more years so long as Lusad met certain conditions, and then with the possibility

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346 **Exhibit CL-0011-ENG**, ¶ 107 (*Middle East Cement*).

347 **Exhibit CL-0019-ENG**, p. 410 (A. Reinisch, Expropriation, in the O*xford Handbook of International investment Law*, 410 (P. Muchlinski et. al. eds. 2008)) ("Whether expropriation, including indirect expropriation, may concern intangible property is, in the first instance, a question of the applicable definition of 'property' or 'investment'. Since most BITs, and the majority of other investment instruments, contain broad definitions of what constitutes an 'investment', anything covered by such definitions will be protected not only against direct but also against indirect expropriation."); **Exhibit CL-0021-ENG**, ¶ 164 (*Southern Pacific Properties (Middle East) Ltd. v. Egypt*, ICSID Case No. ARB/84/3, Award, dated 20 May 1992)) ("The Respondent's cancellation of the project had the effect of taking certain important rights and interests of the Claimants . . . Clearly, those rights and interests were of a contractual rather than in rem nature . . ."); **Exhibit CL-0022-ENG**, ¶ 105 (*Phillips Petroleum Co. Iran v. Iran*, Iran-U.S. Claims Trib., Case No. 39, Chamber 2, Award No. 425-39-2, 1989) (referring to expropriated intangible rights, such as contract rights).

348 **Exhibit CL-0010-ENG**, ¶ 116 (*Tecmed*) ("under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary").

349 **Exhibit CL-0020-ENG**, (T. Wälde & A. Kolo, Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law, 50 INT'L & COMP. L. Q. 811, 835 (2001)) (recognizing that modern rules of investment protection are aimed at the recognition and protection of the value of an investment that comes from "the capability of a combination of rights in a commercial and corporate setting and under a regulatory regime to earn a commercial rate of return");

350 *See supra* Section III.B.

for renewal for yet another 10 years.[351] Lusad's rights and expectations as concessionaire, and those of Claimant as the Investor, were cemented in the Concession.

174. The concessionaire, Lusad, undertook extensive work to develop a business enterprise based on this Concession, including: innovating the technology, creating a business structure, developing software, hiring experienced employees, purchasing hardware, obtaining permits with the government, and successfully testing the technology in over 1,100 taxis.[352] Indeed, Mexico City certified multiple times that Lusad's work satisfied Lusad's obligations under the Concession.[353]

175. Lusad held up its end of the bargain. Regrettably, however, Mexico City did not. Under the Concession, Mexico City was required to facilitate Lusad's installation of the L1bre System into every one of Mexico City's taxis.[354] After Lusad had proved the merits of its concept and successfully tested it in over 1,100 taxis, Lusad was ready to install its technology in Mexico City's entire fleet of 138,000 taxis.[355] This included months of preparation to install the L1bre System into all of Mexico City's taxis, including buying the necessary hardware, setting up

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

352 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 47–61; *see also, e.g.*, **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); **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) (certifying Lusad's digital taximeter as a lawful measuring device and authorizing its commercial use in Mexico City's taxis).

353 *See, e.g.*, **Exhibit C-0056-SPA**, p. 2 (Oficio No. DNRM-0673-2017 from SEMOVI confirming the validity of the Concession Agreement, dated 4 April 2017) ("**No existe la posibilidad de otorgar una concesión adicional a la ya expedida** al amparo de la Declaratoria de Necesidad del 30 de mayo de 2016, pues el Comité Adjudicador de Concesiones para la Prestación del Servicio Público Local de Transporte de Pasajeros o de Carga, **ha tenido por satisfecha y cumplida dicha necesidad**.") (emphasis added); **Exhibit C-0018-SPA** (Oficio No. DGSTPI-965-2018 from Semovi announcing suspension of the Concession, dated 30 May 2018) ("No omito manifestar que, en la actualidad la Concesión Administrativa SEMOVI/DGSTPO/001/2016 **tiene plena vigencia y validez**, pues se encuentra impoluta a la luz de criterios judiciales; por lo que, para esta dependencia **continúan los efectos jurídicos plenos de dicho instrumento legal**.") (emphasis added).

354 **Exhibit C-0007-SPA**, Article 7.1(a) (Amended Concession Agreement, as reissued on 21 March 2017) ("**La Secretaria y el Concesionario habilitarán los centros de atención e instalación**, en donde se realizaran las instalaciones de los Equipos a los concesionarios del Taxis [sic], **a los cuales se les informará en forma oportuna con objeto de que los mismos acudan a que se realice la instalación** en sus respectivas Unidades a fin de que el Equipo y la Aplicación queden instalados y en operación de acuerdo al calendario contenido en el **ANEXO UNO** . . . .") (emphasis added).

355 *See* **Exhibit C-0013-SPA**, p. 1 (Communication from Lusad to Semovi confirming the installation of the L1bre System in 100 Taxis, dated 9 August 2016) (confirming that Lusad had installed the L1bre System in 100 taxis) ("[P]or medio del presente escrito le informamos a esa Secretaría que **la instalación de las primeras 100 (cien) unidades** de los Taxímetros Digitales en las unidades del servicio de transporte de pasajeros público individual (taxi) de la Ciudad de México **ha sido realizada con éxito**, como **Anexo Único** el listado de las unidades instaladas en esta etapa inicial.") (emphasis added); **Exhibit C-0014-SPA**, p. 1 (Communication from Lusad to Semovi confirming installation of the L1bre System in 1,000 Taxis, dated 7 November 2016) ("[P]or medio del presente escrito le informamos a esa Secretaría que la instalación de las primeras 1,000 (mil) unidades de los Taxímetros Digitales en las unidades del servicio de transporte de pasajeros público individual (taxi) de la Ciudad de México **ha sido realizada con éxito**.") (emphasis added).

installation centers, establishing training and protocols, establishing a call center for support, hiring personnel to ensure adequate staffing, and setting up repair and replacement programs and protocols for hardware.[356]

176. In April 2018, Semovi issued a formal notice requiring all taxis to have Lusad's L1bre System installed no later than March 2019.[357] Lusad had conducted vast preparations leading up to this moment, including preparing installation centers across the City.[358] The Mexico City government celebrated this occasion with a public event, making clear its excitement that the L1bre System would soon transform the City's taxi industry.[359] As the Mexico City mayoral race began heating up, however, Lusad's Concession became the focus of unfair political controversy. Then mayoral candidate Sheinbaum used the L1bre System as a political tool to seek votes in the upcoming election.[360] Mexico City responded to these political tactics by temporarily suspending implementation of the Concession on 30 May 2018 until after the mayoral elections.[361] A new government was elected in July 2018 and Mayor-elect Sheinbaum and her incoming administration continued to wrongly attack the L1bre System and the Concession for political gain.[362] Subsequently, on 28 October 2018, Semovi put an end to the Concession by suspending it indefinitely on political grounds.[363]

177. The government's 28 October 2018 suspension letter deprived Lusad of the ability to derive revenue in connection with the rights that it had acquired under the Amended Concession

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356 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 47–61; *see also, e.g.*, **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-0075-SPA** (photos from installation centers).

357 **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).

358 **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-0075-SPA** (photos from installation centers).

359 **Exhibit C-0036-SPA** (Pictures from L1bre Systems Official Launch Event).

360 *See supra* Section III.C.3.

361 **Exhibit C-0019-SPA** (Oficio No. DGSTPI-1943-2018 from Semovi announcing indefinite suspension of the Concession, dated 28 October 2018) (**"[S]olicito suspenda el inicio del periodo de instalación** de taxímetros digitales en las unidades concesionadas taxi de la Ciudad de México. . . . 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.") (emphasis added).

362 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 78, 81.

363 **Exhibit C-0019-SPA** (Oficio No. DGSTPI-1943-2018 from Semovi announcing indefinite suspension of the Concession, dated 28 October 2018) ("[S]olicito c**ontinúe suspendido el inicio del periodo de instalación** de taxímetros digitales en las unidades concesionadas taxi de la Ciudad de México . . . . Lo anterior **se solicita de conformidad a que de las elecciones celebradas el 01 de julio de 2018, se indicó un cambio político en la mandado de la Jefatura de Gobierno de la Ciudad de México**, con lo que se dio inicio a un

Agreement. Without a way to monetize the Concession, Lusad's rights became valueless and so too did ES Holdings' indirect shares and ownership of Lusad and the Concession.[364] Mexico thereby indirectly expropriated the Claimant's investment in indefinitely suspending the Concession. The Claimant's investment was rendered valueless.[365]

178. After Mayor Sheinbaum's was sworn into office in December 2018, Lusad's representatives met with Mayor Sheinbaum and with Semovi in January 2019 to attempt to have the suspension lifted.[366] The Mayor and Semovi officials made crystal clear, however, that the Concession would not go forward. Mexico City's new government had no intention to ever allow Lusad to install the L1bre System in the City's taxi fleet and its 28 October 2018 suspension would hold.[367]

179. In concert with its total destruction of the Concession, the government proceeded to develop a government-run business to supplant the L1bre System. The government's replacement program, called Mi Taxi, is a swindled version of the L1bre System developed and designed by Lusad. The panic button, other safety features, GPS functionality, smartphone app, and improved technology—all hallmark features of the L1bre System—were unscrupulously copied and branded with Mexico City's Mi Taxi.[368] If there was any doubt that Semovi's indefinite suspension notice of 28 October 2018 amounted to an expropriation of Claimant's investment, the City's supplanting the L1bre System with Mi Taxi was the final nail in Lusad's coffin.[369]

180. Mexico City and Semovi's actions, separately and when taken altogether, violate the NAFTA Article 1110 protection against expropriations. Mexico City's indefinite suspension of the Concession and subsequent arrogation of the benefits under that Concession through the

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procedimiento administrativo de transición entre los servidores público actuales . . . con aquellos que ya han sido anunciados y la integrarán . . . quienes han solicitado que continúe la suspensión de la instalación gratuita de taxímetros digitales en tanto asuman el cargo y funciones.") (emphasis added).

364 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 163.

365 *Id.*

366 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 84; Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 63.

367 *Id.*, *see supra* ¶ 130

368 *See, e.g.*, **Exhibit C-0108** (Video of press conference of Claudia Sheinbaum regarding Mi Taxi, dated 9 September 2020) (Mayor Sheinbaum and other high-level officials presented the new version of Mi Taxi as including the following features: insert the plates data in the app and review the drivers' and taxis' information before taking the cab; share the ride with anyone; use the panic button in case of emergencies that would be connected to C5; request a ride from any location and select the final destination; share locations in real-time; follow up with the destination the entire trip; and rate the driver. The presentation also listed app download, visit, and requested ride statistics. The presenters distinguished Mi Taxi from other ride hailing platforms by focusing on the panic button, the ability to verify taxi driver information, to request a taxi from anywhere, and to pay for a ride via wire transfer.).

369 **Exhibit C-0032-SPA** (Call to public individual transport services concessionaires to adhere to the "Mi Taxi" application, published in the Gaceta Oficial de la Ciudad de México, dated 16 April 2020); **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) (describing the Government's replacement app).

replacement of the L1bre System with the Mi Taxi system plainly deprived Claimant of the benefit of its investment. While Lusad was slated to enjoy the benefits (*i.e.*, revenues and profits) derived from the Concession for a minimum of 10 years, and likely 30 years, these guaranteed benefits were destroyed upon the government's permanent suspension of the Concession. As a result of these actions, the Government made sure that there would be no revenues whatsoever earned under the Concession.

181. The government's indefinite suspension of the Concession and replacement of the L1bre System with Mi Taxi satisfies all of the traditional elements to establish an indirect expropriation.[370] Mexico City's actions resulted in a significant—indeed complete—impairment of economic use and enjoyment of the investment. This impairment is not temporary—indeed, the Sheinbaum administration has made clear that it is permanent, and the administration has at no time provided any indication that it would be amenable to lifting the suspension.

182. By way of example, the circumstances in the present case closely resemble those in *Middle East Cement*. In that case, the claimant had been granted a ten-year license by the Egyptian government to import, store, and sell bulk cement at a port in Suez.[371] The claimant carried out its operations under the license until Egypt issued a decree prohibiting the import of all Portland cement through both the private and public sector.[372] The decree had the effect of depriving the claimant of its rights under its license, as the claimant was forced to halt its cement sales operation in Egypt.[373] The claimant argued that Egypt's actions amounted to a *de facto* revocation of its license and therefore an expropriation of its investment.[374] The tribunal agreed with the claimant, and determined that Egypt's decree constituted an indirect expropriation (specifically "measures tantamount to expropriation") because it "deprived by such measures of parts of the value of [the claimant's] investment."[375]

183. As with the decree in *Middle East Cement*, the Respondent's arbitrary and discriminatory actions against Claimant here had the effect of depriving Claimant of the entire

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370 *See, e.g.*, **Exhibit CL-0010-ENG**, ¶ 116 (*Tecmed*) ("Under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary."); **Exhibit CL-0011-ENG**, ¶ 107 (*Middle East Cement*) (finding that an expropriation results when "measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment."); **Exhibit CL-0012-ENG**, ¶ 103 (*Metalclad*) ("Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.").

371 **Exhibit CL-0011-ENG**, ¶ 82 (*Middle East Cement*).

372 *Id.*

373 *Id.*

374 *Id.* at ¶¶ 97–105.

375 *Id.* at ¶ 107 (*Middle East Cement*) ("When measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the

value of its investment. The investment's value was inextricably linked to Mexico City's awarding of the Concession and the terms of the Concession. Mexico City granted Lusad the right to install and maintain technology in all of Mexico City's taxis and to launch a smartphone app connected with the new technology. The Concession guaranteed specific revenue streams to Lusad. Additionally, the Concession obligated the government to facilitate installation of Lusad's technology in every one of Mexico City's 138,000 taxis.[376] Yet, the Respondent violated its commitments and obligations under the Concession agreement. Mexico City, and therefore Mexico, unjustifiably abrogated the Concession and inserted a government-run service and technology in Lusad's stead, precluding Claimant from using and enjoying the benefits of its investment.[377] These actions amounted to an indirect expropriation. Just as the Egyptian decree was a "mortal blow"[378] to the claimant's business in *Middle East Cement*, Respondent's indefinite suspension of the Concession and subsequent installation of Mi Taxi in the L1bre System's place was a mortal blow to Claimant's investment.

3. Mexico's Expropriation Was Unlawful

184. Mexico's expropriation of Claimant's investment does not satisfy the cumulative requirements for a lawful expropriation under NAFTA Article 1110(1). NAFTA prohibits expropriations unless they are done (i) for a public purpose, (ii) on a non-discriminatory basis, (iii) in accordance with due process of law, and (iv) in exchange for prompt and adequate payment of compensation.[379] (NAFTA also requires that an expropriation be done in a manner consistent with the "minimum standard of treatment" prescribed in Article 1105, and Mexico's violations of that Article are addressed in Section V.B, below (Fair & Equitable Treatment)). Mexico's breach of any of these requirements renders its expropriation unlawful under NAFTA and under international law[380]. Here, Mexico did not even attempt to comply with the requirements for a lawful expropriation. There is no question that Mexico's expropriation is unlawful.

185. First, there was no credible public purpose proffered for the expropriation. It was done (as confirmed by Mexico itself) purely for political reasons. The government unambiguously

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respective rights being the investment, the measures are often referred to as a 'creeping' or 'indirect' expropriation or, as in the BIT, as measures 'the effect of which is tantamount to expropriation.' **As a matter of fact, the investor is deprived by such measures of parts of the value of his investment. This is the case here, and, therefore, it is the Tribunal's view that such a taking amounted to an expropriation within the meaning of Article 4 of the BIT and that, accordingly, Respondent is liable to pay compensation therefor**.") (emphasis added).

376 *See supra* ¶¶ 80–85.

377 *See supra* ¶¶ 138–148.

378 **Exhibit CL-0011-ENG**, ¶ 82 (*Middle East Cement*).

379 **Exhibit CL-0001-ENG**, Article 1110(1) (NAFTA) (stating that an expropriation is not unlawful if it is "(a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6").

380 **Exhibit CL-0023-ENG**, pp. 369 (A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009)) ("As almost uniformly establish four requirements or conditions for a lawful expropriation: the expropriation must be for a public purpose, in

admitted as much in the 30 May 2018 temporary suspension notice and the 28 October 2018 indefinite suspension notice.[381] Further, the 30 May 2016 Declaration of Necessity inviting private sector parties to apply for the Concession demonstrates that the State's public purpose in creating the Concession was to secure private sector assistance to update and improve Mexico City's taxi system.[382] By refusing to implement the Concession, the government contravened its own definition of public purpose.

186. In this regard, the case before the Tribunal is similar to *ADC v. Hungary*. There, Hungary argued that certain legislation served as the basis for seizing the claimants' investment (which included a concession to operate an airport terminal), and was "important for the harmonization of the Hungarian Government's transport strategy, laws and regulations with the EU law."[383] The evidence, however, showed that the Hungarian Government's real motivation was to pave the way for a more lucrative deal for the State. In finding the expropriation was illegal, that tribunal explained: "[i]f mere reference to 'public interest' can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the [t]ribunal can imagine no situation where this requirement would not have been met."[384] Here, as in *ADC v. Hungary*, Respondent cannot offer any reasonable public purpose justification for Mexico City's recission of the Concession, destruction of Claimant's investment, and subsequent enjoyment of fees by Mi Taxi that were guaranteed to Lusad through the Concession.

187. Mexico City's expropriation was also discriminatory in favor of the government-owned Mi Taxi, which replaced the L1bre System and continues to operate in Mexico City today.[385] The government's discriminatory acts were blatant—Mayor Sheinbaum campaigned on

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accordance with due process of law, nondiscriminatory and accompanied by compensation. . . . Where the requirements or conditions for an expropriation are not satisfied, the expropriation is illegal.").

381 **Exhibit C-0018-SPA** (Oficio No. DGSTPI-965-2018 from Semovi announcing suspension of the Concession, dated 30 May 2018) ("**[S]olicito suspenda el inicio del periodo de instalación** de taxímetros digitales en las unidades concesionadas taxi de la Ciudad de México. . . . 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. . . . No omito manifestar que esta suspensión n**o es atribuible a su representada**, pues hasta la fecha en que se emite el presente oficio, la concesionada h**a cumplido a cabalidad con las obligaciones y derechos que derivan del título que detenta**.") (emphasis added); **Exhibit C-0019-SPA** (Oficio No. DGSTPI-1943-2018 from Semovi announcing indefinite suspension of the Concession, dated 28 October).

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

383 **Exhibit CL-0024-ENG**, ¶ 430 (*ADC Affiliate Ltd. et. al. v. Hungary*, ICSID Case No. ARB/03/16, Award, dated 2 October, 2006) (hereafter "*ADC*").

384 *Id.* at ¶ 432;

385 *See supra* ¶¶ 138–148; *see also, e.g.*, **Exhibit CL-0025-ENG**, ¶ 242 (*Eureko B.V. v. Poland, Partial Award*, dated 19 August 2005) (hereafter "*Eureko*") ("Furthermore, the measures taken by the RoP in refusing to conduct the IPO are clearly discriminatory. As the Tribunal noted earlier, these measures have been proclaimed by successive Ministers of the State Treasury as being pursued in order to keep PZU under majority

the promise of eliminating outside investment in the taxi system and instead to employ a government-developed service. Mayor Sheinbaum and her administration fulfilled this campaign promise by destroying Claimant's investment. Additional details regarding Mexico City's discriminatory acts are provided below (National Treatment).[386]

188. The expropriation was also effectuated without due process. Under international law, the due process requirement "might be breached in a variety of ways, including failure to provide notice or a fair hearing, non-compliance with local law, or failure to provide a means for legal redress."[387] Violating local law is *prima facie* a violation of due process. So are procedural irregularities. As discussed below in greater detail (Fair & Equitable Treatment), the Concession was unilaterally and permanently suspended in violation of Mexican law, without any legal procedure or opportunity for Lusad to be heard, and for reasons entirely unrelated to Lusad's performance.[388]

189. Mexico has not compensated Claimant in any form for the substantial value that was taken from it.[389] Nor has Mexico even offered compensation. The lack of ***any*** compensation

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Polish control **and to exclude foreign control such as that of Eureko. That discriminatory conduct by the Polish Government is a blunt violation of the expectations of the Parties** in concluding the SPA and the First Addendum.") (emphasis added).

386 *See infra* Section V.C.

387 **Exhibit CL-0023-ENG**, p. 375–76 (A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009))("The better view is that due process is properly viewed as an obligation of conduct. Due process requires, first and foremost, compliance with local law. Breaches of local procedural laws are prima facie breaches of due process. Second, the international standard or due process may be breached by serious procedural irregularities, even if these are later corrected.").

388 *See infra* Section V.B.; *see also* **Exhibit CL-0024-ENG**, ¶ 435 (*ADC*) ("[A]n actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. S**ome basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful**. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that 'the actions are taken under due process of law' rings hollow.") (emphasis added).

389 **Exhibit CL-0001-ENG**, Article 1110(1) (NAFTA).

for destroying a multi-billion dollar Concession is unjust, illegal, and on its own causes Mexico's expropriation to be unlawful.[390]

190. Mexico has therefore failed to satisfy any of the cumulative requirements for a legal expropriation in this instance, and its actions towards Lusad and Claimant constitute an unlawful expropriation in violation of NAFTA's Article 1110.

4. Investment Arbitration Tribunals Have Determined That Analogous Government Acts—and Even Less Egregious Acts—Amount to Indirect Expropriations

191. Several tribunals have found that actions akin to those taken by Mexico amount to indirect expropriations. In fact, at least three of those indirect expropriations in other cases were committed by Mexico under analogous facts. Indeed, several tribunals have determined that government acts that are less egregious than Mexico City's harmful permanent suspension of Lusad's Concession are expropriatory. These cases emphasize that Mexico's actions against Lusad and Claimant present a clear-cut case of an unlawful expropriation.

192. In *Tecmed v. Mexico*, the tribunal determined that Mexico indirectly expropriated an investor's investment when it failed to renew a hazardous waste landfill permit.[391] That case concerned Tecmed's investment in a waste landfill acquired in 1996.[392] Tecmed alleged that it lost the landfill in 1998 when the Mexican authorities refused to renew a license that was necessary to operate the landfill.[393] Tecmed argued that as a result of the authorities' arbitrary and unsubstantiated decision not to renew the license, the value of the investment had been lost, as it ceased to represent any economic value as a going concern.[394] The tribunal agreed.[395]

193. Mexico's wrongful actions against Claimant in the present case are analogous to Mexico's unlawful expropriation in *Tecmed*. In *Tecmed*, the Mexican government issued a resolution that rejected the claimant's application for the renewal of a permit to operate the landfill and ordered the claimant to close the landfill. Tecmed argued that the Mexican government's resolution was tantamount to an expropriation, as it had "deprived [the claimant] of the benefits

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390 *See* **Exhibit CL-0026-ENG**, ¶ 72 (*Compañia del Desarrollo de Santa Elena S.A. v. Costa Rica*, ICSID Case No. ARB/96/1, Final Award, dated 17 February 2000) (hereafter "*Santa Elena*") (finding that even measures taken for a reasonable public purpose (e.g., environmental reasons) still require compensation in order to be legal, and holding in particular: "*Expropriatory environmental measures*—no matter how laudable and beneficial to society as a whole—are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.").

391 **Exhibit CL-0010-ENG**, ¶¶ 132, 149–51 (*Tecmed*) ("To sum up, the reasons that prevailed in INE's decision to deny the renewal of the Permit were reasons related to the social or political circumstances and the pressure exerted on municipal and state authorities and even on INE itself created by such circumstances.").

392 *Id.* at ¶¶ 35–39.

393 *Id.* at ¶¶ 35–39.

394 *Id.* at ¶¶ 35–39.

395 *Id.* at ¶¶ 151.

and economic use of its investment" by destroying the value of the investment.[396] The *Tecmed* tribunal agreed and held that the government resolution in question effectively expropriated the claimant's investment.[397] In so holding, the tribunal emphasized that Mexico's actions had "fully and irrevocably destroyed" the claimant's "economic and commercial operations in the Landfill," and wrongfully prevented the claimant from realizing the "benefits and profits expected or projected by the [c]laimant as a result of the operation of the Landfill."[398] Notably, the tribunal determined that the "socio-political circumstances" cited by Mexico to support its resolution were not "sufficient justification to deprive the foreign investor of its investment with no compensation."[399] This was especially the case given that the stated aims of the government's resolution were not reasonably proportional to the deprivation of rights and economic loss suffered by the claimant. In this respect, the tribunal made clear that Mexico's actions had violated the claimant's legitimate expectation "of a long-term investment . . . and the estimated return through the operation of the Landfill during its entire useful life."[400]

194. Here, like the challenged government resolution in *Tecmed*, Mexico City's 28 October 2018 indefinite suspension of the Concession and subsequent replacement of the L1bre System with Mi Taxi "fully and irrevocably destroyed" Claimant's "economic and commercial operations." [401] Moreover, as with the resolution in *Tecmed*, the Respondent's actions unreasonably frustrated Claimant's legitimate expectation to operate and profit from a 10-year Concession that was subject to renewal for an additional 20 years—an expectation based on repeated promises, representations, and assurances by Respondent.[402] Indeed, Mexico City's

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396 *Id.* at ¶ 96 (*Tecmed*) ("Therefore, Cytrar alleges that it was deprived of the benefits and economic use of its investment. The Claimant highlights that without such permit the personal and real property had no individual or aggregate market value and that the existence of the Landfill as an ongoing business, as well as its value as such, were completely destroyed due to such Resolution which, in addition, ordered the closing of the Landfill.")).

397 *Id.* at ¶ 116 ("Under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary.")

398 *Id.* at ¶ 117.

399 *Id.* at ¶ 147.

400 *Id.* at ¶ 149 ("There is no doubt that, even if Cytrar did not have an indefinite permit but a permit renewable every year, the Claimant's expectation was that of a long-term investment relying on the recovery of its investment and the estimated return through the operation of the Landfill during its entire useful life. . . . **This shows that even before the Claimant made its investment, it was widely known that the investor expected its investments in the Landfill to last for a long term and that it took this into account to estimate the time and business required to recover such investment** and obtain the expected return upon making its tender offer for the acquisition of the assets related to the Landfill. To evaluate if the actions attributable to the Respondent —as well as the Resolution— violate the Agreement, **such expectations should be considered legitimate and should be evaluated in light of the Agreement and of international law**.") (emphasis added).

401 **Exhibit C-0019-SPA** (Oficio No. DGSTPI-1943-2018 from Semovi announcing indefinite suspension of the Concession, dated 28 October) ("("Esta suspensión de instalación de taxímetros digitales continuará a partir de la notificación del presente oficio, y se reanudará en tanto se le notifique oficialmente que podrá continuar la misma, **sin que se atribuible a responsabilidad a la concesionaria, quien hasta la fecha ha cumplido satisfactoriamente con lo que se le ha requerido**.") (emphasis added).

402 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 45.

decision to breach an existing and ongoing Concession is even more egregious than Mexico's decision not to renew the landfill concession underlying *Tecmed*. In the end, like in *Tecmed*, Claimant's entire investment was lost when Mexico City refused to implement the Concession and gave many of the rights thereunder to a separate service run by Mexico City itself.[403] And like in *Tecmed*, Mexico's harm to Lusad was justified only through "socio-political circumstances."[404] To date, Claimant has not received a single penny from Respondent in connection with the rescission of the Concession. Under these circumstances, therefore, Respondent's actions must be held to constitute an unlawful expropriation.[405]

195. Similarly, in *Metalclad v. Mexico*, a U.S. corporation operating through its Mexican subsidiary received a permit from Mexico's federal government to construct a hazardous waste landfill in Guadalcazar, Mexico.[406] Five months after construction began, Metalclad was notified by the Municipality of Guadalcazar that it was unlawfully operating without a municipal construction permit.[407] Metalclad duly applied for a municipal permit, and, while its municipal permit application was pending, completed construction of the landfill. The municipality then denied Metalclad's application, which had the effect of preventing operation of the completed landfill.[408] Following this denial, an ecological decree was issued declaring an area including the landfill as a protected ecological area, thereby effectively precluding the landfill from ever operating. The reviewing NAFTA tribunal found that the Mexican municipality's non-issuance of the permit was a measure tantamount to expropriation in violation of NAFTA Article 1110(1), stating that "[b]y permitting or tolerating the conduct of Guadalcazar in relation to Metalclad . . . and by thus participating or acquiescing in the denial to Metalclad of the right to operate the landfill, notwithstanding the fact that the project was fully approved and endorsed by the federal

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403 *See supra* ¶¶ 138–148 (discussing implementation of Mi Taxi).

404 **Exhibit C-0019-SPA** (Oficio No. DGSTPI-1943-2018 from Semovi announcing indefinite suspension of the Concession, dated 28 October)(expressly framing the decision to permanently suspend the concession as a political matter).

405 *See also* **Exhibit CL-0027-ENG**, ¶ 591 (*CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, dated 13 September 2001) (hereafter "*CME*") ("**The Claimant's expropriation claim under Article 5 of the Treaty is justified**. The Respondent, represented by the Media Council, breached its obligation not to deprive the Claimant of its investment. **The Media Council's actions and omissions, as described above, caused the destruction of ČNTS' operations, leaving CNTS as a company with assets, but without business**. The Respondent's view that the Media Council's actions did not deprive the Claimant of its worth, as there has been no physical taking of the property by the State or because the original License granted to CET 21 always has been held by the original Licensee and kept untouched, is irrelevant.") (emphasis added)); **Exhibit CL-0011-ENG**, ¶ 107 (*Middle East Cement*) ("When measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as a 'creeping' or 'indirect' expropriation or, as in the BIT, as measures 'the effect of which is tantamount to expropriation.' **As a matter of fact, the investor is deprived by such measures of parts of the value of his investment. This is the case here, and, therefore, it is the Tribunal's view that such a taking amounted to an expropriation within the meaning of Article 4 of the BIT and that, accordingly, Respondent is liable to pay compensation therefor**.") (emphasis added)).

406 **Exhibit CL-0012-ENG**, ¶¶ 30–44 (*Metalclad*).

407 *Id.* at ¶¶ 45–64.

408 *Id.*

government, Mexico must be held to have taken a measure tantamount to expropriation in violation of NAFTA Article 1110(1)."[409] Similarly, Mexico City's approval, endorsement, and then subsequent denial of Lusad's right to install and operate the L1bre System in the entire Mexico City taxi fleet in accordance with the legal rights and obligations in the Concession amounts to a measure tantamount to expropriation.

196. Likewise, in *Abengoa v. Mexico*, a tribunal determined that Mexico indirectly expropriated an investor's investment when it revoked an operating license of a newly built hazardous waste facility.[410] The revocation came on the heels of public opposition to the operation of the facility and was executed in large part for political reasons.[411] While the facility was established with the approval of both the municipal and federal government (including required licensing and permitting, etc.), the waste facility became an issue in the political race for president of the municipality. One of the leaders of the movement opposing the facility was then elected president. While that election was later annulled, a municipal council aligned with the briefly-elected municipal president had been formed and oversaw the revocation of the waste facility's operating licenses.[412] Virtually the same political considerations happened in the present case—Mexico City's politics changed, Mexico City nullified Lusad's rights under the Concession for political reasons, and Lusad was "left holding the bag."

197. Mexico recently acknowledged in its counter-memorial in *Odyssey Marine Exploration, Inc. v. Mexico* that government authorizations that involve "defined" or "vested" rights amount to "explicit assurances" to investors in the context of NAFTA's expropriation standard.[413] Mexico attempted to distinguish the facts of the *Odyssey* case with the facts underlying *Metalclad* and *Abengoa*, where tribunals found that an unlawful expropriation had occurred. Specifically, Mexico cited *Abengoa*'s finding that Mexico's cancellation of an operating license was manifestly contrary to the position repeatedly confirmed by the federal authorities, and cited *Metalclad*'s findings that the municipality had "fully approved and endorsed" the project and that "the investor had at least acted in reliance on explicit assurances to the effect that all necessary

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409 *Id.* at 104.

410 **Exhibit CL-0028-SPA**, ¶¶ 663–73 (*Abengoa, S.A. y COFIDES, S.A. v. Mexico*, ICSID Case No. ARB(AF)/09/2, Award, dated 18 April 2013) (hereafter "*Abengoa*").

411 *Id.*

412 *Id.*

413 **Exhibit CL-0008-ENG**, ¶¶ 551–53, 566 (*Odyssey Marine Exploration, Inc. v. Mexico*, ICSID Case No. UNCT/20/1, Excerpt from Mexico's Counter Memorial, dated 23 February 2021) ("In *Abengoa v. Mexico,* under the Spain-Meixco BIT, the processing "Plant [already] had all the administrative and environmental authorizations necessary for its operation," and the cancellations of the operating license were "manifestly contrary to the position repeatedly confirmed by the federal authorities." . . . The same applies to *Metalclad v. Mexico*, where the tribunal cited specifically the municipality of Guadalcazar's failure to issue a construction permit even after the federal authorities had "fully approved and endorsed" the project. . . Since at least *Metalclad*, where the investor had at least acted in reliance on explicit assurances to the effect that all necessary permits would be issued "international tribunals have generally considered the 'reasonably to be expected' economic benefit of property as being one of the touchstones for an assessment of the validity of an expropriation claim". typically, '[t]he question is whether the foreign investor could reasonably have expected that the economic value of its property would have been lost in whole or significant part by the regulatory measures taken by the state.").

permits would be issued."[414] Mexico's characterizations of *Abengoa* and *Metalclad* in the context of its arguments in *Odyssey* accurately acknowledge that explicit government assurances and authorizations—like the Concession in the present case—confer important rights to investors, and that the contravention of those rights amounts to unlawful expropriation.

198. Several other cases involving other States' measures have involved similar facts and had similar outcomes, with the tribunals finding that an indirect expropriation had occurred.

199. For instance in *Biloune, et al. v. Ghana*, a private investor was renovating and expanding a resort restaurant in Ghana. The investor, relying upon the representations of a government-affiliated entity, began construction before applying for a building permit. The government then issued a stop work order based on the absence of a building permit, after a substantial amount of work had been completed. The investor had properly submitted the permit application, but the government never issued (or denied) a permit. The tribunal found that an indirect expropriation had taken place because the totality of the circumstances had the effect of causing the irreparable cessation of work on the project. The tribunal emphasized the investor's justified reliance on the government's representations regarding the permit, the fact that government authorities knew of the construction for more than one year before issuing the stop work order, and the fact that there was no satisfactory avenue for regulatory recourse when the government failed to issue the required permit.[415] In the present case, Mexico's malicious acts towards Claimant are even more egregious than those in *Biloune* because the Concession had already been formally granted to Lusad and Lusad had satisfied all other legal requirements to begin operating—Lusad had no more legal or permitting hoops to jump through with the Mexico City government. Yet the City nevertheless elected to renege on its commitments to Lusad under the Concession.

200. Still other cases have involved similar facts involving rejected government authorizations that led to a finding of unlawful expropriation. In *Bear Creek v. Peru*, a tribunal determined that Peru indirectly expropriated an investor's investment when it revoked a concession to exploit land and operate a silver mine.[416] There was some opposition to the concession from communities near the concession area, and when a new federal administration came into power, the concession was revoked by executive decree. The change in policy that led to the indirect expropriation arose directly out of a change in politics.[417] In *Crystallex v. Venezuela*, the tribunal found that the accumulated effect of three broad government actions amounted to an indirect expropriation: (i) after the investor had sunk considerable costs, the government denied the investor's requested permit for the right to exploit a gold mine; (ii) government officials began to target Crystallex's investment with statements that resulted in a gradual devaluation of the investor's investment; and (iii) the government eventually terminated the contract entitling the

414 *Id.*

415 **Exhibit CL-0029-ENG**, ¶¶ 77–85 (*Biloune*).

416 **Exhibit CL-0030-ENG**, ¶¶ 202, 429 (*Bear Creek Mining Corp. v. Peru*, ICSID Case No. ARB/14/21, Award, dated 30 November 2017) (hereafter "*Bear Creek*").

417 *Id.*

investor to exploit gold deposits and operate a mine, and then took over that covered activity.[418] In *Tethyan v. Pakistan*, the tribunal determined that claimant's investment in a yet-to-be-built mine was indirectly expropriated because the relevant licensing authority rejected the investor's mining lease application, stating, "the Tribunal finds that the denial of [claimant's lease application] was a measure having an effect equivalent to expropriation" and that "[t]he tribunal considered that the GOB's motivation, *i.e.*, to deny the Mining Lease Application because it had decided to implement is own project rather than to continue its collaboration with [c]laimant, also excluded the classification of the denial as a *bona fide* regulatory measure."[419]

201. Mexico City's actions likewise resemble the violative actions taken by States underlying the tribunals' determinations in *Bear Creek*[420], *Crystallex*[421], and *Tethyan*.[422] In particular, the investors in those cases developed their investments with initial approval from the host States, which fostered those developments. Then, after significant time and expense had been incurred to develop the investments, the host States changed their stance with respect to the investment, refusing to take actions necessary to allow the investment to operate successfully (*e.g.*, grant a permit or license). Politics were often the underlying cause of the change in policy—not any problems attributable to the investor.[423] In each case, the tribunal determined that the State's actions that initially encouraged investment but later stood directly in the way of the investments' operation amounted to an illegal expropriation.

202. Similar to these cases, Mexico encouraged the development of Lusad and the L1bre System, requiring Lusad to meet testing and deployment deadlines that further promoted investment in the system, then precluded the successful operation of the investment. This directly caused Lusad to lose the benefit of its investment in that it was prevented from (i) installing its technology in Mexico City's fleet of taxis and (ii) earning a revenue through this technology.

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418 **Exhibit CL-0031-ENG**, ¶¶ 674–85 (*Crystallex International Corp. v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, dated 4 April 2016) (hereafter "*Crystallex*").

419 **Exhibit CL-0032-ENG**, ¶¶ 155–59 (*Tethyan Copper Co. Pty Ltd. v. Pakistan*, ICSID Case No. ARB/12/1, Award, dated 12 July 2019) (hereafter "*Tethyan Copper*").

420 **Exhibit CL-0030-ENG**, ¶¶ 202, 429 (*Bear Creek*).

421 **Exhibit CL-0031-ENG**, ¶ 708 (*Crystallex*) ("In conclusion, the conjunction and progression of acts performed by different governmental organs, starting from the actions surrounding the denial of the Permit, continuing with the announcements that Venezuela would "take back" Las Cristinas, and ending with the repudiation of the MOC, had the effect of substantially depriving Crystallex of the economic use and enjoyment of its investment, and ultimately rendered it entirely useless. The Tribunal thus concludes that the cumulative and incremental effect of those measures was "equivalent to […] expropriation" under Article VII(1) of the Treaty.").

422 **Exhibit CL-0032-ENG**, ¶¶ 155, 157 (*Tethyan Copper*) ("the Tribunal found that Respondent has carried out a measure having effect equivalent to expropriation that did not comply with the requirements for a lawful expropriation under Article 7(1) of the Treaty. . . The Tribunal considered that the GOB's motivation, i.e., to deny the Mining Lease Application because it had decided to implement its own project rather than to continue its collaboration with Claimant, also excluded the classification of the denial as a bona fide regulatory measure.").

423 *See also* **Exhibit CL-0033-ENG**, ¶ 111 (*BP Exploration Co. (Libya) Ltd. v. Libya*, Award (Merits), dated 10 October 1973) (finding that expropriation of the Concession was unlawful because it was "for purely extraneous political reasons.").

Mexico City's indefinite suspension of the Concession thus directly barred Claimant from enjoying its investment.[424]

203. There is an additional significant fact underlying the present case that sets it apart from the abovementioned cases, in that Lusad was guaranteed to earn significant revenues under the Concession, which were soon to be actualized at the time the Concession was suspended. There was nothing tentative or prospective about those revenues. The taxis in operation in Mexico City would generate revenue for Lusad as soon as the L1bre System was installed and activated in those taxis, and those revenues were guaranteed under the Concession. This is distinct from, for example, the prospective right to exploit a mine, which was at issue in *Bear Creek* and *Crystallex*. In those cases, claimants argued that they had been harmed when respondents took away their rights to exploit mines—an activity that ***had the potential*** to earn significant revenues ***if*** valuable minerals/resources were found during exploration and exploitation. The actions taken by Mexico City in this instance are even more harmful than the actions addressed in those cases because the government usurped a concrete—and not tentative—revenue stream from Claimant: Mexico City already had a fleet of 138,000 taxis, all of which would be turned into revenue-generating assets once the L1bre System was installed in those vehicles. There was no question as to whether the L1bre System was going to earn revenue, because its guaranteed revenues were already built into the Concession.[425]

204. For the reasons stated above, Mexico City's actions amount to an unlawful expropriation of Claimant's investment in violation of NAFTA Article 1110(1).

B. MEXICO DENIED CLAIMANT FAIR AND EQUITABLE TREATMENT IN VIOLATION OF NAFTA ARTICLE 1105

1. NAFTA's Fair and Equitable Treatment Protection Includes Protections Against an Array of Harmful State Actions

205. Article 1105(1) of NAFTA provides that "Each 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."[426]

206. Tribunals and commentators alike have generally accepted that the "minimum standard of treatment" under international law is not a singular, defined requirement of baseline treatment, but instead should be understood as "an umbrella concept incorporating a set of rules that over the centuries have crystallized into customary international law in specific contexts."[427] In the context of NAFTA, that standard directly incorporates "fair and equitable treatment"—a standard that itself likewise captures principles of "transparency, the protection of the investor's

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424 *See supra* ¶¶ 131–133.

425 See supra ¶¶ 84.

426 **Exhibit CL-0001-ENG**, Article 1105(1) (NAFTA).

427 **Exhibit CL-0034-ENG**, p. 2 (*ADF Group Inc. v. U.S.A.*, ICSID Case No. ARB (AF)/00/1, Post-Hearing Submission of Respondent United States of America on Article 1105(1) and *Pope & Talbot*, dated 27 June 2002).

legitimate expectations; freedom from coercion and harassment; procedural propriety and due process, and good faith."[428]

207. The NAFTA Free Trade Commission ("Commission") on 31 July 2001 concluded that Article 1105 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of other NAFTA Parties.[429] Several tribunals have since concluded that the Commission's interpretation provides for 'fair and equitable treatment' and 'full protection and security' to be considered as part of the minimum standard of treatment prescribed by Article 1105.

208. Based on the Commission's interpretation, NAFTA tribunals have sought to enforce the NAFTA Parties' obligation to afford fair and equitable treatment to investors in a manner consistent with the minimum standard of treatment prescribed in international law. For example, in the often-cited *Waste Management II* decision the tribunal found:

> Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the 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 . . . 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.[430]

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[428] **Exhibit CL-0035-ENG**, pp. 373–74 (C. Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. WORLD INV. & TRADE 357 (2005) (discussing the protections encapsulated within the umbrella of "fair and equitable treatment."); *see also* **Exhibit CL-0036-ENG**, p. 639 (P.T. Muchlinski, *Multinational Enterprises and the Law*, Blackwell, Oxford U.K., 1999) (offering that "fair and equitable treatment" is not precisely defined and offers a "general point of departure in formulating an argument that the foreign investor has not been well treated by reason of discriminatory or other unfair measures being taken against its interests."); **Exhibit CL-0037-ENG**, ¶ 210 (*Merrill & Ring Forestry L.P. v. Canada* (UNCITRAL) Award, dated 31 March 2010) (hereafter "*Merrill*") ("A requirement that aliens be treated fairly and equitably in relation to business, trade and investment is the outcome of this changing reality and as such it has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris*. In the end, the name assigned to the standard does not really matter.")); **Exhibit CL-0038-ENG**, ¶ 520 (*Rusoro Mining Ltd. v. Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, dated 22 August 2016) (hereafter "*Rusoro*") ("But the incorporation of the [Customary International Minimum] Standard into the definition of the FET does not provoke a major disruption in the level of protection: the CIS Standard has developed and today is indistinguishable from the FET standard and grants investors an equivalent level of protection as the latter. The whole discussion of whether Article II.2 of the BIT incorporates or fails to incorporate the CIS Standard when defining FET has become dogmatic: there is no substantive difference in the level of protection afforded by both standards.")).

[429] **Exhibit CL-0039-ENG** (NAFTA Free Trade Commission, Note of Interpretation of Certain Chapter 11 Provisions (31 July 2001)).

[430] **Exhibit CL-0040-ENG**, ¶ 98 (*Waste Management II*).

In fact, the *Waste Management II* tribunal's summary of the protections under NAFTA Article 1105 has become widely accepted.[431] Mexico has previously endorsed this standard as discussed below.

209. Recently, in *Nelson v. Mexico*, the tribunal likewise invoked the standard set out in *Waste Management II* and held:

> [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.[432]

The *Nelson* tribunal summarized further that "[i]ndeed, . . . a claimant can show a breach of the minimum standard of treatment if it establishes State misconduct that is: (i) arbitrary; (ii) grossly unfair, unjust, or idiosyncratic; (iii) discriminatory; or (iv) absent of due process.[433]

210. Some NAFTA tribunals have defined the applicable standard in terms of the State's arbitrary actions on the heels of earlier State action that induced or encouraged the investor to invest, and which are contrary to the investor's legitimate expectations. The tribunal in *Mobil*

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[431] *See* **Exhibit CL-0041-ENG**, ¶ 284 (*Vento Motorcycles, Inc. v. Mexico*, ICSID Case No. ARB/(AF)/17/3, Award, dated 6 July 2020) ("the Tribunal will analyze the claims that the Respondent's actions breached NAFTA Article 1105 against the minimum standard of treatment as formulated by the *Waste Management II* tribunal that both Parties agree is a correct expression of NAFTA Article 1105."); *see also* **Exhibit CL-0008-ENG**, ¶¶ 449, 551 (*Odyssey Marine Exploration, Inc. v. Mexico*, ICSID Case No. UNCT/20/1, Excerpt from Mexico's Counter Memorial, dated 23 February 2021) (accepting the fair and equitable treatment standard as expressed in *Waste Management II*.).

[432] **Exhibit CL-0042-ENG**, ¶ 321 (*Joshua Dean Nelson v. Mexico*, ICSID Case No. UNCT/17/1, Award, dated 5 June 2020) (hereafter "*Nelson*") (citing *Waste Management II*); *see also* **Exhibit CL-0037-ENG**, ¶¶ 210–11 (*Merrill*) ("[T]he standard protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness. Of course, the concepts of fairness, equity and reasonableness cannot be defined precisely: they require to be applied to the facts of each case. In fact, the concept of fair and equitable treatment has emerged to make possible the consideration of inappropriate behavior of a sort, which while difficult to define, may still be regarded as unfair. . . . against the backdrop of the evolution of the minimum standard of treatment . . . , the Tribunal is satisfied that fair and equitable treatment has become part of customary law.")).

[433] **Exhibit CL-0042-ENG**, ¶ 322 (*Nelson*).

Investments Canada Inc. v. Canada took this approach and summarized the test for a violation of Article 1105(1), as follows:

> (1) the minimum standard of treatment guaranteed by Article 1105 is that which is reflected in customary international law on the treatment of aliens;
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> (2) the fair and equitable treatment standard in customary international law will be infringed by conduct attributable to a NAFTA Party and harmful to a claimant that is arbitrary, grossly unfair, unjust or idiosyncratic, or is discriminatory and exposes a claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety.
>
> (3) in determining whether that standard has been violated it will be a relevant factor if the treatment is made against the background of
>
> > (i) clear and explicit representations made by or attributable to the NAFTA host State in order to induce the investment, and
> >
> > (ii) were, by reference to an objective standard, reasonable relied on by the investor, and
> >
> > (iii) were subsequently repudiated by the NAFTA host State.[434]

[434] **Exhibit CL-0043-ENG**, ¶ 152 (*Mobil Investments Canada Inc. and Murphy Oil Corp. v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, dated 22 May 2012) (hereafter "*Mobil*"); **Exhibit CL-0047-ENG**, ¶ 147 (*International Thunderbird Gaming Corp. v. Mexico* (UNCITRAL), Arbitral Award, dated 26 January 2006) ("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 honor those expectations could cause the investor (or investment) to suffer damages."); **Exhibit CL-0040-ENG**, ¶ 98 (*Waste Management II*) (considering that NAFTA's Article 1105 "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." And adding in particular that "[**i]n *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***.") (emphasis added); **Exhibit CL-0044-ENG**, ¶ 454 (*TECO Guatemala Holdings, LLC v. Guatemala*, ICSID Case No. ARB/10/23, Award, dated 19 December 2013) (hereafter "*TECO*") (interpreting Parties' obligations under CAFTA-DR's minimum standard of treatment protection and finding "[t]he Arbitral Tribunal considers that the minimum standard of FET under Article 10.5 of CAFTA-DR is infringed by conduct attributed to the State and harmful to the investor if the conduct is arbitrary, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety").

211. These tribunals' interpretations are apropos in light of NAFTA's objectives set out in Article 102 of the Treaty to broadly and transparently promote and increase cross-border investment opportunities and ensure the successful implementation of investment initiatives. In particular, Article 102 articulates the view of the NAFTA Parties that NAFTA was designed to "promote conditions of fair competition," "increase substantially investment opportunities in the territories," and "provide adequate and effective protection and enforcement of intellectual property rights" "through its principles and rules including national treatment, most-favored-nation treatment and transparency."[435] These core tenets underlie and inform the Parties' obligation to afford investors a minimum standard of fair and equitable treatment.

212. Thus, NAFTA's fair and equitable treatment standard encompasses a broad array of protections for investors. And, as further elaborated below, NAFTA tribunals have repeatedly recognized that a Party breaches its obligation to afford investors fair and equitable treatment under Article 1105(1) when it: (i) contradicts commitments made to the investor which formed the investor's legitimate expectations arising from State representations or assurances; (ii) engages in activity that is unfair, unpredictable, arbitrary, inconsistent, non-transparent, or inequitable, including bad faith actions; or (iii) otherwise violates due process.[436] The following section

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435 **Exhibit CL-0001-ENG**, Article 102(1) (NAFTA).

436 *See, e.g.*, **Exhibit CL-0040-ENG**, ¶ 98 (*Waste Management II*) (quoted above); **Exhibit CL-0037-ENG**, ¶¶ 208–10 (Merrill) ("Conduct which is unjust, arbitrary, unfair, discriminatory or in violation of due process has also been noted by NAFTA tribunals as constituting a breach of fair and equitable treatment, even in the absence of bad faith or malicious intention on the part of the state. . . . A requirement that aliens be treated fairly and equitably in relation to business, trade and investment is the outcome of this changing reality and as such it has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as opinio juris. In the end, the name assigned to the standard does not really matter. What matters is that the standard protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness."); **Exhibit CL-0046-ENG**, ¶ 296 (*Cargill, Inc. v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, dated 18 September 2009) (hereafter "*Cargill*") ("In summation, the Tribunal finds that the obligations in Article 1105(1) of the NAFTA are to be understood by reference to the customary international law minimum standard of treatment of aliens. The requirement of fair and equitable treatment is one aspect of this minimum standard. To determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an un-expected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety. The Tribunal observes that other NAFTA tribunals have expressed the view that the standard of fair and equitable treatment is not so strict as to require 'bad faith' or 'willful neglect of duty'. The tribunal agrees. However, the Tribunal emphasizes that although bad faith or willful neglect of duty is not required, the presence of such circumstances will certainly suffice."); **Exhibit CL-0045-ENG**, ¶ 125 (*Mondev*) ("there can be no doubt that, by interpreting Article 1105(1) to prescribe the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party under NAFTA, the term "customary international law" refers to customary international law as it stood no earlier than the time at which NAFTA came into force."); **Exhibit CL-0016-ENG**, ¶¶ 265 (*S.D. Myers*) (quoting F.A. Mann, "British Treaties for the Promotion and Protection of Investments", (1981) 52 Brit. Y.B. Int'l L, "it is submitted that the right to fair and equitable treatment goes much further than the right to most-favored-nation and to national treatment. . . . so general a provision is likely to be almost sufficient to cover all conceivable cases, and it may well be that provisions of the Agreements affording substantive protection are not more than examples of specific instances of this overriding duty.").

outlines several cases, which developed and explained these constituent protections of the fair and equitable treatment standard.

a) A State's Violation of an Investor's Legitimate Expectations Amounts to a Breach of Article 1105

213. NAFTA tribunals have regularly recognized that Article 1105(1) prohibits a State's breach of its commitments to an investor, which encouraged the investment. Such an act by the State would amount to unfair treatment, which violates the investor's legitimate expectations.

214. The tribunal in *International Thunderbird* considered:

> [L]egitimate expectations relate to an examination under Article 1105(1) in such situations 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 honor those expectations could cause the investor (or investment) to suffer damages.[437]

215. Similarly the tribunal in *Mobil* noted that when a State makes representations to an investor, the investor reasonably relies on those representations, and then the State subsequently repudiates those representations, this could amount to a breach of Article 1105.[438] The tribunal in *Waste Management II* likewise noted that "[i]n applying [the fair and equitable treatment standard under Article 1105] it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."[439]

216. Tribunals have also held that government interference with a contract between an investor and a State entity, including termination of such a contract, could amount to a violation of the fair and equitable treatment obligation in contravention of an investor's legitimate expectations.[440] Some tribunals have emphasized that a contractual breach only arises to a violation of the fair and equitable treatment standard where the State party's breach implicates its government or sovereign powers.[441] Other tribunals have focused instead on the effect of the

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437 **Exhibit CL-0047-ENG**, ¶ 147 (*International Thunderbird*).

438 **Exhibit CL-0043-ENG**, ¶¶ 152, 154 (*Mobil*).

439 **Exhibit CL-0040-ENG**, ¶ 98 (*Waste Management II*).

440 *See, e.g.*, **Exhibit CL-0048-ENG**, ¶ 615 (*Rumeli Telekom v. Kazakhstan*, ICSID Case. No. Arb/05/16, Award, dated 29 July 2008) (hereafter "*Rumeli Telekom*") ("The Arbitral Tribunal considers that in deciding to terminate the Contract without prior suspension, the Republic breached the Investment Contract. This was admitted by the Republic in two letters sent to the Ministry of Industry and Trade on May 14, 2003 by officials of the Ministry of Finance and the Ministry of Economy and Budget planning. Since the Investment Committee is an organ of the State, and in the particular circumstances of this case discussed above, this breach amounts to a breach of the BIT by the Republic. The decision was arbitrary, unfair, unjust, lacked in due process and did not respect the investor's reasonable and legitimate expectations.").

441 **Exhibit CL-0050-ENG**, ¶¶ 260, 266–70 (*Impregilo v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, dated 22 April 2005) (hereafter "*Impregilo*") (finding that a misuse of public power in the breach of a contract would amount to a violation of the FET standard).

contractual breach.[442] What is clear, however, is where a State (or subnational governments or instrumentalities) repudiates outright a contract and fails to uphold its obligations thereunder, and it does so in its capacity as a sovereign power, the State violates the FET standard.

217. In *Rumeli Telekom v. Republic of Kazakhstan*, for example, the tribunal found the State's abrupt cancellation of a contract following a period of encouraging activity under that contract violated claimants' legitimate expectations.[443] Claimants there had signed an investment contract with a state organ to develop telecommunications facilities in Kazakhstan. Based on this contract, claimants set out to create a "global system for mobile communications" network, including securing necessary local permits and licenses.[444] The tribunal found that repudiation of the contract underlying the claimant's investment, after the claimant had relied on the contract to develop its investment in the host state, undermined claimant's legitimate expectations. The tribunal concluded "that in deciding to terminate the Contract without prior [justified] suspension, the Republic breached the Investment Contract. This was admitted by the Republic in two letters sent to the Ministry of Industry and Trade . . . . The decision was arbitrary, unfair, unjust, lacked in due process and did not respect the investor's reasonable and legitimate expectations."[445]

218. More recently, in *Abengoa v. Mexico*, the tribunal found that claimants had developed legitimate expectations based on having sought and received the necessary administrative and environmental authorization at the municipal, state, and federal levels to run a waste management facility.[446] The tribunal noted that the federal and municipal authorities—up until the election a government administration that was hostile to the waste management facility—had confirmed on several occasions that all the necessary administrative and environmental authorizations required for operation of the facility had been properly obtained.[447] The tribunal determined that these repeated assurances helped to create a legitimate expectation that they would be able to operate their investment without government interference. On this basis, therefore, the tribunal found that the State violated claimant's legitimate expectations when the State revoked claimant's license to operate its investment.[448]

219. Tribunals have also found that when a government undertakes obligations towards the investor under domestic law, and then violates domestic law, this can constitute a breach of an investor's legitimate expectations. For example, and particularly poignant in comparison to the present case, the tribunal in *Quiborax v. Bolivia* determined that the cancellation of a concession

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442 **Exhibit CL-0049-ENG**, ¶ 146 (*SGS Société Générale de Surveillance S.A. v. Paraguay*, ICSID Case Nibo. ARB/07/29, Decision on Jurisdiction, dated 10 February 2012) (hereafter "*SGS v. Paraguay*") (finding that "a State's non-payment of a contract is . . . capable of giving rise to a breach of fair and equitable treatment requirement, such as, perhaps, where the non-payment amounts to a repudiation of the contract, frustration of its economic purpose, or substantial deprivation of its value.").

443 **Exhibit CL-0048-ENG**, ¶¶ 100–12 (*Rumeli Telekom*).

444 *Id.*

445 *Id.* at ¶¶ 614–15.

446 **Exhibit CL-0028-SPA**, ¶¶ 645–58 (*Abengoa*).

447 *Id.*

448 *Id.*

in a manner that was inconsistent with Bolivian law, violated the fair and equitable treatment standard.[449]

220. In its written memorial in a recent case, Mexico accepted that an investor's legitimate expectations "may [] constitute a factor to be considered in evaluating an alleged FET breach."[450] Mexico emphasized that specific representations by the State made to induce investments confer legitimate expectations under the fair and equitable treatment standard.[451]

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[449] **Exhibit CL-0051-ENG**, ¶ 292, 304 (*Quiborax v. Bolivia*, ICSID Case. No. ARB/06/2, Award, dated 16 September 2016) ("In the context of its analysis of the Claimants' expropriation claim, the Tribunal has already held that the ***revocation of the concessions was discriminatory and unjustified under Bolivian law. By the same token, it also violates the fair and equitable treatment standard***, even if it were to be equated with the customary international law minimum standard of treatment") (emphasis added); *see also* **Exhibit CL-0052-ENG**, ¶ 297 (*Luigiterzo Bosca v. Lithuania*, PCA Case No. 2011-05, Award, dated 17 May 2013) ("The Tribunal's conclusion is that the Claimant is entitled to compensation for lost opportunity resulting from the failure of the SPF to respect the legal rules which governed it in the negotiations of the SPA with the winning bidder who had legitimate expectations that the negotiations would be carried out in accordance with law and that the SPA could be successfully concluded"); **Exhibit CL-0053-ENG**, ¶ 1368 (*Glencore International A.G. and C.I. Prodeco S.A. v. Colombia*, ICSID Case No. ARB/16/6, Award, dated 2 August 2010) ("A State can create legitimate expectations vis-à-vis a foreign investor in two different contexts. In the first context, the State makes representations, assurances, or commitments directly to the investor (or to a narrow class of investors or potential investors). But legal expectations can also be created in some cases by the State's general legislative and regulatory framework: an investor may make an investment in reasonable reliance upon the stability of that framework, so that in certain circumstances a reform of the framework may breach the investor's legitimate expectations.").

[450] **Exhibit CL-0008-ENG**, ¶¶ 508–09 (*Odyssey Marine Exploration, Inc. v. Mexico*, ICSID Case No. UNCT/20/1, Excerpt from Mexico's Counter Memorial, dated 23 February 2021) ("legitimate expectations stand or fall depending on whether specific representations have in fact been made. McLachlan states that "*[t]he making of specific representations has been the decisive factor in the cases in which this ground of decision has been successfully invoked […] [c]onversely, the absence of representations is a material factor in leading to a finding that the standard has not been breached.*" Dolzer and Schreuer concur, stating that "*[s]pecific representations play a central role in the creation of legitimate expectations*", and adding further: "*[p]articularly important in the creation of legitimate expectations are specific assurances and representations made by the host state in order to induce investors to make investments.*" Fietta adds, "*the more specific the assurances that are given, the more likely they are to give rise to some basis for a legitimate expectations-based claim*." To be sure, expectations themselves are "never to be seen as an iron-clad guarantee – comparable to a long- term concession contract with a stabilization guarantee.") (citations omitted; emphases in original).

[451] *Id.*

Mexico also referred to long-term concession contracts part of an "iron-clad guarantee" conferring expectations.[452]

b) State Actions That Are Unfair, Unpredictable, Arbitrary, Inconsistent, Non-Transparent, Inequitable, or Amount to Bad Faith Violate Article 1105

221. NAFTA tribunals have recognized that Article 1105(1) also encompasses a State's obligation to ensure regulatory fairness and predictability to investors. Different tribunals have explained this concept in several different ways, as detailed below.[453]

222. For example, the *Chemtura* tribunal found that "Article 1105 of NAFTA seeks to ensure that investors from NAFTA member states benefit from ***regulatory fairness***."[454]

223. Similarly, the tribunal in *Merrill & Ring* confirmed that "[t]he ***stability of the legal environment*** is also an issue to be considered in respect of fair and equitable treatment."[455] That tribunal specified further that "state practice and jurisprudence have consistently supported such a requirement in order to ***avoid sudden and arbitrary alterations of the legal framework*** governing the investment."[456] The tribunal considered the measures at issue in the context of the broader policy objectives purportedly targeted by those measures and determined that a measure that was an abrupt departure from the overall policy objective could amount to a violation of Article 1105.[457]

224. According to the *Cargill* tribunal, the international minimum standard of fair and equitable treatment includes an obligation not to behave in an arbitrary, grossly unfair, or inequitable manner. That tribunal summarized:

> [T]he Tribunal finds that the obligations in Article 1105(1) of the NAFTA are to be understood by reference to the customary international law minimum standard of treatment of aliens. The requirement of fair and equitable treatment is one aspect of this minimum standard. To determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine ***whether the complained-of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal***

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452 *Id.*

453 **Exhibit CL-0055-ENG**, p. 190 (C. Schreuer, *The Future of Investment Arbitration* (C.A. Rogers, R.P. Alford eds., 2009)) ("In a number of cases, Tribunals have dealt with the prohibition of unreasonable or arbitrary measures in close conjunction with the fair and equitable treatment standard. This tendency is particularly pronounced with Tribunals applying the NAFTA.").

454 **Exhibit CL-0054-ENG**, ¶ 179 (*Crompton (Chemtura) Corp. v. Canada*, (UNCITRAL), Award, dated 2 August 2010) (emphasis added).

455 **Exhibit CL-0037-ENG**, ¶ 232 (*Merrill*) (emphasis added).

456 *Id.*

457 *Id.*

> ***policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals***, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; ***or involve an utter lack of due process*** so as to affect judicial propriety. The Tribunal observes that other NAFTA tribunals have expressed the view ***that the standard of fair and equitable treatment is not so strict as to require 'bad faith' or 'wilful neglect of duty'***. The Tribunal agrees. However, ***the Tribunal emphasizes that although bad faith or wilful neglect of duty is not required, the presence of such circumstances will certainly suffice***.[458]

The tribunal found on this basis that the State's imposition of an import permit requirement and its subsequent failure to issue import permits, which interfered directly with the claimant's business, violated Article 1105.[459] And, although bad faith or neglect of duty were not required to amount to a violation of Article 1105, such conduct would be sufficient to constitute a violation.[460]

225. Other tribunals have also expressed this general principle of "fairness" in terms of the State's obligation to act in good faith. The tribunal in *TECO v. Guatemala* confirmed this notion, stating "the minimum standard is part and parcel of the international principle of good faith. . . . a lack of good faith on the part of the State or of one of its organs should be taken into account in order to assess whether the minimum standard was breached."[461] The tribunal in *Tecmed v. Mexico* likewise found that "the commitment of fair and equitable treatment […] is an expression and part of the *bona fide* principle recognized in international law although bad faith from the State is not required for its violation."[462]

226. The *Tecmed* tribunal went on to explain that the good faith and fairness elements of fair and equitable treatment also require consistent, transparent, and non-arbitrary acts. The tribunal explains, specifically, that revoking government authorizations relied upon by the investor amounts to a breach of this standard. The *Tecmed* tribunal states:

> The foreign investor expects 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. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals

458 **Exhibit CL-0046-ENG**, ¶ 296 (*Cargill*) (emphases added).

459 *Id.* at ¶¶ 297–304.

460 *Id.* at ¶ 296.

461 **Exhibit CL-0044-ENG**, ¶ 456 (*TECO*).

462 **Exhibit CL-0010-ENG**, ¶ 153 (*Tecmed*).

> underlying such regulations. The foreign investor also expects the host State 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.[463]

227. Relatedly, tribunals have also found the failure to grant regulatory approvals for an ulterior, political motive to be arbitrary, and thus a breach of the fair and equitable treatment standard. For example, in *Gold Reserve v. Venezuela*, the tribunal found that Venezuela breached its obligation to afford investors fair and equitable treatment because it made decisions regarding permits and licenses on the basis of "political priorities" and "a change of policy," and not based on applicable legal rules.[464] The tribunal reasoned that this reflected a lack of transparency as to the real reasons behind the decisions and also displayed a lack of good faith.[465]

228. In *Eureko v. Poland*, the tribunal also found that the State's rescission of commitments to an investor for political reasons violated the fair and equitable treatment standard. In that case, a Dutch financial services firm, Eureko, was slated to acquire a controlling stake in a formerly publicly owned Polish insurance company.[466] There was strong political opposition to the privatization of the insurance company.[467] Notwithstanding that it had agreed to sell a majority share of the company to Eureko, the Polish treasury refused to sell the shares, reversing the Polish privatization strategy. The tribunal found that the Polish treasury's rescission of its commitment in the agreement to sell shares in the insurance company and to "confirm and agree on steps to be taken in order to implement the intentions and objectives that have been agreed by the parties . . . in relation to the privatization of [the insurance company]" amounted to unfair and inequitable treatment in violation of the treaty.[468] The tribunal elaborated further that the basis for the treasury's decision was unacceptable and violative of the fair and equitable treatment standard:

> Eureko's investments, its contractual rights to an IPO, which would have led it to acquire majority control of PZU, have been, in the opinion of the Tribunal, unfairly and inequitably treated by the Council of Ministers and Minister of the State Treasury. Those

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463 **Exhibit CL-0010-ENG**, ¶ 154 (*Tecmed*).

464 **Exhibit CL-0056-ENG**, ¶¶ 564, 580–82, 600 (*Gold Reserve v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, dated 22 September 2014) (hereafter "*Gold Reserve*").

465 *Id.* at ¶ 591; *see also, e.g.*, **Exhibit CL-0057-ENG**, ¶ 7.4.39 (*Compañia de Aguas del Aconquija S.A and Vivendi universal S.A. v. Argentina*, ICSID Case. No. ARB/97/3, Award, dated 20 August 2007) (hereafter "*Vivendi II*") ("[u]nder the fair and equitable standard, there is no doubt about a government's obligation not to disparage and undercut a concession (a 'do no harm' standard) that has properly been granted, albeit by a predecessor government, based on falsities and motivated by a desire to rescind or force a renegotiation."); **Exhibit CL-0058-ENG**, ¶ 378 (*Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award, dated 14 July 2006) (hereafter "*Azurix*") ("[T]he politicization of the Concession is an element in the Tribunal's determination that the fair and equitable standard has been breached.").

466 **Exhibit CL-0025-ENG**, ¶¶ 38–39 (*Eureko*).

467 *Id.* at ¶ 43.

468 *Id.* at 152–53, 231.

> organs of [Poland], consciously and overtly, breached the basic expectations of Eureko that are at the basis of its investment in PZU and were enshrined in the SPA, and, particularly, the First Addendum. The Tribunal has found that [Poland], by the conduct of organs of the State, ***acted not for cause but for purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character***. The Tribunal has no hesitation in concluding that the "fair and equitable" provisions of the Treaty have clearly been violated by the Respondent.[469]

c) Treatment by the State That is Without Due Process Likewise Violates Article 1105

229. Another element of the Article 1105 standard is the requirement to afford investors adequate due process. In *Nelson v. Mexico*, the Tribunal summarized:

> [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 [*inter alia*] 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.[470]

The tribunal there found further that "[i]ndeed, . . . a claimant can show a breach of the minimum standard of treatment if it establishes State misconduct that is [*inter alia*] ***absent of due process***."[471]

230. The tribunal in *Mobil Investments Canada Inc. v. Canada* similarly found that "the fair and equitable treatment standard in customary international law will be infringed by conduct

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469 *Id.* at 232–34; *see also, e.g.*, **Exhibit CL-0059-ENG**, ¶¶ 379–80 (*Windstream Energy LLC v. Canada, PCA Case No. 2013-22, Award*, dated 27 September 2016) (hereafter "*Windstream*") (considering as part of its FET analysis the politically-motivated decision of a Canadian State organ to block implementation of an investment); **Exhibit CL-0060-ENG**, ¶ 285 (*Frontier Petroleum Services Ltd. v. Czech Republic* (UNCITRAL), Final Award, dated 12 November 2010) ("Transparency means that the legal framework for the investor's operations is readily apparent and that any decisions of the host state affecting the investor can be traced to that legal framework. ***Stability means that the investor's legitimate expectations based on this legal framework and on any undertakings and representations made explicitly or implicitly by the host state will be protected.*** The investor may rely on that legal framework as well as on representations and undertakings made by the host state including those in legislation, treaties, decrees, licenses, and contracts. ***Consequently, an arbitrary reversal of such undertakings will constitute a violation of fair and equitable treatment.*** While the host state is entitled to determine its legal and economic order, the investor also has a legitimate expectation in the system's stability to facilitate rational planning and decision making").

470 **Exhibit CL-0042-ENG**, ¶ 321 (*Nelson*) (quoting *Waste Management II*, ¶ 98).

471 *Id.* at 322.

attributable to a NAFTA Party and harmful to a claimant that . . . involves a lack of due process leading to an outcome which offends judicial propriety."[472]

231. In its submissions in other cases, Mexico has agreed that "prior tribunals have stated that a gross violation [of fair and equitable treatment] may occur when an investor is denied an opportunity to be heard or failure to give notice."[473]

232. Tribunals have also clarified that the requirement to afford investors due process under the fair and equitable treatment standard extends not only to judicial contexts, but also to administrative processes. Invoking *Metalclad*, the *Nelson* tribunal held that "lack of due process may occur in the context of judicial and administrative proceedings," and that "[i]n the field of administrative proceedings, the standard is a 'a complete lack of transparency and candour in an administrative process.'"[474] The administrative process that was found to be deficient in *Metalclad* involved the municipal government denying a construction permit on grounds largely unrelated to the investment. The "permit was denied at a meeting of the Municipal Town Council of which Metalclad received no notice, to which it received no invitation, and at which it was given no opportunity to appear."[475] The tribunal found this process sufficiently deficient to amount to a breach of due process protections under NAFTA Article 1105.[476]

2. Mexico's Actions Violate NAFTA's Fair and Equitable Treatment Standard

233. Mexico's indefinite suspension of Lusad's Concession and subsequent replacement of Lusad's L1bre System with Mexico's own government-owned and operated Mi Taxi business violated the requirement of fair and equitable treatment that Mexico owed Claimant under Article 1105 of NAFTA. Mexico's actions in this regard (i) violated the Claimant's legitimate expectations; (ii) produced a regulatory framework that was unfair, unpredictable, arbitrary;

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472 **Exhibit CL-0043-ENG**, ¶ 152 (*Mobil*); *see also* **Exhibit CL-0046-ENG**, ¶¶ 285, 296 (*Cargill*) (enumerating absence of due process as a recognized violation of the NAFTA's FET protection).

473 **Exhibit CL-0008-ENG**, ¶ 490 (*Odyssey Marine Exploration, Inc. v. Mexico*, ICSID Case No. UNCT/20/1, Excerpt from Mexico's Counter Memorial, dated 23 February 2021) (citing *Metalclad* and *Tecmed*).

474 **Exhibit CL-0042-ENG**, ¶¶ 358–59 (*Nelson*) (citing *Metalclad*, ¶¶ 76, 79–101); *See also* **Exhibit CL-0044-ENG,** ¶ 457–58 (*TECO*) ("the [a]rbitral [t]ribunal considers that, pursuant to Article 10.5 of CEFTA-DR, a lack of due process in the context of administrative proceedings such as the tariff review process constitutes a breach of the minimum standard. In assessing whether there has been such a breach of due process, it is relevant that the Guatemalan administration entirely failed to provide reasons for its decisions or disregarded its own rules. Based on such principles, the Arbitral Tribunal considers that a willful disregard of the fundamental principles upon which the regulatory framework is based, a complete lack of candor or good faith on the part of the regulator in its dealings with the investor, as well as a total lack of reasoning, would constitute a breach of the minimum standard.").

475 **Exhibit CL-0012-ENG**, ¶ 91 (*Metalclad*).

476 *Id.* at ¶ 101.

inconsistent, non-transparent, inequitable, and amounting to bad faith; and (iii) failed to afford Lusad due process.

a) Mexico's Actions Violated Claimant's Legitimate Expectations in Contravention of Article 1105's Fair and Equitable Treatment Standard

234. As detailed above and well-summarized by the *International Thunderbird* tribunal, "[t]he 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 honor those expectations could cause the investor (or investment) to suffer damages."[477]

235. Claimant's investments in Mexico were not made haphazardly, but rather were based on "reasonable and justifiable expectations" created by Respondent and relied upon by Claimant when it acquired its participation in Lusad. These expectations included, at a minimum, that Respondent (i) would not violate Mexican law, including related to the Declaration of Necessity; (ii) would with respect and honor its obligations and commitments under the Concession; (iii) would not arbitrarily and unreasonably interfere with the operation of Claimant's investment, and thus would not compromise Claimant's guaranteed revenues derived from the investment; and (iv) would continue to work Lusad to have the L1bre System installed in all of Mexico City's taxis, and thus ensure the profitable operation of Lusad.[478] Instead, Respondent failed to protect Claimant's legitimate expectations, indeed repeatedly violated them, thereby violating the FET standard.

236. Beginning in 2015, the Mexico City government encouraged ES Investments and Lusad to pour additional capital and time into their plan to dramatically improve the City's taxi system.[479] ES Investments had several meetings with the Semovi leadership between April and December 2015.[480] At each meeting, ES Investments' prospective plan to improve the City's taxi system was met with great enthusiasm. In order to enable further development of the nascent plan, the government initially offered a temporary permit to support further investment and development

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477 *See supra* ¶¶ 213–232; **Exhibit CL-0047-ENG**, ¶ 147 (*International Thunderbird*).

478 *See generally* Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 47–72. (describing the extensive process that went into conceptualizing, developing, and eventually rolling out the L1bre System).

479 **Exhibit C-0038-SPA**, p. 3 (Oficio No. SEMOVI/OSSM/137-2016 from Semovi confirming interest in the Taxis L1bre project, dated 20 April 2015) ("La dependencia que represento **sí considera viable la modernización del sistema de cobro de tarifas** del Servicio de Transporte Público Individual de Pasajeros en el Distrito Federal . . . . Al respecto, es de precisar que un proyecto que contemple tal sustitución de taxímetros . . . **es un proyecto por demás esperanzado**, por lo cual, de ser el caso y estimarlo pertinente, quedamos en espera de su propuesta") (emphasis added).

480 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 9–11, 22–23, 28–29; Witness Statement of Eduardo Zayas, 13 September 2021, ¶¶ 15–23.

of the L1bre concept.[481] ES Investments conveyed that it needed a more stable and secure structure, such as a formal contract, that would adequately assure and protect investors.[482] In coordination with the Mayor's office, Semovi's initial offer developed into an offer for a service contract, which in turn developed into a formal concession to be requested from the government.[483] Meanwhile, on the back of the government's excitement about the project and commitment to work with Lusad, Lusad hired teams of data analysts and software developers and began formally developing their concept into a tangible product.[484]

237. The government then further cemented the expectations of Lusad's investors through the initiation of a formal concession grant process.[485] With all signs suggesting that the Concession would be granted to Lusad, Lusad continued to develop solutions to the City's taxi problems. It developed a prototype of the updated taximeter, and received approval for its prototype from Mexico City's Secretary of the Economy, which formally authorized Lusad to "commercialize the taximeters for installation, with the right to exploit commercially, and to use the taximeter to determine the fares to be charged by the passenger public transportation units operating as taxis."[486] It received approval as a registered taxi-hailing application provider.[487] The government continued to pave the pathway for Lusad to enact its system.

238. With a robust and developed system in hand, Lusad prepared "feasibility, finality, and justification" as well as profitability studies to support its Request for Concession.[488] On 22

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481 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 30; Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 16.

482 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 30; Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 16.

483 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 34; Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 22; *See* **Exhibit C-0004-SPA** (Request for Concession to Semovi, dated 22 April 2016) (attaching draft concession).

484 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 35–36; Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 21.

485 **Exhibit C-0005-SPA** (Necessity Declaration issued by Semovi); **Exhibit C-0046-SPA** (Minutes of the session of the Evaluation Committee, authorizing the issuance of the Declaration of Necessity, dated 25 May 2016)

486 **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).

487 **Exhibit C-0012-SPA** (Certificate of Registration as taxi-hailing application provider, No. 6D6C61F32327F227C-1651180691531691, dated 1 June 2016).

488 **Exhibit C-0043-SPA** (Feasibility, Finality, and Justification Study, dated 22 April 2016) (explaining in detail how the L1bre System would improve the taxi transport sector in Mexico City and justifying the need for the City to award a concession; describing the features and benefits of the proposed digital taximeters; explaining how the ride-hailing application and digital taximeter functioned; describing the technical specifications of the L1bre System's hardware and software; and analyzing the taxi-transport sector in Mexico City); **Exhibit C-0044-SPA** (Profitability study, attached to Lusad's Request for Concession) (containing preliminary projections on profitability).

April 2016, Lusad formally presented its Request to Semovi.[489] Lusad's request was provisionally approved by Semovi and moved on to the next phase of review before the "Evaluation and Analysis Committee of the Permanent Cabinet of the New Urban Order and Sustainable Development."[490]

239. The Evaluation Committee unanimously approved the issuance of a Declaration of Necessity, which was the next step to granting a concession.[491] The Declaration was published on 30 May 2016, outlining that the government required private investment, services, and technology to implement its goal of updating the City's taxi system and inviting the private sector to bid for a concession to that end.[492] This Declaration of Necessity, backed by the force of Mexican law, articulated that the government was unable to provide the services and technologies to update the taxis as desired, and therefore the government required private investment, technology, and service offerings to solve the problems in the taxi industry.[493]

240. At this stage, Lusad and its representatives worked hand-in-hand with the Mexican government to (i) develop a system that would modernize and revitalize Mexico City's taxi system, (ii) follow the requisite legal and administrative avenues to have a private sector actor assist in this quasi-public function, and (iii) test and prove the merits of this system.[494] Claimant had every reasonable expectation that Lusad's work with the government would continue in order to implement this symbiotic public-private partnership.

241. On 17 June 2016, the government awarded the Concession to Lusad.[495] This decision followed a transparent, competitive process, with eight companies submitting proposals.[496] The government then amended the Concession on 9 January 2017 (and formally reissued the amended Concession in March 2017).[497] As amended, the Concession granted Lusad

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

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

491 **Exhibit C-0046-SPA**, pp. 1, 3 (Minutes of the session of the Evaluation Committee, authorizing the issuance of the Declaration of Necessity, dated 25 May 2016); *see also* **Exhibit C-0094-SPA** (Oficio No. DGJR-0997-2016 from Semovi to the General Director of Legal and Legislative Affairs of the Office of Judicial and Legal Affairs of Mexico City, dated 27 May 2016) (sending the Declaration of Necessity for publication in Mexico City's official gazette) ("[L]e remito [la] 'Declaratoria de necesidad . . .' a efecto de publicar esta Declaratoria y estudios técnicos que se acompañan en la Gaceta official de la Ciudad de México").

492 **Exhibit C-0005-SPA** (Necessity Declaration issued by Semovi, dated 30 May 2016) (including the required technical specifications required for the project).

493 *Id.*; *see also* Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 39.

494 See supra ¶¶ 88–121 (describing the work that Lusad's representatives did to bring the L1bre System to fruition, securing permits and licenses from the government, reporting progress, conducting pilot programs, developing training, scouting and establishing installation sites, developing installation instructions so that the project could hit the ground running, and more.).

495 See **Exhibit C-0053-SPA** (Concession Agreement without amendment, dated 17 June 2016).

496 **Exhibit C-0006-SPA**, pp. 7–8 (Minutes of the Adjudication Committee for Concessions for Public Transport, dated 17 June 2016) (listing the eight companies that presented proposals in response to the Declaration of Necessity).

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

certain rights and obligations, including the right to: (i) substitute, install, and maintain the digital taximeters, which would provide GPS location and other services to the Mexico City taxi fleet; (ii) develop and operate a remote taxi-hailing smartphone application and accompanying software, and (iii) earn revenues through various defined fees ("application fee," "recuperation fee," "wi-fi fee", advertisement fee, etc.).[498] On the other hand, the Concession required Mexico City and Semovi to (i) facilitate Lusad's installation of the L1bre System, and (ii) inform taxi operators about the mandatory installation procedure.[499] The rights and obligations defined in the Concession were the culmination of years-long effort, and they made concrete Lusad's rights. The Concession gave the investors in Lusad every reason to expect that the government would uphold its obligations, in furtherance of the government's own objective of modernizing its taxi fleet.[500] Indeed, Lusad's rights were backed with the force of law.

242. Having already worked to develop the smartphone application, tablet software, and with an experienced team to implement both software and hardware solutions, Lusad began to install its L1bre System in August 2016.[501] By November 2016, Lusad had installed its technology in an initial 1,100 taxis through two stages of installation and testing of the L1bre System, as required by the government.[502] Semovi inspected Lusad's progress in early 2017 and confirmed that the Trial Period had generated "favorable and satisfactory results."[503] Lusad took further steps to meet required deadlines under the Concession to install the L1bre System in all of Mexico City's 138,000 taxis, including setting up a call center, optimizing installation processes, training employees, and standing up installation centers throughout Mexico City.[504] In April 2017, Semovi issued a communication reaffirming Lusad's rights under the Concession, stating that Semovi did not intend to issue another Declaration of Necessity (because the L1bre System was satisfactorily addressing that necessity) and confirming that the Concession was "in force and valid . . . and the legal rights granted remain in effect."[505] These communications, including formal certifications of

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498 *Id.* at Articles 2, 5.

499 *Id.* at Article 7.

500 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 44–46.

501 *See* **Exhibit C-0013-SPA** (Communication from Lusad to Semovi confirming the installation of the L1bre System in 100 Taxis, dated 9 August 2016).

502 *See* **Exhibit C-0014-SPA** (Communication from Lusad to Semovi confirming installation of the L1bre System in 1,000 Taxis, dated 7 November 2016).

503 **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).

504 *See, e.g.*, **Exhibit C-0073-SPA** (L1bre installation centers operations manual, dated 24 August 2018); **Exhibit C-0074-SPA** (Physical requirements for Installation Centers, May 2018).

505 **Exhibit C-0056-SPA**, pp. 2–3 (Oficio No. DNRM-0673-2017 from SEMOVI confirming the validity of the Concession Agreement., dated 4 April 2017) ("**No existe la posibilidad de otorgar una concesión adicional a la ya expedida** al amparo de la Declaratoria de Necesidad del 30 de mayo de 2016, pues el Comité Adjudicador de Concesiones para la Prestación del Servicio Público Local de Transporte de Pasajeros o de Carga, **ha tenido por satisfecha y cumplida dicha necesidad**. . . . **No existe [la] posibilidad de expedir nueva declaratoria de necesidad** que verse sobre la necesidad que permitiera la sustitución, instalación y mantenimiento de todos los taxímetros del parque vehicular del servicio de transporte público individual . . . toda vez que el Comité de Evaluación y Análisis del Gabinete Permanente de Nuevo Orden Urbano y Desarrollo

the L1bre System's adequacy and success, conferred additional legitimate expectations that Lusad would be able to install the L1bre System in all taxis and begin earning substantial revenue, as promised in the Concession.[506]

243. Based on the assurances given by Semovi and Mexico City of the continued support of the Concession and the clear commitments provided to Lusad, Claimant obtained additional loans and outside investment to fund the continued development of the L1bre System.[507] Claimant's continued investment supported Lusad's work to finalize the development of the L1bre software and to secure vendor contracts necessary to fully implement the L1bre System.[508]

244. On 17 April 2018, Semovi issued a mandatory installation notice to all taxi operators, stating that the installation of the L1bre System would occur via an electronic appointment system between April 2018 and March 2019.[509] The Notice required taxi drivers to bring their vehicles to specific installation points to install the System, and required Lusad to complete the installation of the taximeters by 31 March 2019.[510] This was the logical and expected next step to ensure the effective implementation of the Concession. It was also a major moment in the final commercialization of Claimant's investment, because the mandatory installation notice implemented the Concession's requirement for the L1bre System to be installed in all of Mexico City's 138,000 taxis.[511]

245. Semovi temporarily suspended the implementation of the Concession in May 2018 on the basis of the upcoming mayoral election, citing political concerns in light of comments by Sheinbaum (at the time only a mayoral candidate) that misrepresented the terms of the Concession and sought to rally opposition to it.[512] Notwithstanding this temporary suspension, the government

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Sustentable, **ya ha aprobado una declaratoria de necesidad con esas características del 30 de mayo de 2016**.") (emphasis added).

506 *See also, e.g.*, **Exhibit C-0057-SPA**, p. 2 (Oficio No. DNRM-1460-2017 from Semovi confirming the validity of the Concession Agreement, dated 19 June 2017) ("No omito manifestar que, en la actualidad la Concesión Administrativa SEMOVI/DGSTPO/001/2016 **tiene plena vigencia y validez**, pues se encuentra impoluta a la luz de criterios judiciales; por lo que, para esta dependencia **continúan los efectos jurídicos plenos de dicho instrumento legal**.") (emphasis added).

507 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 63–66.

508 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 68–72.

509 **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).

510 *Id.*

511 *Id.*; Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 71; Witness Statement of Eduardo Zayas, 13 September 2021, ¶¶ 53–54.

512 **Exhibit C-0018-SPA** (Oficio No. DGSTPI-965-2018 from Semovi announcing suspension of the Concession, dated 30 May 2018) ("**[S]olicito suspenda el inicio del periodo de instalación** de taxímetros digitales en las unidades concesionadas taxi de la Ciudad de México. . . . 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.") (emphasis added).

continued throughout the summer of 2018 to support Lusad in preparing for the implementation of the mandatory installation procedure, which both Claimant and Semovi believed to be imminent. CENAM, Mexico's calibration and measurement authority, and the Secretary of Economy tested, certified, and authorized Lusad's digital taximeter for commercial use in Mexico in September 2018.[513]

246. However, following Mayor Sheinbaum's election, the government followed through on her political rhetoric. On 28 October 2018, Semovi indefinitely suspended the implementation of the Concession.[514] The sole justification offered for this indefinite suspension was that a new administration had been elected.[515] No blame was put on Lusad, because there was none. Indeed, no substantive reason was provided for this suspension. Only politics. Lusad, of course, could not have expected that the Concession would be suspended for purely political reasons, in contravention of the terms of the Concession and in contravention of Mexican law. Mexico City's reversal of Lusad's fortunes was unlawful.

247. Lusad was initially left in limbo, unsure if this suspension, like the earlier May 2018 suspension, was meant only to be temporary. Finally, in January 2019, representatives of the Sheinbaum administration confirmed to Lusad's representatives that the 28 October 2018 indefinite suspension meant that the Concession would never be honored by the government.[516]

248. Until this point, Lusad—through diligence, hard work, and substantial monetary investment—had proceeded through the administrative processes of developing a system that was of great interest to the government; petitioning the government for a Concession to implement that system; making that system a reality by developing and commissioning the technology to implement and support the system; testing that system to the satisfaction of the government; and developing a framework for the system to be implemented across the City's entire fleet of taxis. Lusad had done all of this work with the repeated and enthusiastic support of the government. Each administrative approval brought the L1bre System closer to full implementation and compounded Claimant's legitimate expectations that its investment would be permitted to thrive with the government's full support. There were no signs of what was soon to come—the government's 180-degree turn in the City's policy towards Lusad. Due to politics and politics

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513 *See* **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).

514 **Exhibit C-0019-SPA** (Oficio No. DGSTPI-1943-2018 from Semovi announcing indefinite suspension of the Concession, dated 28 October 2018) ("[S]olicito c**ontinúe suspendido el inicio del periodo de instalación** de taxímetros digitales en las unidades concesionadas taxi de la Ciudad de México . . . . Lo anterior **se solicita de conformidad a que de las elecciones celebradas el 01 de julio de 2018, se indicó un cambio político en la mandado de la Jefatura de Gobierno de la Ciudad de México**, con lo que se dio inicio a un procedimiento administrativo de transición entre los servidores público actuales . . . con aquellos que ya han sido anunciados y la integrarán . . . quienes han solicitado que continúe la suspensión de la instalación gratuita de taxímetros digitales en tanto asuman el cargo y funciones.") (emphasis added).

515 *Id.*

516 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 83; Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 63.

alone, the City's treatment of Lusad about-faced from full support to devastating interference, destruction, and theft.

249. Lusad's ability to implement the L1bre System was dependent on the government facilitating that implementation. Lusad had no authority to require taxi drivers to install the L1bre System—only the government could compel taxi drivers. Semovi never activated the electronic appointment platform required to facilitate installation of the L1bre System in Mexico City's taxi fleet, in direct violation of its obligation under the Concession.[517] Without the government's facilitation, it was impossible for Lusad to install the L1bre System and therefore impossible for Lusad to obtain the promised revenue from its investment.[518]

250. Like the investors in *Abengoa* and *Metalclad*, Claimant here was led by Respondent to believe that it had satisfied all regulatory requirements necessary to implement and operate its investment.[519] Also much like those claimants, Claimant's belief was backed by supportive statements directly from Respondent in addition to licenses and permits that it had secured in full view of Respondent.[520] What is more, Claimant in the present case had already secured a formal Concession to support its investment. Thus, when Respondent's support for the investment abruptly changed into outright hostility as a new administration came to power, the investor's legitimate expectation that it would be allowed to pursue its Concession rights and commercialize its investment was crushed.

251. Claimant's legitimate expectation also came from Claimant's belief that Mexico would follow its own laws and regulations, including the Declaration of Necessity and the public Concession it had issued.

252. Claimant relied on Lusad's Concession with the government to further develop its investment in Mexico City. The Concession was signed with the backdrop of years of collaboration relating to the matters governed by the Concession, all of which only added to Claimant's legitimate belief that the government would abide by its commitments in furtherance of the government and Lusad's mutual goal—modernizing Mexico City's taxi fleet. On the back of this Concession (and other earlier regulatory approvals, secured permits, and express assurances from the government), Claimant continued to pour investment into the Lusad project to develop it into a business that was set to enter the revenue-producing phase. The government's conduct created reasonable and justifiable expectations on the part of Claimant, which acted in reliance on the conduct by continuing to develop the L1bre System. Then, in violation of the plain terms of the Concession and Claimant's legitimate expectations, the government repudiated the

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517 *See* **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).

518 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 83–84.

519 **Exhibit CL-0028-SPA**, ¶¶ 645–58 (*Abengoa*); **Exhibit CL-0012-ENG**, ¶¶ 89, 97, 99 (*Metalclad*).

520 **Exhibit CL-0028-SPA**, ¶¶ 645–58 (*Abengoa*); **Exhibit CL-0012-ENG**, ¶¶ 89, 97, 99 (*Metalclad*).

concession.[521] The government's repudiation has injured, and continues to injure, Claimant, which as a result has seen its investment become worthless.

253. For all of these reasons, Mexico violated Claimant's legitimate expectations and failed to afford fair and equitable treatment when Mexico City suspended and eventually halted implementation of the Concession and reused to uphold its obligations under the Concession for political reasons.

b) Mexico's Unfair, Unpredictable, Arbitrary, Inconsistent, Non-Transparent, Inequitable, and Bad Faith Actions Likewise Violated Mexico's Obligation to Afford Claimant Fair and Equitable Treatment Under Article 1105

254. As described above, and in addition to an obligation to protect investors' legitimate expectations, tribunals have recognized that the fair and equitable treatment standard encompasses obligations to afford investors fair, predictable, non-arbitrary, consistent, transparent, equitable, and good faith treatment.[522] Several tribunals, including under NAFTA, have emphasized that abrupt reversals or departures from prior policies violate this standard. Additionally, tribunals have found that while malintent is not required to amount to a violation of fair and equitable treatment, bad faith is clear indication of a State's failure to afford an investor the required level of treatment.[523] Mexico has violated each of these additional elements of the fair and equitable treatment standard.

255. Mexico City's treatment of Claimant and its investment was arbitrary and was by no means fair or predictable. From April 2015 through October 2018, Lusad worked to develop a

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[521] **Exhibit CL-0048-ENG**, ¶¶ 614–15 (*Rumeli Telekom*); *see also* **Exhibit CL-0049-ENG**, ¶ 146 (*SGS v. Paraguay*) (finding that "a State's non-payment of a contract is . . . capable of giving rise to a breach of fair and equitable treatment requirement, such as, perhaps, where the non-payment amounts to a repudiation of the contract, frustration of its economic purpose, or substantial deprivation of its value."); **Exhibit CL-0050-ENG**, ¶¶ 260, 266–70 (*Impregilo*) (finding that a misuse of public power in the breach of a contract would amount to a violation of the FET standard); *cf.* **Exhibit CL-0061-ENG**, ¶ 23 (*GAMI v. Mexico*, Ad hoc Arbitration, Final Award, dated 15 November 2004) (hereafter "*GAMI*") ("[a]nother fundamental aspect of the case is that GAMI cannot invoke contractual commitments by Mexico. Neither GAM nor GAMI had contracts with the Government. GAMI therefore cannot say that its investment decision was predicated on contractual promises to establish or maintain a certain regime for its investment.").

[522] *See* **Exhibit CL-0040-ENG**, ¶ 98 (*Waste Management II*) ("the 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."); *see also* **Exhibit CL-0042-ENG**, ¶ 322 (*Nelson*) (endorsing *Waste Management* for the same proposition).

[523] *See* **Exhibit CL-0046-ENG**, ¶ 296 (*Cargill*) ("the Tribunal finds that the obligations in Article 1105(1) of the NAFTA are to be understood by reference to the customary international law minimum standard of treatment of aliens. The requirement of fair and equitable treatment is one aspect of this minimum standard. To determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine ***whether the complained-of measures were grossly unfair, unjust or idiosyncratic; arbitrary***

system that, by Mexico City's own admission through the Declaration of Necessity, would fill a gap that the government could not fill without the assistance of the private sector.[524] Lusad had sought and received a long list of regulatory approvals over these three years, working its way in full view of the government to develop a technology and a system that would revolutionize Mexico City's taxi fleet. The government was entirely supportive of Lusad's L1bre System throughout these three years, paving the way for implementation of the L1bre System.[525] It issued the Declaration of Necessity, stating to the public the importance of private investment and the qualities of such investment that were needed to fulfill the government's objectives.[526] After a public bidding process, it granted Lusad a formal Concession in June 2016 and amended that Concession in January 2017 (reissued in March 2017), improving the revenue-generating terms of the Concession in Lusad's favor.[527] It granted all needed permits and authorizations to implement the technology.[528] And then it formally publicly mandated installation of the L1bre System in every taxi.[529] All of these steps were done with expressions of confidence and celebration of Lusad, the L1bre System, and the exciting improvements in Mexico City's taxi system that Lusad would be fulfilling through Claimant's investment.

256. Barely one month after Semovi published its notice mandating that all taxis install the L1bre System by 31 March 2019, the government did a *volte face*, suspending Lusad's Concession and refusing to uphold its obligation to facilitate the installation of the L1bre System.[530] Then, in October 2018, after Sheinbaum won the mayoral election, the government made

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beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; ***or involve an utter lack of due process*** so as to affect judicial propriety. The Tribunal observes that other NAFTA tribunals have expressed the view ***that the standard of fair and equitable treatment is not so strict as to require 'bad faith' or 'willful neglect of duty'***. The Tribunal agrees. However, ***the Tribunal emphasizes that although bad faith or willful neglect of duty is not required, the presence of such circumstances will certainly suffice***.") (emphasis added); **Exhibit CL-0044-ENG**, ¶ 456 (*TECO*) ("the minimum standard is part and parcel of the international principle of good faith. … a lack of good faith on the part of the State or of one of its organs should be taken into account in order to assess whether the minimum standard was breached.").

524 **Exhibit C-0005-SPA**, p. 17 (Necessity Declaration issued by Semovi, dated 30 May 2016); **Exhibit C-0007-SPA**, (Amended Concession Agreement, as reissued on 21 March 2017).

525 *See supra* at ¶¶ 30–112.

526 **Exhibit C-0005-SPA**, p. 17 (Necessity Declaration issued by Semovi, dated 30 May 2016).

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

528 *See, e.g.*, **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); *See* **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).

529 *See* **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).

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

permanent its harmful action, suspending implementation of the Concession indefinitely.[531] This new, surprising policy, justified entirely by municipal politics, was unfair, unpredictable, arbitrary, inconsistent, lacked transparency, and was inequitable.

257. The government's refusal to abide by the terms of the Concession it had granted to Lusad was not something that Lusad could have predicted. By Mexico City's own admission, the decision to suspend the Concession was totally unrelated to Lusad's performance under the Concession. According to Semovi's communication to Lusad suspending the Concession, "***this suspension is not attributable to [Lusad] since to the day this writ is issued, the concessionaire has fully complied with its rights and obligations [under the Concession]***."[532] It is therefore entirely reasonable for Lusad to have assumed that the government would abide by commitments that it had made to a concessionaire given the concessionaire's full compliance with the rights and obligations under the concession. The swift and dramatic change in the government's disposition towards Lusad, culminating in the outright rescission of the Concession, was therefore even less predictable.

258. Mexico City's arbitrary and unpredictable treatment of Lusad is akin to that which the tribunals in *Gold Reserve v. Venezuela* and *Eureko v. Poland* found violated the fair and equitable treatment standard. In both of those cases, the government dramatically altered its disposition towards the investments after the investors had poured significant capital into developing those investments. The reason for the change in disposition, the tribunals determined, was political. And therefore, the politically-motivated acts violated the fair and equitable treatment standard.[533] *Eureko* is particularly analogous in this regard, as the apparent basis for the Polish government's frustration of the investment was because the investment at issue there had become

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

[532] **Exhibit C-0018-SPA** (Oficio No. DGSTPI-965-2018 from Semovi announcing suspension of the Concession, dated 30 May 2018) ("No omito manifestar que esta suspensión n**o es atribuible a su representada**, pues hasta la fecha en que se emite el presente oficio, la concesionada **ha cumplido a cabalidad con las obligaciones y derechos que derivan del título que detenta**.") (emphasis added).

[533] *See* **Exhibit CL-0025-ENG**, ¶¶ 232–34 (*Eureko*) ("It is abundantly clear to the Tribunal that Eureko has been treated unfairly and inequitably by the Republic of Poland. . . The Tribunal has found that the RoP, by the conduct of organs of the State, acted not for cause but for purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character. The Tribunal has no hesitation in concluding that the "fair and equitable" provisions of the Treaty have clearly been violated by the Respondent."); **Exhibit CL-0056-ENG**, ¶ 580 (*Gold Reserve*) ("the reasons for the termination of the Brisas, Unicornio and El Pauji Concessions are not limited to those officially stated by MIBAM in the Resolutions of 25 May 2009, 17 June 2010 and 22 May 2009, respectively. Rather, they are to be found in the change of political priorities of the Administration."); *see also* **Exhibit CL-0059-ENG**, ¶¶ 377, 380 (*Windstream*) ("the evidence before the Tribunal suggests that the decision to impose the moratorium was not only driven by the lack of science. The impact of offshore wind on electricity costs in Ontario, as well as the upcoming provincial elections in November 2011, also appear to have influenced the decision, and the latter in particular in light of the public opposition to offshore wind that had emerged during the relevant period in many parts of rural Ontario. . . the failure of the Government of Ontario to take the necessary measures, including when necessary by way of directing the OPA, within a reasonable period of time after the imposition of the moratorium to bring clarity to the regulatory uncertainty surrounding the status and the development of the Project created by the moratorium, constitutes a breach of Article 1105(1) of NAFTA.").

"the epicenter of Polish party politics" and respondent there admitted that "it appeared that the privatization of the [formerly publicly-owned insurance company] was becoming more and more a political issue."[534] It was therefore politically convenient for Poland to prevent the investment from moving forward. This is exactly what happened in the present case: motivated by municipal politics, Mexico City's new administration prevented Claimant's investment from moving forward.[535] The *Eureko* tribunal found the respondent's very similar failure to create a predictable and transparent legal framework violated the fair and equitable treatment standard.

259. Here, much like in *Eureko*, the arbitrary political basis upon which the government suspended and eventually halted implementation of the Concession was not fair, predictable, or transparent. After three years of consistency in its treatment of Claimant's investment, the government acted inconsistently by reversing its favorable policy towards Lusad—with political gain and the sole basis for the change in policy. The Tribunal should therefore find on this basis alone that the Respondent violated the fair and equitable treatment standard.

260. Mexico's violations of the fair and equitable treatment standard do not stop with its arbitrary refusal to implement the Concession. Adding insult to injury, in November 2018, only a few days after the indefinite suspension had been announced, senior government officials attempted to dupe Lusad's representatives into signing a back-dated and amended version of the Concession to amend *post hoc* the rights and obligations under the Concession.[536] Under false pretenses, the officials invited Lusad's representatives to a nighttime meeting purportedly to discuss a separate line of business that Lusad's representatives were pursuing.[537] Upon arrival, however, it became clear that the meeting actually was to pressure Lusad's representative to sign a "re-issued" version of the Concession. The government officials represented that the Concession was identical and it was merely being reissued by the new administration. None of that was true.[538] Instead, the "re-issued" version of the Concession stripped out guaranteed revenue streams that were supposed to run to Lusad.[539]

261. The charade mounted by these government officials was a clear bad faith attempt to procure Lusad's signature on an amended version of the Concession in order to shield the City from full liability for its illegal actions towards Lusad. There is no reasonable explanation for Mexico's actions—which occurred less than two weeks after Semovi indefinitely suspended implementation of the Concession—other than it was attempting *post hoc* to limit its liability for its illegal destruction of Claimant's investment. If there were any doubt about the government's intentions towards Lusad—amidst countless public insults and lies about Lusad and the L1bre

534 **Exhibit CL-0025-ENG**, ¶ 43 (*Eureko*).

535 **Exhibit C-0018-SPA** (Oficio No. DGSTPI-965-2018 from Semovi announcing suspension of the Concession, dated 30 May 2018) (expressly stating that the concession was being suspended for political reasons).

536 Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 61.

537 *Id.*

538 *See* **Exhibit C-0020-SPA** (Forged Concession Agreement, dated 13 April 2018).

539 *See id.* (attempting to eliminate the Recuperation Fee Lusad received each time a user hailed a taxi containing the L1bre System).

System during the campaign and in its aftermath—this episode evidences the government's plan to destroy Lusad by any means necessary.[540]

262. As the Tribunal in *Cargill v. Mexico* found: "NAFTA tribunals have expressed the view that the standard of fair and equitable treatment is not so strict as to require 'bad faith' or 'willful neglect of duty'. The Tribunal agrees. However, the [t]ribunal emphasizes that ***although bad faith or wilful neglect of duty is not required, the presence of such circumstances will certainly suffice***."[541] Thus, while this Tribunal need not find that Respondent acted in bad faith in order to find a violation of the fair and equitable treatment standard, finding that Respondent acted in bad faith is sufficient to amount to a fair and equitable treatment violation.

263. During the same time period, Mexico City was also working to replace the L1bre System with Mi Taxi. The bad faith underlying the government's actions towards Lusad is therefore compounded by Mexico City's motivations to swiftly replace the L1bre System with its own Mi Taxi.[542]

264. On these bases, Mexico breached its obligation to afford Claimant fair and equitable treatment. Moreover, Mexico's attempt to diminish its liability *post hoc* by attempting to have Lusad sign a fraudulent reissued version of the Concession is evidence of Mexico's bad faith action towards Claimant and further grounds for this Tribunal to find a violation of the fair and equitable treatment standard.

c) Mexico Failed to Afford Claimant Adequate Due Process, in Violation of Article 1105

265. The fair and equitable treatment standard also requires the State to grant adequate due process to investors. Due process is recognized as a keystone element of the rule of law and represents a core element of fair and equitable treatment.[543]

266. The *Waste Management II* tribunal explained that the due process standard includes conduct that, *inter alia*, "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."[544] The *Nelson* tribunal adopted the same standard with respect to administrative due process, stating "[i]n

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540 *See* Witness Statement of Eduardo Zayas, 13 September 2021, ¶ 61.

541 **Exhibit CL-0046-ENG**,¶ 296 (*Cargill*) (emphasis added).

542 *See supra* ¶¶ 138–148 (discussing Mexico City's replacement of L1bre with Mi Taxi).

543 *See generally* **Exhibit CL-0035-ENG**, pp. 372, 381–82 (C. Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. WORLD INV. & TRADE 357.) (discussing due process as a bedrock principle of law generally and international investment law in particular).

544 **Exhibit CL-0040-ENG**, ¶ 98 (*Waste Management II*).

the field of administrative proceedings, the standard is a 'a complete lack of transparency and candour in an administrative process.'"[545]

267. Here, Respondent afforded Claimant no due process before unilaterally suspending the Concession[546], then indefinitely and ultimately destroying Claimant's investment.[547] These communications—each just one page in length—were the full extent of the process Lusad received. Both were unilateral and afforded Lusad no opportunity to be heard. Quite simply, Mexico City's actions did not afford Lusad any substantive administrative procedure.

268. In this case there was a manifest absence of any legal process in the decision to destroy Lusad's concession rights. The government's candor in telling Lusad that it was indefinitely suspending the Concession for purely political reasons does not in some way cure the absence of any legal procedure in which Claimant could be heard. For these reasons, the government's suspension of the Concession was devoid of due process, in violation of the fair and equitable treatment standard.[548]

269. In sum, Mexico violated, among other provisions, Article 1105 of NAFTA when it failed to provide Claimant with fair and equitable treatment by contravening Claimant's legitimate

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[545] **Exhibit CL-0042-ENG**, ¶ 322 (*Nelson*); *see also* **Exhibit CL-0044-ENG**, ¶ 457–58 (*TECO*) ("the [a]rbitral [t]ribunal considers that, pursuant to Article 10.5 of CEFTA-DR, a lack of due process in the context of administrative proceedings such as the tariff review process constitutes a breach of the minimum standard. In assessing whether there has been such a breach of due process, it is relevant that the Guatemalan administration entirely failed to provide reasons for its decisions or disregarded its own rules. Based on such principles, the Arbitral Tribunal considers that a willful disregard of the fundamental principles upon which the regulatory framework is based, a complete lack of candor or good faith on the part of the regulator in its dealings with the investor, as well as a total lack of reasoning, would constitute a breach of the minimum standard."); **Exhibit CL-0063-ENG**, ¶ 356 (*David R. Aven et al. v. Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, dated 18 September 2018) (hereafter "*Aven*") (fair and equitable treatment has as a fundamental component of denial of justice; 'fair and equitable treatment' includes the obligation not to deny justice in criminal civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.").

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

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

[548] *See* **Exhibit CL-0042-ENG**, ¶ 322 (*Nelson*); **Exhibit CL-0040-ENG**, ¶ 98 (*Waste Management II*).

expectations; treating Claimant unfairly, arbitrarily, and in bad faith; and subjecting Claimant to an unpredictable and arbitrary legal decision-making process that was bereft of due process.

C. MEXICO DISCRIMINATED AGAINST CLAIMANT AND ITS INVESTMENT TO THE BENEFIT OF ITS GOVERNMENT-OWNED ENTITY, IN VIOLATION OF MEXICO'S NATIONAL TREATMENT OBLIGATION UNDER NAFTA ARTICLE 1102

1. Mexico Was Obligated Under Article 1102 to Provide Claimant and Its Investment Treatment No Less Favorable Than That Accorded to Mexican Investors and Investments

270. Article 1102 of NAFTA provides national treatment protection as follows:

> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.[549]

271. UNCTAD has recognized that "[t]he national treatment standard is perhaps the single most important standard of treatment embodied in international investment agreements."[550] The tribunal in *Corn Products Inc. v. Mexico* also observed that the national treatment standard

549 **Exhibit CL-0001-ENG**, Article 1102 (NAFTA).

550 **Exhibit CL-0064-ENG** (UNCTAD, *National Treatment*, 1, UNCTAD/ITE/IIT/11 (Vol. IV) (1999))

"embodies a principle of fundamental importance, both in international trade law and the international law of investment, that of non-discrimination."[551]

272. NAFTA Article 102(1) also specifically mentions "national treatment" as an example of the "principles and rules" that "elaborate[]" the objectives of NAFTA.[552] Mexico breached this fundamental principle when it accorded its own government-owned Mi Taxi system treatment more favorable than the treatment accorded to Lusad.

273. NAFTA tribunals examining alleged violations of Article 1102 have often applied a three-step analysis. As the tribunal in *Archer Daniels Midland v. Mexico* explained, "[p]ursuant to the ordinary meaning of Article 1102, the Arbitral Tribunal shall: (i) identify the relevant subjects for comparison; (ii) consider the treatment each comparator receives; and (iii) consider any factors that may justify any differential treatment."[553]

274. The "relevant subjects for comparison" must, according to the terms of Article 1102, be in "like circumstances" to the investment or investor to which those subjects are being compared.[554] As the *S.D. Meyers* tribunal found, "the interpretation of 'like' must depend on all circumstances of each case," and

> [t]he concept of 'like circumstances' invites an examination of whether a non-national investor complaining of less favourable treatment is in the same 'sector' as the national investor. The [t]ribunal takes the view that the word 'sector' has a wide connotation that includes the concepts of 'economic sector' and 'business sector.'[555]

The *Bilcon* tribunal further emphasized that "the operative word in Article 1102 is 'similar', not 'identical[,]'" and so tribunals should "giv[e] the reasonably broad language of Article 1102 its due, [and] take into account the objects of NAFTA, which include according to Article 102(1)(c) 'to increase substantially investment opportunities in the territories of the Parties.'"[556] In short, an

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551 **Exhibit CL-0065-ENG**, ¶ 109 (*Corn Products International Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, dated 15 January 2008) (hereafter "*Corn Products*"); *see also* **Exhibit CL-0008-SPA**, ¶ 574 (*Odyssey Marine Exploration, Inc. v. Mexico*, ICSID Case No. UNCT/20/1, Excerpt from Mexico's Counter Memorial, dated 23 February 2021) (citing the national treatment standard outlined in Corn Products with approval).

552 **Exhibit CL-0001-ENG**, Article 102(1) (NAFTA); *see also* **Exhibit CL-0065-ENG**, ¶ 113 (*Corn Products*) (observing that the national treatment principle is given prominence at Article 102(1)).

553 **Exhibit CL-0013-ENG**, ¶ 196 (*Archer Daniels Midland*); s*ee also* **Exhibit CL-0066-ENG**, ¶ 83 (*United Parcel Service of America Inc. v. Canada* (UNCITRAL) Award on the Merits, 24 May 2007) (hereafter "*UPS*") (espousing a similar three-part test).

554 **Exhibit CL-0001-ENG**, Article 102(1) (NAFTA).

555 **Exhibit CL-0016-ENG**, ¶ 250 (*S.D. Myers*).

556 **Exhibit CL-0067-ENG**, ¶ 692 (*William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada* (UNCITRAL) Award on Jurisdiction and Liability, dated, 17 March 2015) (hereafter "*Bilcon*").

investor or investment in a similar situation and line of business to the investment or investor at issue is in "like circumstances" and therefore is comparable for purposes of Article 1102.

275. The second factor under Article 1102 requires a determination of whether the investor or investment in like circumstances has suffered treatment "less favorable" than treatment of a local investor or investment. The tribunal in *Archer Daniels Midland v. Mexico* explained:

> Article 1102 prohibits treatment which discriminates on the basis of the foreign investor's nationality. Nationality discrimination is established by showing that a foreign investor has unreasonably been treated less favorably than domestic investors in like circumstances. Accordingly, Claimants and their investment are entitled to the best level of treatment available to any other domestic investor or investment operating in like circumstances.[557]

276. The *Merrill & Ring* tribunal clarified that the scope of "treatment" "is very broad, as it "includes almost any conceivable measure that can be with respect to the beginning, development, management and end of an investor's business activity."[558] In *S.D. Meyers*, the tribunal determined that "treatment" violative of Article 1102's standard must have a practical impact on the investment; merely demonstrating motive or intent behind a measure is insufficient.[559] The *Archer Daniels Midland v. Mexico* tribunal, however, considered "both the intent and the effects of the [treatment]" in finding a violation of this NAFTA's national treatment standard.[560] But discriminatory intent is not required to find a violation of the national treatment standard, which merely requires demonstrating that discrimination occurred. Tribunals have also found that "less favorable treatment" may be either *de jure* (*i.e.*, measures that are discriminatory on their face) or *de facto* (*i.e.*, neutral measures that result in differential treatment).[561]

277. The third and final element for a tribunal to consider is whether there are any factors justifying different treatment between the investor or investment and domestic investors or

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557 **Exhibit CL-0013-ENG**, ¶ 205 (*Archer Daniels Midland*).

558 **Exhibit CL-0037-ENG**, ¶ 79 (*Merrill*).

559 **Exhibit CL-0016-ENG**, ¶ 254 (*S.D. Myers*).

560 **Exhibit CL-0013-ENG**, ¶¶ 209–10 (*Archer Daniels Midland*)

561 **Exhibit CL-0068-ENG**, ¶ 66 and accompanying notes (*Pope & Talbot Inc. v. Canada* (UNCITRAL), Award on the Merits of Phase 2, dated 10 April 2001); **Exhibit CL-0065-ENG**, ¶ 115 (*Corn Products*) ("[t]he parties in the present case agreed that Article 1102 embraces de facto as well as de jure discrimination. The Tribunal agrees."); **Exhibit CL-0069-ENG**, ¶¶ 181, 183 (*Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, dated 16 December 2002) (hereafter "*Feldman*") ("It is clear that the concept of national treatment as embodied in NAFTA and similar agreements is designed to prevent discrimination on the basis of nationality, or 'by reason of nationality.' […] However, 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. Rather, Article 1102 by its terms suggests that it is sufficient to show less favorable treatment for the foreign investor than for domestic investors in like circumstances."); **Exhibit CL-0070-ENG**, ¶ 177 (*Occidental Exploration and Production Co. v. Ecuador*, LCIA Case No. UN3467, Final Award, dated 1 July 2004) (hereafter "*Occidental Exploration*") ("In the present dispute the fact is that OEPC has received treatment less

investments. As the tribunal in *Feldman* found, once "the [c]laimant has made a prima facie case for differential and less favorable treatment," the host state can attempt to address how, objectively, the conduct was not a denial of equal competitive opportunities in light of the strictures of Article 1102.[562] Once a claimant proves its *prima facie* case of discrimination, the burden shifts to the respondent to "introduce credible evidence into the record to rebut that presumption."

278. In *S.D. Meyers*, for example, claimant had established an investment in Canada to collect and send a particular type of waste ("PCBs") to its treatment facility in the United States. Canada then issued an order prohibiting export of that type of waste at least partially because Canada was "concerned to ensure the economic strength of the Canadian industry [and] wanted to maintain the ability to process PCBs within Canada in the future."[563] The tribunal determined that Canada's ***goal*** in imposing this measure was legitimate (and even consistent with objectives of the Basel Convention, a multilateral environmental agreement), but that ***the way in which the measure was imposed***—an outright effective cancellation of the investor's investment—was illegitimate and discriminatory in violation of NAFTA Article 1102.[564] Thus, even where the State's goals were legitimate, a State's differential treatment violates NAFTA Article 1102 when the treatment was illegitimate.[565]

2. Mexico's Actions Violate NAFTA's National Treatment Standard

279. Mexico's preferential treatment of the government-owned Mi Taxi over Lusad is a violation of the national treatment standard enshrined in Article 1102. On the heels of indefinitely suspending Lusad's Concession and precluding Claimant's enjoyment of its investment, Mexico City replaced Lusad's business and system with its own Mi Taxi system. In September 2019—less than a year after the indefinite suspension of the Concession in October 2018—the government

favorable than that accorded to national companies. The Tribunal is convinced that this has not been done with the intent of discriminating against foreign-owned companies. The statement of Mrs. De Mena at the hearing evidences that the SRI is a very professional service that did what it thought was its obligation to do under the law. However, the result of the policy enacted and the interpretation followed by the SRI in fact has been a less favorable treatment of OEPC"); **Exhibit CL-0071-ENG**, ¶¶ 343–45 (*Cargill, Inc. v. Poland II*, UNCITRAL, Award, 5 March 2008) (stating that the national treatment clause is an objective provision, that the impact of the provision is what matters, and that a violation of national treatment protection does not require proof that discrimination is based on nationality of the claimant) (citing *Feldman*).

562 **Exhibit CL-0069-ENG**, ¶ 177 (*Feldman*).

563 *See* **Exhibit CL-0016-ENG**, ¶ 255 (*S.D. Myers*) ("CANADA was concerned to ensure the economic strength of the Canadian industry, in part, because it wanted to maintain the ability to process PCBs within Canada in the future. This was a legitimate goal, consistent with the policy objectives of the Basel Convention. There were a number of legitimate ways by which CANADA could have achieved it, but preventing SDMI from exporting PCBs for processing in the USA by the use of the Interim Order and the Final Order was not one of them. The indirect motive was understandable, but the method contravened CANADA'S international commitments under the NAFTA")

564 *Id.*

565 *Id.* at ¶ 256.

announced pilot testing of Mi Taxi.[566] The Mi Taxi system bore close similarities to the L1bre System. In particular, Mi Taxi would include (i) GPS service, (ii) a smartphone application through which taxi riders could hail taxis, and (iii) a panic button directly connected to C5 that is accessible to riders and drivers to improve safety.[567]

280. Indeed, the relevant government organ, the DAPI, even confirmed directly and publicly that Mi Taxi was intended to replace the L1bre System. As Mi Taxi was being rolled out, the Director of DAPI confirmed in an interview that Lusad's Concession was no longer in effect and that Mi Taxi was to replace it.[568]

281. On 16 April 2020, Semovi formally issued a resolution instructing all Mexico City taxi drivers to install and begin using the Mi Taxi application.[569] The resolution mandated a minimum fee of MXN $13.10 for each hailed ride—which is higher than the maximum fee of MXN $12 fee per ride that was awarded to Lusad under the Concession.[570] Mi Taxi was receiving the full backing of the government to help ensure its success.

282. Since its launch, Mi Taxi has experienced early success. As of 30 March 2021, more than 1.9 million users had downloaded the app and more than 12,000 taxi drivers had used it.[571] Around the same time, the Mexico City government estimated that at least 79,000 taxi drivers would use the app.[572] The system continues to operate and grow with support from the highest

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566 **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) (announcing the launch of Mi Taxi).

567 **Exhibit C-0022-SPA** (Press article *"Launch of 'Mi Taxi' app that Includes a Panic Button.* dated 5 September 2019); **Exhibit C-0028-SPA** (Article titled: "Sheinbaum Presents First Phase of Digital Application "Mi Taxi" dated 5 September 2019); **Exhibit C-0082-SPA** (Press article "*Sheinbaum Presents First Phase of Digital Application 'Mi Taxi,'*" dated 5 September 2019) (stating that the Mexico City government developed Mi Taxi and that Mi Taxi was connected to C5 with a panic button and the ability to look up a taxi driver's plates in the application to increase taxi safety following taxi drivers' links to sex crimes, kidnappings, and disappearances, and that Mi Taxi would allow credit card and digital payment for taxi rides); **Exhibit C-0104-SPA** (Press article "*Presentan app Mi taxi para garantizar seguridad y calidad en taxis de la CDMX*," dated 5 September 2019) (stating that the Mi Taxi application would seek to guarantee security and quality for taxi services including connection to C5).

568 **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).

569 **Exhibit C-0032-SPA** (Call to public individual transport services concessionaires to adhere to the "Mi Taxi" application, published in the Gaceta Oficial de la Ciudad de México., dated 16 April 2020).

570 *Id.* at p. 3; **Exhibit C-0007-SPA**, Article 6.c(i) (Amended Concession Agreement, dated 9 January 2017).

571 **Exhibit C-0081-SPA** (Press article "*¿Cómo funciona la app "Mi Taxi" en la CDMX?*", dated 30 March 2021) (stating that more than 1.9 million users have download the Mi Taxi app, more than 12,000 taxi drivers are actively using the app, the Mexico City government expects approximately 79,000 taxi drivers to download the app, and that Semovi will be increasing training to teach taxi drivers how to use the app).

572 *Id.*

levels of Mexico City government.[573] Mayor Sheinbaum stated on 28 March 2021 that she intended for Mi Taxi to compete directly with other ride platforms (such as Uber), and she has lauded the system as the best ride hailing app because it is free and has a panic button that connects directly to the Mexican authorities, two of the hallmark features of the L1bre System that were stolen by the government and provided through Mi Taxi.[574]

283. Mexico City's actions to replace the L1bre System with Mi Taxi satisfy the above-described three-prong test for evaluating whether a violation of national treatment has occurred. In particular, and as described further below, (i) Mi Taxi is an appropriate subject for comparison as a Mexican entity operating in the same sector (and serving the same role in that sector) as Claimant's investment; (ii) the treatment afforded to Mi Taxi was more favorable than the treatment afforded to Lusad in several material respects; and (iii) there is no reasonable justification for the differential treatment.

284. First the Mexican (and government-owned) taxi service provider, Mi Taxi, and Claimant's investment, Lusad, were in "like circumstances." Indeed, the L1bre System and Mi Taxi each were attempting to fulfill the same role of updating Mexico City's taxi fleet using new technology, including in particular a smartphone application that would enhance users' experience and improve safety. The two entities operated in the same "sector" and are plainly fit for comparison for purposes of the national treatment analysis.

285. Second, the treatment that Respondent accorded to Mi Taxi was far more favorable than the treatment accorded to Lusad. When it came time to implement Lusad's system, Mexico City's government stood directly in the way of that implementation, notwithstanding its firm legal obligation under the Concession to assist in and facilitate that implementation. The government not only failed to uphold its end of the Concession, but also it eventually suspended then ceased implementation of the Concession altogether, thereby nullifying Claimant's investment and preventing adoption of the L1bre System. In contrast, the government was directly involved in implementing the Mi Taxi system, issuing the requisite notices to require taxi drivers to adopt the system and vocally supporting widespread adoption.[575] Making matters worse, the government has accorded to Mi Taxi a higher per-ride fee than Lusad would have earned through the L1bre System.[576] Mexico City's refusal to implement the L1bre System on the one hand, and its full

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[573] **Exhibit C-0112-SPA** (Tweets from Mayor Sheinbaum promoting Mi Taxi); **Exhibit C-0072-SPA** (Article titled: "Mi Taxi CDMX-- así funciona la app que está vinculada al C5 y cuenta con botón de pánico" dated 28 March 2021); **Exhibit C-0107-SPA** (Press article "*Mi Taxi, mucho mejor que qualquier otra aplicacion: Sheinbaum*," dated 28 March 2021) (stating that Mi Taxi is "much better" than private ride hailing applications in major part due to the panic button connecting directly to authorities).

[574] **Exhibit C-0106-SPA** (Press article "'*Mi Taxi' de la CDMX es mejor que aplicaciones de transporte privadas: Sheinbaum*," dated 28 March 2021).

[575] *See supra* ¶¶ 138–148.

[576] *See supra* ¶ 142; Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 89.

regulatory and outspoken support of Mi Taxi on the other, is a clear-cut case of discriminatory treatment—both *de jure* and *de facto*.

286. Finally, there is no legitimate justification for Mexico City's discriminatory treatment. Mexico City has not even attempted to justify its harmful and discriminatory actions towards Lusad and the L1bre System. And even if Mexico attempts to demonstrate a legitimate ***motive*** for its actions after the fact, the government's ***actions*** remain illegitimate. Quite simply, Mexico City indefinitely suspended and then stopped implementing Lusad's Concession not for any legitimate purpose, but expressly for political reasons. Mexico City then turned around and in less than a year's time propped up its own replacement business. This discrimination, which benefits not just a private domestic company but the government itself, represents an even more egregious example of discrimination than any of the other cases referenced in this Section. Mexico City's actions were plainly discriminatory in violation of the National Treatment protection enshrined in Article 1102.

VI.
MEXICO IS REQUIRED TO COMPENSATE CLAIMANT TO WIPE OUT ALL CONSEQUENCES OF ITS UNLAWFUL CONDUCT

287. Claimant is entitled to be compensated by Mexico for the damages that it suffered as a result of Mexico's breaches of NAFTA. As discussed below, the applicable standard of compensation requires an award of compensation to wipe out all consequences of Mexico's unlawful conduct. That assessment requires, *inter alia*, evaluating the reduction in the fair market value of Claimant's investment as a result of Mexico's measures that are found to have breached NAFTA. Claimant bears the burden of proving its claimed damages by establishing "the existence of the *fact* of damage" and providing "a reasonable basis for the Tribunal to determine the *amount of loss*."[577]

288. In the present circumstances, Mexico's conduct entirely destroyed the value of Claimant's investment. The value of Claimant's investment was derived from the contractual rights contained in the Amended Concession Agreement to which its subsidiary Lusad was a party. When Mexico indefinitely suspended the Concession for political reasons on 28 October 2018, Claimant's investment was rendered entirely valueless: Lusad could no longer proceed with operationalizing the L1bre System across Mexico City's taxi fleet and enjoy the revenues to which it was entitled under the Amended Concession Agreement, and, in turn, Claimant had no way to monetize its investment.[578]

289. Valuing the damages suffered by Claimant requires determining the fair market value of its investment in the absence of (*i.e.*, "but-for") Mexico's unlawful conduct. On 27 October 2018, the day before Mexico's indefinite suspension of the Concession, Lusad was about to launch full-scale operations. Years of investment, and millions of dollars had been spent developing the L1bre System.[579] Lusad's software development team had fully developed the necessary software and acquired hardware to install the L1bre System, and had signed contracts with key vendors. The efficacy of the L1bre System had been proven through pilot programs involving more than 1,100 taxis.[580] Lusad received the support of the Mexico City government, receiving all of the regulatory approvals required to operate its Concession, culminating in Semovi's April 2018 notice requiring all of Mexico City's taxis to have the L1bre System installed, as well as a September 2018 approval by the Secretary of the Economy to operate its taximeter as a measurement and charging device.[581] The company was well capitalized, in light of the cash injection and line of credit provided by L1bero Partners and Banco Azteca (a part of Grupo

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577 **Exhibit CL-0074-ENG**, ¶ 845 (*Hydro S.r.l. et al. v. Albania*, ICSID Case ARB/15/28, Award, dated 24 April 2019) (hereafter "*Hydro*") ("In light of the above, the Tribunal considers that the Claimants must prove the existence of the fact of damage with sufficient certainty and then provide a reasonable basis for the Tribunal to determine the amount of loss. The Tribunal considers this a fair outcome considering that any difficulty that the Claimants may face in proving the amount of loss will have flowed from the Respondent's wrongdoing.").

578 *See supra* ¶¶ 131–133.

579 *See supra* ¶¶ 30–112.

580 *See supra* ¶¶ 93–96.

581 *See supra* ¶¶ 107–112.

Salinas).[582] It had in place contracts with the necessary service providers to have the tablets delivered and installed.[583] Lusad had even secured premises for installation sites and staffed them with personnel who were trained and practiced in the expeditious installation of the L1bre System in each taxi.[584] A call center was set up, with contracts already signed, to provide technical assistance to users.[585]

290. The value created by the years of work and investment that went into making Lusad and the L1bre System ready for full-scale operations was observed in the market. As explained above, just prior to Mexico's indefinite suspension of the Concession, Claimant's subsidiary engaged leading investment bank Goldman Sachs to review the business under the Concession and act as investment banker in identifying minority investors.[586] In that capacity, Goldman Sachs conducted a broad review of the business and in early October 2018—while conservatively limiting the analysis only to two revenue streams—valued its rights under the Amended Concession Agreement at USD $2.43 billion.[587]

291. In a presentation dated 4 October 2018—approximately three weeks before Mexico's suspension notice that would effectively put an end to the Concession—Goldman Sachs also reported on its outreach to potential investors. Several investors had expressed interest in proceeding with due diligence in respect of an investment in Lusad, including leading global private equity firm Blackstone.[588] Blackstone had previously, in March 2017, come to an agreement with one of ES Holdings' subsidiaries on a term sheet for acquiring a portion of Lusad, which was ultimately not consummated at that time.[589] More than a year later, Blackstone remained "[v]ery interested in the asset," noting that it had "already done extensive work on the

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582 *See supra* ¶¶ 101–106.

583 *See supra* ¶ 117.

584 *See supra* ¶ 108.

585 *See supra* ¶¶ 110, 175.

586 *See supra* ¶¶ 118–121.

587 **Exhibit C-0079-ENG**, p. 23 (Goldman Sachs Pre-Marketing Recap and Potential Next Steps, dated 4 October 2018). Goldman Sachs assembled a team for this project that had extensive experience advising on mergers, acquisitions, and sale transactions involving technology companies as well as automotive companies, including Uber, Tesla, Microsoft, Apple, Amazon, Ford, and Daimler. The team included Goldman Sachs' Global Head of Internet Investment Banking, the Co-head of the Latin America practice, the Co-head of their LatAm Financing and Investment Banking practice, and teams based in the United States, London, and Mexico City. Lusad opened its books to Goldman Sachs, letting the Goldman Sachs team pore over its financial assumptions, vendor contracts, and market data. **Exhibit C-0077-ENG** (Goldman Sachs financial advisory services proposal, dated 14 June 2018); **Exhibit C-0078-ENG** (Goldman Sachs engagement letter, dated 30 August 2018); Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 73–74.

588 **Exhibit C-0079-ENG**, p. 6 (Goldman Sachs Pre-Marketing Recap and Potential Next Steps, dated 4 October 2018).

589 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 145.

[c]ompany on [the] previous approach" and "could act pretty fast as they are already familiar with the asset."[590]

292. Claimant, however, was deprived of the ability to profitably operate or otherwise monetize its investment as, at the end of October 2018, Mexico illegitimately suspended the Concession, rendering it valueless.[591] Since the L1bre System was ready to be rolled out—pursuant to exclusive rights granted by Concession—to the entirety of Mexico City's taxi fleet following a successful pilot program, there were no more obstacles to overcome. The consequence of Mexico's unlawful conduct was thus to prevent Claimant receiving the profits from the exploitation of those rights. Claimant is therefore entitled to receive compensation by reference to those lost profits of which it was deprived.

293. Claimant has instructed Howard Rosen, a Managing Director of Secretariat Advisors, LLC ("Secretariat") to value the damages that Claimant has suffered as a result of Mexico's unlawful measures. Rosen is a leading Chartered Professional Accountant and a Chartered Business Valuator, with over 39 years of experience in the valuation of business interests and the quantification of economic damages.[592] He has been qualified as an expert witness in over 200 matters in domestic courts and international arbitration proceedings. Rosen's analysis shows that Claimant has suffered damages amount to at least USD $2.802 billion, considering the application of any pre-award interest and true-up for income tax.[593]

294. The remainder of this section is organized as follows:

- **Subsection A** sets out the legal standard for the compensation payable to Claimant and the applicable date on which Claimant's damages are to be valued;
- **Subsection B** explains why an income-based approach is the appropriate method for valuing the damages that Claimant has suffered;
- **Subsection C** describes Secretariat's approach to computing the damages that Claimant has suffered;
- **Section D** explains why a fully compensatory award must grant Claimant compound interest at a rate that wipes out all consequences of Mexico's unlawful conduct;
- **Section E** explains why the Tribunal's award should be made net of all applicable taxes; and
- **Section F** sets out Claimant's claim for its fees and costs associated with pursuing the present arbitration.

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590 **Exhibit C-0079-ENG**, p. 6 (Goldman Sachs Pre-Marketing Recap and Potential Next Steps, dated 4 October 2018).

591 *See supra* ¶¶ 122–126; **Exhibit C-0019-SPA** (Communication from Semovi to Lusad permanently suspending implementation of the Concession, dated 28 October 2018).

592 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 1.

593 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 115, 166.

A. CLAIMANT IS ENTITLED TO COMPENSATION BASED ON THE FULL REPARATION STANDARD CALCULATED BY REFERENCE TO THE VALUE OF ITS INVESTMENT ON 27 OCTOBER 2018

295. NAFTA provides that an investor may submit claims for breaches of the Treaty to arbitration provided that it has "incurred loss or damage by reason of, or arising out of [a] […] breach" of a provision in NAFTA Chapter 11.[594] However, the only compensation standard expressly set out in NAFTA is that for a lawful expropriation carried out in accordance with the criteria in Article 1110.[595] NAFTA establishes no express compensation standard for Mexico's treaty breaches described above: namely, for its unlawful expropriation of Claimant's investment in breach of Article 1110, for its unfair and inequitable treatment of Claimant's investment in breach of Article 1105, or for its breach of the national treatment standard established in Article 1102. In the absence of a treaty compensation standard for those breaches, customary international law provides the remedies for Mexico's unlawful acts.[596] While the computation of damages under the customary international law standard differs from the Treaty standard of compensation for expropriation (under Article 1110 of NAFTA), the two standards may ultimately lead to similar results as they both are ultimately designed to, at a minimum, compensate for the loss in the fair market value of the investment.

296. 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").[597] The ILC Articles provide that the primary remedies for breaches of international include, among others, the duty to make full reparation, preferably through restitution.[598]

297. The duty to make "full reparation" for internationally wrongful acts was established in 1928 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

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594 **Exhibit CL-0001-ENG**, Articles 1116, 1117 (NAFTA).

595 **Exhibit CL-0001-ENG**, Article 1110 (NAFTA).

596 *See* **Exhibit CL-0024-ENG**, ¶ 481 (*ADC*) ("The BIT only stipulates the standard of compensation that is payable in the case of a lawful expropriation, and these cannot be used to determine the issue of damages payable in the case of an unlawful expropriation since this would be to conflate the compensation for a lawful expropriation with damages for an unlawful expropriation."); **Exhibit CL-0057-ENG**, ¶ 8.2.3 (*Vivendi II*) ("The treaty […] it does not purport to establish a *lex specialis* governing the standards of compensation for *wrongful* expropriations. As to the appropriate measure of compensation for the breaches other than expropriation, the Treaty is silent.").

597 **Exhibit CL-0002-ENG** (International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001)).

598 *Id.*, Articles 29–31, 34–39.

> 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.[599]

298. ILC Article 31 now encapsulates this full reparation obligation as follows:

> (1) The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
>
> (2) Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.[600]

299. ILC Article 35 goes on to establish that, when it comes to making full reparation for an internationally wrongful act, a State's primary obligation is to provide restitution.[601] Where restitution is impractical, as it is here 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), ILC Article 36(1) states that:

> The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.[602]

300. Thus, a monetary award to Claimant should put it in a position that it would have occupied had Mexico's internationally wrongful acts never occurred.[603] As the tribunal in *Vivendi v. Argentina II* stated:

> Based on these principles [of international law], and absent limiting terms in the relevant treaty, it is generally accepted today that, regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to

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599 **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*").

600 **Exhibit CL-0002-ENG**, Article 31 (International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001)).

601 *Id.*, Article 35.

602 *Id.*, Article 36(1).

603 **Exhibit CL-0072-ENG**, p. 47 (*Chorzów Factory*).

> compensate the affected party fully and to eliminate the consequences of the state's action.[604]

301. 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.[605] Tribunals tend to use this standard to calculate damages payable for breaches of expropriation[606] and breaches of other standards of treatment established in bilateral investment treaties.[607] Fair market value has been defined as follows:

> [T]he price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat. [The expert] appropriately assumed that the willing buyer was a reasonable businessman.[608]

302. Whether the Tribunal views the indefinite suspension notice of 28 October 2018 as being an unlawful expropriation contrary to Article 1110 or instead a breach of either Article 1102 (National Treatment) or Article 1105 (Minimum Standard of Treatment) is inconsequential to the computation of damages that Claimant has suffered. That is because—regardless of the legal characterization of Mexico's unlawful conduct—the harm suffered by the Claimant remains the same in all three instances: the total loss of value in its investment. The Concession became valueless once Mexico indefinitely suspended it.[609] Therefore, the computation of damages for each of the three bases of Claimant's claim—breach of Articles 1110, 1105 and 1102 of NAFTA—requires valuing the fair market value of Claimant's investment but-for the Government's unlawful

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604 **Exhibit CL-0057-ENG**, ¶ 8.2.7 (*Vivendi II*).

605 **Exhibit CL-0077-ENG**, p. 225 (J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002)) ("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."). Even if the expropriation is deemed lawful and the Treaty standard on compensation were to apply, there would be no substantive difference here. The Treaty provides that compensation for an expropriation shall be "equivalent to the fair market value of the expropriated investment."

606 *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).

607 *See, e.g.*, **Exhibit CL-0073-ENG**, ¶ 410 (*CMS Gas Transmission Company v. Argentina*, ICSID Case No. 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*").

608 **Exhibit CL-0083-ENG**, ¶ 277 (*Starrett Housing Corporation, Starrett Systems, Inc, and others v. The Iran et al.*, Iran-US Claims Tribunal Case No. 24, Final Award, dated 14 August 1987).

609 *See* Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 72–74; *supra*, ¶¶ 131–133.

conduct.[610] The damages that Claimant has suffered for all three of its breach claims is equal to the entire fair market value of its investment.

303. The valuation date for the calculation of Claimant's damages for all three bases of Claimant's claim is the same. In order to compute the fair market value of Claimant's investment but-for Mexico's unlawful conduct (*i.e.*, but-for the indefinite suspension of 28 October 2018 and the various events described above that followed thereafter), the fair market value must be computed just prior to the unlawful conduct that crystallized into a breach of the Treaty.[611] In the circumstances, Claimant has instructed Secretariat to compute damages that Claimant suffered using 27 October 2018 as the date of valuation ("Valuation Date"), reflecting the circumstances prevailing just prior to Mexico's breach of the Treaty.

B. AN INCOME-BASED VALUATION IS THE APPROPRIATE METHOD FOR VALUING CLAIMANT'S DAMAGES

304. The discounted cash flow ("DCF") method of valuation, which estimates future cash flows and discounts them to a present value, is the appropriate method for deriving the fair market value of Claimant's rights under the Concession.

305. International investment arbitration tribunals have, for many years, relied on the DCF method to compute the damages owing to investors for breaches by states of investment protection treaties, including in cases involving expropriation,[612] breach of the FET standard,[613] and breach of the national treatment standard.[614] The tribunal in *Rusoro v. Venezuela* acknowledged the broad acceptance of the DCF method for valuing damages arising from investment treaty breaches:

> Valuations based on the DCF method have become usual in investment arbitrations, whenever the fair market value of an enterprise must be established. The Tribunal agrees that, where the circumstances for its use are appropriate, forward looking DCF has

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610 Ripinsky and Williams explain: "In a number of cases, a non-expropriatory violation has produced effects similar to those of an expropriation, ie the *total loss of the investment* . . . . In these circumstances, arbitrators have logically chosen to measure the loss, and therefore compensation, by focusing on the market value of the investment lost." **Exhibit CL-0084-ENG**, p. 92 (S. Ripinsky and K. Williams, *Damages in International Investment Law* (2008)).

611 *See* **Exhibit CL-0072-ENG**, p. 47 (*Chorzów Factory*); **Exhibit CL-0026-ENG**, ¶¶ 77–78 (*Santa Elena*); **Exhibit CL-0031-ENG**, ¶¶ 855, 891 (*Crystallex*).

612 *See, e.g.*, **Exhibit CL-0031-ENG**, ¶¶ 877, 879 (*Crystallex*); **Exhibit CL-0056-ENG**, ¶ 830 (*Gold Reserve*).

613 *See, e.g.*, **Exhibit CL-0073-ENG**, ¶¶ 411–17 (*CMS*); **Exhibit CL-0080-ENG**, ¶ 385 (*Enron*); **Exhibit CL-0085-ENG**, ¶¶ 275–76 (*National Grid p.l.c. v. Argentina* (UNCITRAL), Award, dated 3 November 2008).

614 **Exhibit CL-0046-ENG**, ¶¶ 444–48 (*Cargill*).

> advantages over other, more backwards looking valuation methods.[615]

306. The DCF method is used almost uniformly by investment tribunals valuing business interests that have historical cash flows from which to estimate future ones. Historical cash flows are not, however, a prerequisite to using the DCF method to compute damages. Indeed, investment tribunals have relied on the approach 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.

307. The tribunal in *Rusoro v. Venezuela* acknowledged that the DCF method could be an appropriate valuation method even without a track record of financial performance, and set out the relevant criteria for determining when the methodology might be appropriate:

> DCF works properly if all, or at least a significant part, of the following criteria are met:
>
> - The enterprise has an established historical record of financial performance;
>
> - There are reliable projections of its future cash flow, ideally in the form of a detailed business plan adopted in *tempore insuspecto*, prepared by the company's officers and verified by an impartial expert;
>
> - The price at which the enterprise will be able to sell its products or services can be determined with reasonable certainty;
>
> - The business plan can be financed with self-generated cash, or, if additional cash is required, there must be no uncertainty regarding the availability of financing;
>
> - It is possible to calculate a meaningful WACC, including a reasonable country risk premium, which fairly represents the political risk in the host country;
>
> - The enterprise is active in a sector with low regulatory pressure, or, if the regulatory pressure is high, its scope and effects must be predictable: it should be possible to establish the impact of regulation on future cash flows with a minimum of certainty.[616]

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615 **Exhibit CL-0038-ENG**, ¶ 758 (*Rusoro*).

616 *Id.*, ¶ 759. The *Rusoro* tribunal determined on the facts of that case that the DCF method was not a suitable basis upon which to compute damages.

308. Indeed, where pre-operational or pre-profit businesses are sufficiently advanced in their development such that it is possible to estimate with sufficient reliability the inputs for a DCF valuation, investment tribunals have used the method to compute damages. This has been most evident in respect of disputes where the projects were about to commence operations, as was the case here.

309. For instance, 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."[617] The tribunal 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."[618] The tribunal considered that "the development stage of the project" was such that its "costs and future profits [could] be estimated with greater certainty."[619] 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."[620] In concluding that the DCF method was appropriate, the tribunal made the following observations:

> In short, the Claimant has established the fact of future profitability, as it had completed the exploration phase, the size of the deposits had been established, the value can be determined based on market prices, and the costs are well known in the industry and can be estimated with a sufficient degree of certainty.
>
> The Tribunal considers that in this case only forward-looking methodologies aimed at calculating lost profits are appropriate in order to determine the fair market value of Crystallex's investment. By contrast, a backward-looking methodology such as the cost approach, while susceptible of being utilized in certain instances where there is no record of profitability and other methodologies would lead to excessively speculative and uncertain results, cannot be resorted to in this case. 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.[621]

310. 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."[622] That notwithstanding, the tribunal also

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617 **Exhibit CL-0031-ENG**, ¶ 877 (*Crystallex*).

618 *Id.*, ¶ 877.

619 *Id.*, ¶¶ 877, 879.

620 *Id.*, ¶ 879.

621 *Id.*, ¶¶ 880, 882.

622 **Exhibit CL-0056-ENG**, ¶ 830 (*Gold Reserve*).

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."[623] 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 analysis of whether the DCF method is the appropriate method for valuing a business interest is of course, as noted above, fact specific. In contrast to the decisions in *Crystallex* and *Gold Reserve*, the tribunal *South American Silver v. Bolivia*, another mining case, considered that the DCF method was not appropriate, but that project was not nearly as advanced.[624]

311. 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 circumstances of the individual case."[625] 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.[626]

312. In *Tethyan*, the tribunal was persuaded based on the facts that the "[c]laimant would have been able to obtain the necessary funds and would also have brought the necessary experience to successfully execute the project."[627] The tribunal was impressed by "several years of intensive work on the ground" in the years prior to the government's measures.[628] Consequently, in light of the project's stage of development, the tribunal concluded that "it is appropriate to assume that

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623 **Exhibit CL-0056-ENG**, ¶ 830 (*Gold Reserve*).

624 **Exhibit CL-0086-ENG**, ¶ 823 (*South American Silver Ltd. v. Bolivia*, PCA Case No. 2013-15, Award, dated 22 November 2018) (hereafter "*South American Silver*") ("In sum, the Tribunal finds that, at the time of Reversion, (i) the Project was not at an advanced stage since it only had the PEA 2011 and had not conducted a prefeasibility or feasibility study; (ii) it did not have mineral reserves, but merely resources, most of them inferred; and (iii) there was no certainty that the metals could be economically extracted through the Metallurgical Process. The Tribunal considers that the Project's state of progress cast serious doubt as to its economic viability and, based on the reasons elaborated below, they preclude acceptance of the valuation presented by the Claimant.").

625 **Exhibit CL-0032-ENG**, ¶ 330 (*Tethyan Copper*).

626 *Id.*

627 *Id.*, ¶ 331.

628 *Id.*, ¶ 332.

[c]laimant's investment would have been profitable and to determine these future profits by using a DCF method."[629]

313. The use of an income approach to value projects that are not yet in the profit-generation stage is not limited to projects involving natural resources. 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 of time before the expropriation.[630] 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."[631] 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."[632] 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:

> The Tribunal considers that awarding the Claimants their wasted costs would merely return them 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. A similar conclusion was made by the tribunal in Crystallex, namely that it "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".
>
> The Tribunal sees some limitations in the application of the DCF method to value Agonset, namely that the 2012 Business Plan is not particularly detailed and both businesses have only been operating for a short period of time. Mr. MacGregor, a chartered accountant,
>
> says there is insufficient evidence to undertake a valuation using the DCF Method. However, the Tribunal has a mandate, having found breach of the BIT, to arrive at a valuation on such evidence as it has. The tribunal in Kardassopoulos drew a similar conclusion stating that "The Tribunal's duty is to make the best estimate that it can of the amount of the loss, on the basis of the available evidence. That must be done even if there is no absolute documentary proof of the

629 *Id.*, ¶ 335.

630 **Exhibit CL-0074-ENG**, ¶¶ 286, 697 (*Hydro*).

631 *Id.*, ¶ 851.

632 *Id.*, ¶ 791.

> precise amount lost". Further, discarding the DCF method for lack of sufficient evidence in this case would, in effect, reward a State for expropriating promising businesses shortly after their founding.
>
> On balance, the Tribunal considers that the DCF method is an appropriate method to value Agonset. While valuation is not an exact science, the DCF method is a widely-accepted valuation method that can address the uncertainties that arise in this case.[633]

314. Determining the reliability of the DCF method for valuing pre-operating projects is a fact-specific inquiry into the project's stage of development and into whether the inputs for the DCF reflect "a reasonable basis for the Tribunal to determine the *amount of loss*."[634] To determine if there is sufficient information to allow the estimation of future revenues and costs in order to perform a DCF analysis, tribunals have considered how close the project was to generating revenues, including whether a feasibility study had been conducted, whether there was any evidence that revenues would outweigh costs, and whether the source of revenues had already been identified.[635]

315. In the present matter, the L1bre System's stage of development as of the Valuation Date of 27 October 2018 and all of the relevant facts strongly support the use of the DCF method as the appropriate way to value Claimant's investment, even more so than in the above cases. In summary:

- Significant investment over several years: By October 2018, the L1bre System had been under development for four years. Over that time, over USD $80 million had

633 **Exhibit CL-0074-ENG**, ¶¶ 847–49 (*Hydro*). The tribunal in *Rumeli Telekom v. Kazakhstan* reached a similar conclusion in similar circumstances. **Exhibit CL-0048-ENG**, ¶ 811 (*Rumeli Telekom*) (awarding damages utilizing a DCF analysis 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.").

634 **Exhibit CL-0074-ENG**, ¶ 845 (*Hydro*) ("In light of the above, the Tribunal considers that the Claimants must prove the existence of the fact of damage with sufficient certainty and then provide a reasonable basis for the Tribunal to determine the amount of loss. The Tribunal considers this a fair outcome considering that any difficulty that the Claimants may face in proving the amount of loss will have flowed from the Respondent's wrongdoing."); *see also* **Exhibit CL-0031-ENG**, ¶ 886 (*Crystallex*); **Exhibit CL-0032-ENG**, ¶ 310 (*Tethyan Copper*).

635 *See* **Exhibit CL-0086-ENG**, ¶ 823 (*South American Silver*) ("In sum, the Tribunal finds that, at the time of Reversion, (i) the Project was not at an advanced stage since it only had the PEA 2011 and had not conducted a prefeasibility or feasibility study; (ii) it did not have mineral reserves, but merely resources, most of them inferred; and (iii) there was no certainty that the metals could be economically extracted through the Metallurgical Process. The Tribunal considers that the Project's state of progress cast serious doubt as to its economic viability and, based on the reasons elaborated below, they preclude acceptance of the valuation presented by the Claimant.").

been invested into the development of reliable software, hardware, and the hiring of personnel with the experience to realize the investment.[636]

- Fully developed software: Lusad's software development team had developed a 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.[637] Lusad had signed agreements with vendors to support this software, including 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.[638]

- Hardware ready to install: 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. Crucially, it stockpiled in Mexico City an inventory of more than 85,000 kits (each comprising two tablets and all accessories needed for installation) ready to be installed, with arrangements to acquire the remainder as installations began.[639]

- Proven technology: The efficacy of the L1bre software and hardware had been established and accepted by Mexico. 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.[640] Mexico's relevant regulatory body confirmed in 2017 that Lusad successfully completed the Trial Period.[641]

- Regulatory approvals obtained: Lusad had 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.[642] Lusad required the government's cooperation—in the form of the issuance of an order to Mexico City's taxi drivers to

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636 *See supra* ¶¶ 30–100; Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 47.

637 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 52–53, 55.

638 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 53–54.

639 Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 56.

640 *See supra* ¶¶ 93–100; Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 59–61.

641 **Exhibit C-0069-SPA** (Communication from Semovi to Lusad, dated 21 March 2017) (confirming that Lusad successfully completed the Trial Period); *see supra* ¶¶ 93–100; Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 62.

642 *See supra* ¶¶ 58–62, 109, 117; Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 36, 58, 69.

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.[643]

- Mandatory adoption and set sources of revenue: Under the Concession, installation was to be mandatory for all of Mexico City's 138,000 taxis. Furthermore, once the L1bre System was installed, Lusad was guaranteed to earn a set amount of revenue in connection with every ride taken in each taxi, whether in the form of the Recuperation Fee for rides hailed on the street, or the Application Fee for rides hailed using the L1bre smartphone ride-hailing app. Each ride would generate further revenue through targeted advertising displayed to each passenger, through an advertising system that had already been developed and which had been price-tested by TV Promo.

- Operationally ready: In the months leadings up to Semovi's Mandatory Installation Notice, Lusad had taken all of the necessary steps to be ready to launch operations. Lusad had set up installation sites, hired and trained personnel for those sites, had prepared installation guides and operating manuals, and had carried out test runs to maximize efficiency of installations. It had also contracted for a call center to provide support to users.[644] Lusad was ready to launch full-scale operations. All that was holding Lusad back up from commencing full-scale operations was Semovi's activation of the electronic appointment platform so that taxi drivers could make an appointment for the installation of the L1bre System. Semovi never took that final step, and so Lusad remained at the precipice of full-scale commercial operations until the investment was expropriated.[645]

- Sufficiently capitalized: As a result of the transaction with L1bero Partners, Lusad had sufficient working capital and access to a line of credit to substantially exceed all capital needs associated with the launch of its operations.[646]

- Reliable revenue and cost inputs for a DCF analysis: The inputs for a DCF valuation based on information available as of the Valuation Date are all cognizable and reliable. The various inputs underlying Secretariat's valuation are discussed in further detail below.[647] For present purposes, it is relevant to observe that the reliability for the sources for the inputs more than satisfies the standard of proof that the Claimant is to

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643 **Exhibit C-0098-SPA** (Mandatory Installation Notice by Mexico City in the Official Gazette, dated 17 April 2018); *see supra* ¶¶ 107–112; Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 71.

644 *See supra* ¶¶ 88–100; Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 49, 70. Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ A.92–A.93.

645 *See supra* ¶¶ 113–126.

646 *See supra* ¶¶101–106; Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 65. Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 69–70, A.144–A.145.

647 *See infra* ¶¶ 319–350.

meet to establish the damages that it has suffered. Secretariat's DCF analysis estimates future revenues based on two revenue streams: (a) the fees associated with taxi rides in a taxi that had the L1bre platform installed in the form of the Application Fee[648] or the Recuperation Fee[649] ("L1bre Fees"), and (b) revenues associated with advertising run on the L1bre passenger tablet ("Advertising Revenue").[650] Both can be estimated with a high degree of comfort. The L1bre Fees are set in the Amended Concession Agreement and the number of taxi riders per day to which they are applied is based on Semovi's own ridership data.[651] The Advertising Revenue is based on contemporaneous revenue estimates prepared by a leading advertising partner with whom Claimant's subsidiary had entered a memorandum of understanding.[652] The costs are estimated based on firm contracts or proposals from service providers already vetted by Lusad.[653]

316. The facts here support the computation of damages by reference to an income-based approach even more so than in the cases discussed above. Lusad was prepared from a regulatory, operational readiness, and financing standpoint to launch full-scale operations of its L1bre platform and service. As of the Valuation Date, Lusad also had in place everything required to reliably estimate future revenues and costs.

317. The only reason that Lusad was unable to proceed with profitable operations is the Government's interference in suspending the Concession indefinitely. In the circumstances, in order to give effect to the compensation standard applicable here and wipe out all consequences of Mexico's unlawful conduct, Claimant's damages must be computed by reference to the present value of the profits that it lost computed on an income-based approach. Anything less will not adequately compensate Claimant for the fair market value of its investment as of the Valuation Date.

318. For completeness, Secretariat considered whether it could derive a reliable valuation for Lusad as of the Valuation Date by reference to (i) transactions involving comparable companies, or (ii) prior transactions involving Lusad. As to the former, Secretariat was unable to find any comparable company against which to compare Lusad, which was unique in benefitting

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[648] Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 45; Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 106(c), A.25–A.26.

[649] Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶¶ 44–45; Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 106(c), A.25–A.26.

[650] Witness Statement of Santiago León Aveleyra, dated 14 September 2021, ¶ 44–45; Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 106(d), A.33–A.40.

[651] **Exhibit C-0007-SPA**, Art. 6.c(i) (Amended Concession Agreement, as reissued in March 2017); Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 106(b), 129(d), A.28(c), A.29–A.30.

[652] Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶107(d), A.34–A.40. **Exhibit HR-0048-ENG** (Memorandum of Understanding between L1BRE Holding LLC and Grupo TV Promo, dated 4 March 2017).

[653] Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 107(e), section A4.4.

from revenue streams established in a government-granted Concession.[654] As for the prior transactions involving Lusad, namely the transactions involving Accendo and L1bero Partners, Secretariat considered that there were several reasons why these transactions do not reflect, and cannot be used to derive, a value for Lusad on the Valuation Date.[655] Crucially, both of those transactions took place over a year prior to the Valuation Date, at a time when Lusad was at a different stage of its development.[656] In the intervening time, software development was completed, tens of millions of dollars had been injected into the L1bre System, Lusad was better capitalized, the final regulatory approvals had been obtained, and Lusad positioned itself for the full-scale launch of its operations.[657]

C. SECRETARIAT'S RELIABLE DCF VALUATION

319. Secretariat has valued the damages suffered by Claimant by valuing its investment by reference to the DCF method. The DCF method involves estimating cash flows expected in the future and then bringing them to a present value by computing an appropriate discount rate.

320. In estimating future cash flows, Secretariat uses as its starting point the DCF valuation model that Goldman Sachs prepared in October 2018, a few weeks prior to the indefinite suspension notice.[658] As explained above, Goldman Sachs had been retained for its investment banking services and to market to potential investors a minority stake interest in L1bre LLC and the business under the Concession.[659] Goldman Sachs concluded that the business had an enterprise value of USD $2.43 billion and that valuation was based on its own independent analysis, combined with the ordinary-course-of-business projections prepared contemporaneously (*i.e.*, in 2018) by L1bre LLC's management.[660]

321. Secretariat's reliance on the Goldman Sachs DCF model as a starting point is particularly appropriate because it is highly persuasive evidence. Indeed, international tribunals have frequently relied on pre-expropriation ordinary-course-of-business planning documents for valuation purposes because they reflect the best evidence of the business expectations and projections at a non-suspect time, prior to the dispute arising.[661] The *ADC v. Hungary* tribunal, for instance, emphasized the importance of relying on pre-expropriation ordinary course business

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654 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 130–32, A.168–A.171 .

655 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 155.

656 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 155–56.

657 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 58, 156–58.

658 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 101–02, A.20–A.23.

659 *See supra* ¶¶ 118–121.

660 **Exhibit C-0079-ENG**, p. 23 (Goldman Sachs Pre-Marketing Recap and Potential Next Steps, dated 4 October 2018).

661 **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).

planning documents for the "best evidence . . . of the expectations" for the business "at the time of expropriation."[662]

322. Indeed, for the same reason, Secretariat emphasizes in its report the reliability of the Goldman Sachs DCF model:

> I consider the Goldman Projections to represent the best available evidence of the cash flows the Claimant's Investment was expected to generate as of the Valuation Date. These projections were prepared contemporaneously, in the normal course of business, prior to the initiation of this dispute. Furthermore, they were prepared by a reputable investment banking firm who had access to the contracts, vendor invoices and proposals necessary to support the cost and revenue assumptions made.
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> . . . .
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> As such, I consider the Goldman Projections form a reliable basis for the purposes of a valuation exercise.[663]

323. Secretariat did not, however, simply adopt the Goldman Sachs DCF model. Secretariat evaluated every single input to the DCF model, considered the information that would have been available relating to the inputs as of the Valuation Date, and made adjustments as it considered appropriate in deriving its own valuation:

> I understand that the Goldman Projections represent the best available source of information for cash flows projections of the Business Venture in a scenario in which the Measures did not occur. I have reviewed these projections and, where applicable, made certain amendments to update economic inputs (such as the assumed rate of inflation or foreign exchange rate assumptions).
>
> I have also conducted a comprehensive review of the inputs and assumptions which drive the estimation of projected cashflows in the Goldman Projections. This review included reconciling inputs for revenues, operating costs and capital expenditures with contemporaneous invoices, proposals and contracts produced prior to the Measures. I have made further adjustments to the Goldman Projections in instances where contemporaneous contracts or proposals provided more accurate information than what was relied on in the Goldman Projections.[664]

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662 **Exhibit CL-0024-ENG**, ¶ 507 (*ADC*).

663 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ A.21, A.23.

664 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 103–04.

324. The key elements of Secretariat's DCF analysis are described below and comprise of: (a) computing cash inflows in the form of revenues, (b) computing cash outflows in the form of costs, government contributions, and taxes, (c) applying macroeconomic factors, namely foreign exchange rates and inflation rates, (d) bringing the estimated cash flow to a present value by applying a discount rate, and (e) determining the term over which cash flows should be estimated. The Secretariat report describes each input in its DCF analysis in greater detail.[665]

1. Cash Inflows

325. The first step in Secretariat's DCF valuation is to calculate the money flowing into the business in connection with two revenue streams: (i) fees payable in connection with each ride using the L1bre System, whether that be the Application Fee or the Recuperation Fee (i.e., as defined above, collectively the L1bre Fees), and (ii) the revenue associated with advertising on the L1bre System passenger tablets (i.e., as defined above, the Advertising Revenue).

326. The L1bre Fees payable per ride (starting at MXN 12 pesos for the Application Fee and up to MXN 12 pesos for the Recuperation Fee, depending on the distance travelled) are established in the Amended Concession Agreement, which also establishes that the fees are to grow proportionately with inflation.[666]

327. The key variable in determining revenues associated with the L1bre Fees is the number of rides to be conducted per day by Mexico City's taxi fleet, which (as of the date of the Concession) comprised 138,000 taxis. Semovi maintains data regarding the average number of trips for Mexico City's taxi fleet and Secretariat relies on, *inter alia*, Semovi's own 2018 data as a basis for estimating the daily number of trips in its model.[667] Based on this data, Secretariat estimates that Lusad would have collected L1bre Fees revenue in connection with 2.1 million taxi trips a day.[668] Secretariat conservatively holds this assumption flat for the duration of the Concession term in its model.[669] This is in line with the Goldman Sachs model, which estimated a flatline of 2.1 million taxi trips per day in its model.[670]

328. As for the Advertising Revenue, Lusad was in advanced discussions with and had entered into a memorandum of understanding with a leading advertising partner. The advertising partner, Grupo TV Promo, presented a detailed forecast for revenue-sharing with Lusad and

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665 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 107, Appendix 4.

666 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 107(c), A.25–A.26.

667 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 107(b), A.27–A.32.

668 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 107(b), A.30.

669 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 107(b), A.31.

670 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 107(b), A.29; **Exhibit C-0079-ENG**, p. 23 (Goldman Sachs Pre-Marketing Recap and Potential Next Steps, dated 4 October 2018).

revenue estimates that it prepared based on its intimate knowledge of marketing in Mexico.[671] That 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.[672] Secretariat conservatively adopts the figures shown in the Grupo TV Promo for its model.[673]

329. Notably, Lusad had available to it other potential revenue streams under consideration, including expansions to other cities, a private driver service, a food delivery service, a package delivery service, market research service via the passenger tablets, and the sale of data relating to the services it was rendering under the Concession. The conservative nature of Secretariat's valuation is reflected by the fact that it does not incorporate in its DCF analysis any cash flows relating to these revenue streams, notwithstanding that they reflected additional value that a buyer would have considered in valuing Lusad.

2. Cash Outflows

330. The next step in Secretariat's DCF analysis is to subtract the money flowing out, in the form of (i) costs, (ii) revenue sharing with the Government, and (iii) applicable taxes.

331. Secretariat estimates four groups of costs: operating costs; selling, general and administrative costs; research and development costs; and capital expenditures.[674]

332. Secretariat estimated operating costs of the business on the basis of firm contracts that Lusad had already entered into or on contemporaneous proposals that Lusad had received from service providers.[675] The largest operating costs associated with the business were: cellular data costs for the L1bre tablets; e-wallet costs for the payment platform that pays drivers and pays the L1bre Fees to Lusad; installation costs for the installation of the tablet kits for the L1bre System; and payment processing costs for rides paid with credit card.[676] Secretariat has for these largest cost categories contemporaneous, pre-expropriation records upon which to estimate costs.

333. As for selling, general, and administrative costs, the largest two categories of costs are marketing costs and payroll expenses. For the former, Secretariat once again is able to estimate costs based on contracts that Lusad already had in place and key personnel that had already been

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671 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 107(d), A.33–A.40.

672 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 107(d), A.38.

673 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 107(d), A.39.

674 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 107(e)(g–i); sections A4.4, A4.5.

675 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 107(e); sections A4.4, A4.5.

676 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 107(e); sections A4.4.1, A4.4.3, A4.4.4, A.4.4.7.

engaged by Lusad.[677] For the latter, Secretariat estimates payroll expenses based on contemporaneous records reflecting an expected organizational chart, headcount, and applicable salaries.[678]

334. Lusad's research and development costs were projected, contemporaneously, to be equal to 2% of annual revenues.[679] Secretariat adopts that assumption for purposes of its DCF valuation.

335. Lusad's principal capital expenditures relate to the cost of acquiring additional tablets to complete the initial installation of the L1bre System in Mexico City's taxi fleet and acquiring new, replacement tablets every three years as required by the Concession.[680] Once again, Secretariat has contemporaneous, pre-October 2018 invoices to ascertain the costs of the tablets.[681]

336. The Amended Concession Agreement provided that, after the first three years of operation, Lusad was to pay 8.33% of the Application Fees it generated to Semovi.[682] Secretariat incorporates that revenue-sharing agreement in its projected cash flows.[683]

337. Finally, Secretariat applies a tax rate of 30%, which reflects the corporate income tax rate applicable in Mexico as of the Valuation Date.[684]

3. Macroeconomic Assumptions

338. Secretariat's DCF analysis incorporates two macroeconomic assumptions: inflation and the USD/MXN exchange rate.

339. Secretariat inflates the fees payable under the Amended Concession Agreement and Lusad's costs in accordance with inflation assumptions. Secretariat's inflation assumptions are

677 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 107(g), section A4.4.12.

678 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 107(g), section A4.4.14.

679 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 107(h), section A4.4.3.

680 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 107(i), section A4.5.

681 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 107(i), A.128–30.

682 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 107(f), A.112.

683 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 107(f), A.112.

684 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 107(l).

based on contemporaneous inflation expectations for the medium term and, for the long term, on the Bank of Mexico's target inflation rate.[685]

340. Secretariat's discount rate is computed by reference to USD inputs, while the cash flows are computed in Mexican pesos. As a result, Secretariat converts its cash flow projections from pesos to USD in order to then be able to discount them. Secretariat uses for that exercise the forward foreign exchange rates quoted by banking institutions for the years 2019 through 2023, and thereafter assumes that foreign exchange rates will reflect the relative purchasing power parity (i.e., the relative estimate rates of inflation for the two countries in the currency pair).[686]

4. Present Value

341. The next step in Secretariat's analysis is to compute a discount rate and apply it to its projected cash flows to bring them to a present value. The purpose of the discount rate is to adjust future free cash flows downwards to reflect the risk profile associated with those funds. Therefore, the applicable discount rate depends on the nature of those cash flows.

342. Secretariat calculates the discount rate by reference to the weighted average cost of capital ("WACC") associated with the business enterprise, which reflects a weighted average of the enterprise's cost of debt and cost of equity.[687] The WACC is the appropriate metric for the discount rate because the enterprise is funded with both debt and equity capital.[688] The WACC is the most suitable rate for the risk profile present here because it factors in, amongst other things, the cost of equity, the cost of debt, and the country risk premium in Mexico.[689]

343. Secretariat's calculations, described in detail in its report, yield a WACC of 10.5%.[690]

5. Concession Term

344. The final input in the DCF that has a bearing on damages is the term over which cash flows are estimated. The Amended Concession Agreement had an initial term of 10 years.[691] However, as discussed above, the Amended Concession Agreement granted Lusad an explicit right to extend the term for a further 10 years, subject to the fulfillment of certain basic conditions, including that Lusad had complied with the terms of the Concession and made a timely request to

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685 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 107(j), A.141–42.

686 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 107(k), A.135–40.

687 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 107(o), A.153.

688 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 71.

689 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ A.156, A.176–85, A.199–203.

690 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ A.205.

691 **Exhibit C-0007-SPA**, Article 12 (Amended Concession Agreement, as reissued in March 2017).

renew it. [692] Notably, Semovi could not reject the additional 10-year term on a discretionary basis.[693] Further, at the end of the 20-year term (*i.e.*, the combination of the initial and subsequent 10-year terms), Lusad had a legal right under Mexican law to extend for a further 10 years based on the same conditions as set out in the Amended Concession Agreement (i.e., the second extension period also could not be denied by Mexico on a purely discretionary basis).[694] As such, but-for Mexico's measures, Lusad could have generated cash flows in connection with the Concession for a total of 30 years.

345. In computing damages payable to claimants who have been deprived of the value of their investments associated with State-granted concessions or licenses, investment tribunals have recognized that a fair market value assessment requires ascribing value to extension periods available to the investors.

346. For instance, in *CME v. Czech Republic*, the tribunal ruled that it "cannot accept" an argument that the license at issue would not have been renewed and "the possibility of a non-renewal of the license" without a justifiable basis "must be disregarded as a matter of fact", and could very well have amounted to "another severe breach of the Treaty and must be put aside when determining the value of [the investment]."[695]

347. In *LETCO v. Liberia*, the tribunal computed lost profits for a total concession period of 35 years, 20 of which related to an "initial period" and 15 years of which related to "a second period" available to the investor if it had, amongst other things, complied with the terms of the concession.[696] The tribunal granted cash flows for the second period on the following basis: "Given LETCO's past compliance with the terms of the Concession Agreement, the Tribunal

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692 **Exhibit C-0007-SPA**, Article 13 (Amended Concession Agreement, as reissued in March 2017).

693 **Exhibit C-0007-SPA**, Article 13 (Amended Concession Agreement, as reissued in March 2017).

694 **Exhibit C-0007-SPA**, Article 13 (Amended Concession Agreement, as reissued in March 2017) ("La vigencia de la Concesión podrá prorrogarse hasta por un periodo igual, siempre y cuando se acredite lo establecido en el artículo 102 de la Ley de Movilidad . . . ."); **Exhibit CL-0103-SPA**, Article 102 (Ley de Movilidad, Cápitulo V, De la vigencia de las concesiones).

695 **Exhibit CL-0078-ENG**, ¶ 605 (*CME*).

696 **Exhibit CL-0088-ENG**, ¶ 105 (*Liberian Eastern Timber Corporation v. Liberia*, ICISD Case No. ARB/83/2, Award, dated 31 March 1986).

believes that the Concession Agreement would in fact have been renewed had LETCO so desired."[697]

348. Mexico's indefinite suspension notice of 28 October 2018 observed that Lusad had complied with all of its obligations under the Concession Contract.[698] Accordingly, there is no basis to assume that Lusad would not have continued to comply with the terms of the Concession Contract but-for Mexico's indefinite suspension of the Concession.

349. Given Lusad's good standing under the Concession Contract, it is reasonable to assume that Lusad would have been granted both the contractual and legal 10-year extension periods for which it would have been permitted to apply (for a total Concession period of 30 years). Indeed, a buyer in the market would have ascribed value to these subsequent extension periods—that is why Goldman Sachs' own valuation prepared in connection with seeking third-party investors calculates a terminal value for Lusad that continues in perpetuity.[699] As cash flows that are estimated to occur later in time resolve to a lower present value as compared to cash flows that are estimated to occur earlier in time, the DCF calculation automatically risk-adjusts the later-in-time cash flows. In other words, the DCF calculation automatically factors in higher risks associated with cash flows after the initial 10-year term, and ascribes a value to them consistent with that risk level.

350. In summary, Secretariat's DCF calculations, reflecting a 30-year Concession period, yields a fair market value of USD $1.777 billion before the addition of pre-award interest and tax gross-ups.[700]

D. A FULLY COMPENSATORY AWARD MUST GRANT CLAIMANT COMPOUND INTEREST AT A RATE COMMENSURATE TO ITS OPPORTUNITY COST

351. 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

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[697] *Id.*, ¶ 106; *see also* **Exhibit CL-0089-ENG**, ¶¶ 206–22, 315–26, 421 (*Perenco Ecuador Limited v. Ecuador*, ICSID Case No. ARB/08/6, Award, dated 27 September 2019) (acknowledging the value of an extension period for which the investor could have applied, however deciding that it was unable to include the extension period as part of the lost cash flows and instead awarding damages associated with the loss of opportunity to apply for the extension).

[698] **Exhibit C-0019-SPA** (Communication from Semovi to Lusad permanently suspending implementation of the Concession, dated 28 October 2018) ("Esta suspensión de instalación de taxímetros digitales continuará a partir de la notificación del presente oficio, y se reanudará en tanto se le notifique oficialmente que podrá continuar la misma, **sin que se atribuible a responsabilidad a la concesionaria, quen hasta la fecha ha cumplido satisfactoriamente con lo que se le ha requerido**.") (emphasis added).

[699] **Exhibit C-0079-ENG**, p. 23 (Goldman Sachs Pre-Marketing Recap and Potential Next Steps, dated 4 October 2018); **Exhibit HR-0001-ENG** (Goldman Sachs Operating Model, dated October 2018).

[700] Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 114–15 (Scenario 3). Secretariat has also computed fair market values for 20-year and 10-year periods, which yield USD $1.524 billion and USD $944 million respectively.

opportunity to invest funds using the money to which that investor was rightfully entitled.[701] 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 ends. 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.

352. As such, an award of interest is not separate from full reparation under the *Chorzów Factory* standard; it is a component of, and gives effect to, full reparation.[702] The requirement of full reparation must inform all aspects of an award, including the determination of the appropriate rate of interest, and whether such interest should be simple or compound.[703] In the words of the ILC Articles: "[i]nterest on any principal sum due . . . shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result."[704]

353. Under Article 1110(4) of NAFTA, Mexico agreed that compensation for a lawful expropriation "shall include interest at a commercially reasonable rate . . . from the date of expropriation until the date of actual payment."[705] However, the "commercially reasonable rate" of interest is applicable only to damages owing for a lawful expropriation. The Treaty does not provide guidance on the rate of interest payable on damages owing for an unlawful expropriation or for a breach of the FET and FPS standards. Thus, interest payable on damages flowing from

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701 **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).

702 *See* **Exhibit CL-0091-ENG**, ¶ 114 (*Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, dated 27 June 1990) ("[T]he case-law elaborated by international arbitral tribunals strongly suggests that in assessing the liability due for losses incurred the interest becomes an integral part of the compensation itself, and should run consequently from the date when the State's international responsibility became engaged."); **Exhibit CL-0011-ENG**, ¶ 174 (*Middle East Cement*) ("Regarding such claims for expropriation, international jurisprudence and literature have recently, after detailed consideration, concluded that interest is an integral part of the compensation due after the award and that compound (as opposed to simple) interest is at present deemed appropriate as the standard of international law in such expropriation cases.").

703 **Exhibit CL-0077-ENG**, pp. 235–39 (J. Crawford, *The International Law Commission's Articles of State Responsibility: Introduction, Text and Commentaries* (2002)); **Exhibit CL-0092-ENG**, p. 34 (J. Gotanda, *A Study of Interest* (2007) Working Paper Series 83) ("It is a settled principle that a respondent is liable for all damages that have accrued naturally as a result of the failure to perform its obligations. Liability includes the obligation to pay the claimant interest for its lost opportunity cost, which may be in the form of interest.").

704 **Exhibit CL-0002-ENG**, Article 38(1) (International Law Commission, *Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001)) ("Interest on any principal sum payable under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.").

705 **Exhibit CL-0001-ENG**, Article 1110(4) (NAFTA).

such Treaty breaches must be calculated in a manner giving effect to the principle of full reparation and is not limited by the Treaty standard for lawful expropriations.

354. The loss to the Claimant for which an adequate award of interest must compensate is 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. The tribunal in *Vivendi v. Argentina* confirmed the rationale underlying this approach:

> The object of an award of interest is to compensate the damage resulting from the fact that, during the period of non-payment by the debtor, the creditor is deprived of the use and disposition of that sum he was supposed to receive.[706]

355. In its report, Secretariat acknowledges that the full reparation standard "might warrant a higher rate of pre-award interest" compared to the Treaty standard of a "commercially reasonable rate."[707] Secretariat, however, computes interest in accordance with the latter "commercial reasonable rate" standard,[708] which reflects a floor and to which a premium should be added in order to give effect to the principle of full reparation. In light of Mexico's unlawful conduct and failure to pay Claimant compensation commensurate with its losses as of the Valuation Date, Mexico has effectively availed itself of a loan from Claimant (*i.e.*, a "forced loan"). In the circumstances, Secretariat considers that an appropriate rate of interest is no less than the rate at which Mexico borrows in the market.[709] Secretariat has reviewed Mexico's debt offering of USD-denominated debt and calculated that the yield to maturity on the debt amounts to 3.96%, which is the rate that Secretariat uses to compute pre-award interest payable on the compensation owing to Claimant.[710] As noted above, this is be a floor for the computation of interest, to which a reasonable premium should be added.

356. Tribunals have repeatedly affirmed that compound interest best gives effect to the customary international law rule of full reparation.[711] There is no longer any genuine debate that

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706 **Exhibit CL-0057-ENG**, ¶ 9.2.3 (*Vivendi II*).

707 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 178.

708 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 178.

709 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 179.

710 Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 180.

711 **Exhibit CL-0093-ENG**, ¶ 834 (*Occidental Petroleum Corp. and Occidental Exploration and Production Co. v. Ecuador*, ICSID Case No. ARB/06/11, Award, dated 5 October 2012) (hereafter "*Occidental Petroleum*") ("[M]ost recent awards provide for compound interest. This practice accords with the *Chorzów* principle as an award of compound interest will usually reflect the damages suffered."), ¶ 840 ("In summary, it may be seen that compound interest is the norm in recent expropriation cases under ICSID."); *see also* **Exhibit CL-0094-ENG**, ¶¶ 324–25 (*Marion Unglaube and Reinhard Unglaube v. Costa Rica*, ICSID Case Nos. ARB/08/1 and ARB/09/20, Award, dated 16 May 2012); **Exhibit CL-0095-ENG**, ¶¶ 226, 228 (*Quasar de Valores SICAV SA et al. v. Russia*, SCC Case No. 24/2007, Award, dated 20 July 2012); **Exhibit CL-0096-ENG**, ¶¶ 307–16 (*Continental Casualty Co. v. Argentina*, ICSID Case No. ARB/03/9, Award, dated 5 September 2008) (hereafter "*Continental Casualty*"); **Exhibit CL-0097-ENG**, ¶¶ 382–84 (*Impregilo S.p.A. v. Argentina*, ICSID Case No. ARB/07/17, Award, dated 21 June 2011); **Exhibit CL-0082-ENG**, ¶ 746 (*El Paso*).

compound interest is the only way to compensate Claimant for the time value of its money.[712] On this issue, the tribunal in *Gemplus v. Mexico*, noted that the awarding of compound interest is enshrined in investment arbitration:

> [T]here is now a form of 'jurisprudence constante' where the presumption has shifted from the position a decade or so ago with the result it would now be more appropriate to order compound interest, unless shown to be inappropriate in favour of simple interest, rather than vice-versa.[713]

357. Compound interest "reflects economic reality in modern times," where "the time value of money in free market economies is measured in compound interest."[714] In *Ioannis Kardassopoulos v. Georgia*, the tribunal was required to award interest under Article 13(1) of the Energy Charter Treaty, which required interest to be awarded at a "commercial rate." The tribunal decided to order that interest be compounded semi-annually.[715]

358. Based on the above, Claimant claims pre-award interest on the principal sum claimed of USD $1.777 billion at an annual rate of 3.96%, compounded annually. The interest accrued from the Valuation Date until August 2023 (as a proxy for the date of the Award) on that basis amounts to USD $368 million.[716]

359. Furthermore, to the extent that Mexico may not immediately satisfy an eventual damages award issued by the Tribunal, Claimant is clearly entitled to compound interest accruing on such an Award from the date of the award until payment is made in full. The threat of post-

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712 **Exhibit CL-0098-ENG**, ¶ 595 (*Waguih Elie George Siag and Clorinda Vecchi v. Egypt*, ICSID Case No. ARB/05/15, Award, dated 1 June 2009) ("[T]he Tribunal is certain that in recent times compound interest has indeed been awarded more often than not, and is becoming widely accepted as an appropriate and necessary component of compensation for expropriation.").

713 **Exhibit CL-0099-ENG**, ¶¶ 16–26 (*Gemplus, S.A. et al. v. Mexico*, ICSID Case Nos. ARB(AF)/04/3 and ARB (AF)/04/4, Award, dated 16 June 2010); *see also* **Exhibit CL-0093-ENG**, ¶¶ 843–45 (*Occidental Petroleum*) (noting that "more recent awards have also favoured annual or semi-annual compounding" and, "not without hesitation," conservatively awarding annual compounding "given the large amount of the Award and the number of years that have passed since the violation").

714 **Exhibit CL-0096-ENG**, ¶ 309 (*Continental Casualty*).

715 **Exhibit CL-0102-ENG**, ¶¶ 658, 667–68 (*Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, dated 3 March 2010).

716 *See* Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 180, 196(c).

award interest removes any incentive on the part of the Respondent to further delay the compensation to which Claimant is entitled.[717]

E. THE AWARD SHOULD BE NET OF ALL APPLICABLE MEXICAN TAXES AND GROSSED UP TO COMPENSATE CLAIMANT FOR APPLICABLE CANADIAN TAXES PAYABLE ON THE AWARD

360. The valuation set out in the Secretariat report has been prepared net of Mexican tax.[718] Consequently, any taxation by Mexico of the eventual Award in this arbitration would result in Claimant being effectively taxed twice for the same proceeds. That would subvert the purpose of the Award—*i.e.*, to place Claimant in the financial position in which it would have been had Mexico not breached its obligations under the Treaty.

361. In the circumstances, Claimant requests that the Tribunal declare that: (i) its Award is made net of all applicable Mexican taxes; and (ii) Mexico may not tax or attempt to tax the Award.[719] Further, and in addition to the above, Claimant seeks an indemnity from Mexico in respect of any adverse consequences that may result from the imposition of a double taxation liability by the Mexican tax authorities, in the event that the declaration in the Tribunal's Award recognizing that the Award is net of Mexican taxes is not accepted as the equivalent of evidence of payment.

362. Furthermore, as part of Mexico's obligation to pay compensation to wipe out all consequences of its unlawful conduct, Claimant must be made whole for the different tax treatment that it will be subjected to in Canada as a result of Mexico's measures. In the but-for scenario, Claimant would have received non-taxable dividends in Canada because taxes would already have been paid in Mexico (income tax) and in the Unites States by Claimant's subsidiaries (withholding tax), and Claimant would have benefitted from exemptions in applicable double taxation treaties.[720] However, because Claimant should receive payment in the form of compensation in connection with an arbitral award instead of as dividends, Canada would tax those sums in accordance with applicable rates of provincial and federal corporate income tax.[721] That is an additional tax liability

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717 *See, e.g.*, **Exhibit CL-0073-ENG**, ¶¶ 470-471 (*CMS*) (awarding separate post-award interest to be compounded); **Exhibit CL-0012-ENG**, ¶ 131 (*Metalclad*) (applying monthly compounding frequency arguably to expedite Mexico's payment); **Exhibit CL-0070-ENG**, pp. 73–74 (*Occidental Exploration*) (increasing simple interest rate from 2.75 percent (pre-award) to 4 percent (post-award)); *see also* **Exhibit CL-0084-ENG**, p. 389 (S. Ripinsky and K. Williams, *Damages in International Investment Law* (2008)) (hypothesizing that such "changes can be explained by the desire of some tribunals to ensure prompt compliance with the award by adding a punitive interest and thereby turning the post-award interest from a purely compensatory instrument into a sanction.").

718 *See* Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 185.

719 Tribunals have recognized that this is a risk against which claimants in investor-state arbitrations require protection. *See, e.g.*, **Exhibit CL-0100-ENG**, ¶¶ 552–53 (*Chevron Corp. (USA) and Texaco Petroleum Co. (USA) v. Ecuador*, (UNCITRAL) PCA Case No. 34877, Partial Award on the Merits, dated 30 March 2010); **Exhibit CL-0101-ENG**, ¶¶ 544–47 (*Burlington Resources Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, dated 7 February 2017); **Exhibit CL-0038-ENG**, ¶¶ 850–55 (*Rusoro*).

720 *See* Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 185–89.

721 *See* Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶¶ 194–95.

that Claimant will incur only as a result of Mexico's unlawful conduct. In the circumstances, Claimant will not be fully compensated for its loss unless a tax gross-up is also included to compensate Claimant for the fact that a portion of its damages—at least 27% under Canadian and Albertan tax laws—will be deducted.[722]

363. By adding the 27% tax gross-up to the pre-interest DCF values, Secretariat calculates the following damages values as of the date of its report on the basis of a thirty year Concession term:[723]

Scenario 3 (USD Millions)	
Scenario 3 - Damages Conclusion (Prior to Tax Gross Up, Pre-Award Interest)	1,777
Plus: Taxes on Award	657
Plus: Pre-Award Interest	368
Scenario 3 - Damages Conclusion (Including Tax Gross-Up & Pre-Award Interest)	**2,802**

F. THE AWARD SHOULD AWARD CLAIMANT COSTS AND FEES FOR THE ARBITRATION ON AN INDEMNITY BASIS

364. The Tribunal has broad discretion to award costs and fees, including the costs of the tribunal and the fees of attorneys, experts, and legal assistants. Article 61(2) of the ICSID Convention states:

> In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.[724]

365. Claimant seeks an Award of costs covering all of the costs and fees incurred in connection with the arbitration on an indemnity basis. The only reason that Claimant has to incur such costs and fees is as a result of Mexico's unlawful conduct and Mexico's failure to pay compensation for the damages that Claimant suffered as a result of Mexico's unlawful conduct. Claimant will provide its full costs submission at the conclusion of this arbitration, or as otherwise directed by the Tribunal.

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722 *See* Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 195.

723 *See* Expert Report of Howard Rosen (Secretariat Advisors), dated 17 September 2021, ¶ 196(c).

724 **Exhibit CL-0002-ENG**, Article 61(2) (ICSID Convention).

VII.
REQUEST FOR RELIEF

Claimant submits the following requests of the Tribunal:

Requests:

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

(ii) An order directing Mexico to compensate Claimant for its losses resulting from Mexico's breaches of the Treaty and international law in an award of damages not less than USD $2.802 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 Respondents reimburse Claimant for all costs, expenses, expert fees, and reasonable attorneys' fees incurred or paid by Claimant in connection with this arbitral proceeding, plus interest; and

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

Claimant also reserves its right to alter, amend, and/or supplement its claims as necessary and in accordance with the applicable rules during the course of this arbitral proceeding.

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