IN AN ARBITRATION UNDER THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE ICSID ADDITIONAL FACILITY RULES

B-Mex, LLC and others

v.

United Mexican States

(ICSID Case No. ARB(AF)/16/3)

PARTIAL DISSENT ON THE MERITS BY PROFESSOR RAÚL E. VINUESA

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I dissent from the majority's conclusion that the treatment accorded by SEGOB to the Claimants' investment falls below the Fair and Equitable Treatment (FET) standard required under NAFTA Article 1105 (Award, ¶¶ 78 *et seq*). Consequently, I dissent from the majority's conclusions as to the existence of a compensable damage and the lack of causation in order to determine its quantum (Award, ¶¶ 182 *et seq*).

I also dissent from the majority's assertion that the termination of Claimants' permits is based on the change of political leadership in the Mexican Government (Award, ¶¶ 93 *et seq*).

I dissent from the majority's presumption that SEGOB should have implemented other alternatives available to it so as not to terminate the permits and, thus, preserve the continuity of the investments (Award, ¶¶ 103 *et seq*).

I fully agree with the Award's decision whereby the treatment accorded by the Respondent's domestic courts to the Claimants' investments does not constitute a denial of justice under international law (Award, ¶¶ 120 *et seq*). However, I dissent from the majority's determination whereby the absence of a denial of justice does not absolve the Respondent of international responsibility for SEGOB's conduct in breach of the FET standard (Award, ¶¶ 137 *et seq*).

Even though I share the Award's conclusions as to the irrelevance of the evidence obtained by Black Cube, I dissent from the majority's assertion in paragraph 146 of the Award that the mere interpretation and application of Mexican law on Data Protection shows that such evidence was procured and introduced into the record of this proceeding in violation of that law. In the understanding that such evidence was obtained in violation of applicable law, I readily dissent from the majority's finding that the *Black Cube* Evidence is admissible.

As a consequence of the foregoing, I disagree with the majority's decision on the allocation of the costs of the proceeding and the allocation of fees and other costs of the Parties, in the understanding that the costs of the proceeding should be equally shared and that fees and other costs should be borne by the Party that incurred them.

Lastly, I consider that the evidentiary record made it possible to claim the Respondent's international responsibility for the grant to *E-Games* of the 2009 and 2012 Permits in breach of the Mexican law in force and effect on the regulation of activities regarding gambling and raffles.

It is worth pointing out that the majority states its own interpretation of this dissent in paragraph 70 of the Award. It is also worth clarifying that, as to the decisions heralded in the Award as adopted "by the Tribunal", only the decisions contained in the paragraphs in which, in accordance with this submission, I do not state my dissent should be understood as such.

Now, I proceed to state the reasons for my partial dissent.

I. THE ACTIONS AND OMISSIONS ATTRIBUTABLE TO SEGOB IN RELATION TO THE TERMINATION OF THE PERMITS WERE NOT IN BREACH OF THE FET OBLIGATION UNDER NAFTA ARTICLE 1105

1. I dissent from the majority's conclusion that the treatment accorded by SEGOB to the Claimants' investments falls below the Fair and Equitable Treatment (FET) standard under NAFTA Article 1105.[1]

2. I also dissent from the majority's assertion that "… SEGOB's revocation of the 2009 Permit did not affect the Claimants' operations because SEGOB had by then granted *E-Games* the 2012 Permit. To the Tribunal's mind, it was therefore this last decision by SEGOB to grant *E-Games* its own 2012 Permit…" that ensured the continuity of the Claimant's business.[2]

3. This assertion by the majority ignores not only the express contents of the SEGOB order of November 2012, but also disregards the text of the court decision that declared the non-subsistence of the Permit granted by such order. Moreover, it runs afoul of this Tribunal's unanimous decision as to the legality of the non-subsistence of such permit given the absence of a denial of justice in the proceeding concerning Amparo 1668/2011.

4. The majority fails to analyze the contradictions existing in both the whereas clauses and the *dispositif* of the SEGOB order granting the permit in November 2012. It simply transcribes the whereas clauses ensuring the independence of the *E-Games* permit from that previously granted to *B-Mex* without confronting its effects with the whereas clauses evidencing the direct relationship and continuity between one permit and the other.[3] Furthermore, the majority ignores, and thus disregards, that the 2012 Permit was declared unconstitutional by the Mexican courts and that this Tribunal unanimously confirmed the legality of the decision adopted by the Mexican courts in the Amparo proceeding, including the recognition of the non-subsistence of the 2012 Permit.

5. In sum, the majority ignores that the Mexican courts decided that the Claimants' permits be declared unconstitutional and, thus, non-subsistent. The majority, following the Claimants, starts from the presumption that the permits are valid, in disregard of the legal considerations that the Mexican courts themselves stated as basis of the outcome of the procedural saga of Amparo 1668/2011.

6. The Award fails to analyze whether SEGOB breached the law in force by granting the permits in 2009 and 2012. It only purports to define the validity of such permits through the whereas

[1] Award, Item C, ¶¶ 78 *et seq*.

[2] Award, ¶ 87.

[3] Award, ¶ 105.

clauses stated in their texts, without noting the serious contradictions and ambiguities in such whereas clauses.

7. The Award disregards the fact that the permit granted in November 2012 was declared invalid, and, therefore, the guarantees set forth in the text of such official letter cannot remedy the effects of the non-subsistence declared by the courts. It should be borne in mind that the official letter granting an independent permit to Claimants contains a series of inaccuracies and irregularities that converge on serious contradictions affecting its legality.

8. The majority starts from the wrong understanding that the terms of the November 2012 Permit ensured the Claimants a right based on applicable law, i.e., the Federal Law Regarding Gambling and Raffles (*Ley Federal de Juegos y Sorteos*) (LFJS, for its Spanish acronym) and its regulations. But, as stated above, the Award does not notice, or even second-guess, the inconsistencies and contradictions arising from the terms of the official letters at issue in Amparo 1668/2011. Nor can the Award go as far as describing as unlawful the court decisions that finally determined the scope of Amparo 1668/2011.

9. The text of the November 2012 Independent Permit shows that it was issued under the same terms and conditions as that granted in August 2012 (Permitholder Official Letter) and under the same terms and conditions as those granted to *E-Mex*. The basis on which the permit was granted to *E-Games* concerned the notion of "acquired rights". Consequently, *E-Games*, in its capacity as operator of *E-Mex*, could not have acquired other rights than those granted to *E-Mex*.[4]

10. It should be borne in mind that it was E-Games that requested to be granted permitholder capacity "under the same conditions as the Permit which is currently Operator, which is identified as Number DGAJS/SCEVF/P-6/2005." Hence, the November 2012 Official Letter does not concern a request for an "independent permit" by *E-Games*, but the latter requested a permit to operate its facilities under the same terms and conditions as the *E-Mex* permit under which it operated its casinos.[5]

11. The allegedly independent permit granted to *E-Games* was not a permit granted under Article 32 of the LFJS Regulations, but a permit acknowledging the change from operator to

[4] Exhibit C-16, pp. 6-7: The November 2012 Official Letter states that "they must be issued a permit to be granted the same rights and obligations under identical conditions in which it had been operating along with modifications made thereto, i.e., authorizing it to continue performing their activity in the same terms, conditions, legal scope and materials of permit number DGAJS/SCEVF/P-06/2005 and the modifications it holds."

[5] As per Exhibit C-14, *E-Games* Submission of 22 February 2011.

permitholder or concessionaire under the same terms and conditions as the permit under which *E-Games* operated its casinos in compliance with Permit No. DGAJS/SCEVF/P-6/2005.

12. Furthermore, the commencement of SEGOB Official Letter DGJS/SCEV/1426/2012 makes express reference to Permit No. DGJS/SCEVF/P-06/2005-BIS. In accordance with its Whereas Clause 1, *E-Games* requested a permit "for the opening, operation and installation of remote gambling centers and lottery rooms it currently runs as an operator, granting the capacity as Concessionaire under the same conditions as the Permit which is currently Operator, which is identified as Number DGAJS/SCEVF/P-06/2005 of May 25, 2005 and its amendments".[6] Whereas Clause 6 recognizes that *E-Games* invoked compliance with the precedent condition (Declaration of Bankruptcy proceedings for *E-Mex*), to request a definitive resolution of the change of status or legal condition of the concessionaire as operator.[7]

13. Whereas Clause II acknowledges that "[t]his case, as mentioned above is a unique and extraordinary case, since the Concessionaire Entretenimiento de México S.A. de C.V. is facing a case of revocation of its permit [...]."[8] [Emphasis added]

14. Although, under Whereas Clause V, SEGOB clarifies that "this authority resolves the case exercising its interpretation and application of the Federal Law on Gaming and Lotteries and its Regulations provided for in article 2, first paragraph of this legal system," it cannot be claimed that granting a permit without demanding compliance of the requirements laid down by law stems from an "interpretation of the law." Under the same whereas clause, SEGOB also mentions its powers as Authority to resolve factual situations not covered by the law and regulations in order to pronounce on the requests made.[9]

15. It is worth highlighting that SEGOB's authority to interpret and apply the law in force does not empower it to resolve at its discretion situations expressly covered by the law and regulations, such as the grant of permits subject to the requirements specifically provided by such law and regulations.

16. On the other hand, the Award fails to consider the scope and effects of the Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa de Distrito Federal* of 31 January 2013 issued in the Amparo proceeding, as well as the Order of the *Séptimo Tribunal* of 10 March 2014.

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[6] Exhibit C-16, p. 2.
[7] Exhibit C-16, p. 2.
[8] Exhibit C-16, p. 4.
[9] Exhibit C-16, p. 4.

17. It should be borne in mind that the *Juzgado Decimosexto* stated in its January 2013 Order that:

> "In view of the foregoing it is concluded that the arguments advanced by the claimant are mainly based to demonstrate the unconstitutionality of order DGAJS/0260/2009-BIS […], that ruled lawful the authorization to Exciting Games […] as direct agent of federal permit DGAJS/SCEVF/P-06/2005 […] because there are no grounds under the Federal Gambling and Lottery Law to grant such authorization."[10]
>
> "In fact, from the provisions cited by the responsible authority in the challenged order, there is neither evidence of the concept of a direct agent of a permit nor of the acquisition of rights for exploitation of a permit without intervention of the concessionaire, by complying with the obligations under article 29 of the Federal Gambling and Lottery Law."[11]
>
> […] "In view of the above, it can be easily noted that the Regulation of the Federal Gambling and Lottery Law does not contemplate the figure of the autonomous agent of a permit or that of the agent that obtained the legal exploitation of the permit by acquired rights and without the intervention of the concessionaire […]."[12]
>
> […] "In the aforementioned conditions, the violation of the legal guarantee is evident before the claimant, because the authority recognized the legal acquisition for the exploitation of a permit, without legal basis, but just pointing out that it is a result of acquired rights, by complying with the obligations of the agent set forth by the Federal Gambling and Lottery Law and its Regulation, without precisely indicating the legal provisions applicable to this case and without reconciliation between the reasons given and the applicable regulations, reflecting incorrect substantiation and justification of the challenged order."[13]

18. The Majority's Award also disregards the scope and effects of the *recurso de inconformidad* (Procedure VIII) of Amparo 1668/2011, as well as the relevant Order issued by the *Juez Decimosexto de Distrito en Materia Administrativa de Distrito Federal*, on 26 August 2013.

19. First, the Judge seized of the *recurso de inconformidad* held that, "[…] given that the fulfillment of the judgments pertains to public order in accordance with article 214 of the Amparo Law, which states that no lawsuit may be filed without the judgment being fully

[10] Exhibit C-18, p. 98.

[11] Such assertion by the Judge is based on Article 3 of the Regulations and Article 30 of the LFJS. Exhibit C-18, p. 98.

[12] Exhibit C-18, p. 99.

[13] "Consequently, considering the proposed arguments are well founded, the Nation's Supreme Court of Justice Support and Protect Entretenimiento de México, S.A. De C.V., against order DGAJS/0260/2009-BIS dated May 27, 2009, to the effect of declaring it groundless and issue a new one to rule, in a founded and justified manner, on the matter requested on May 18, 2009:" Exhibit C-18, p. 100.

served wherein the harmed party has been rendered full constitutional protection; based on court records, a ruling is thus issued insofar as the protective ruling has been met or not."[14]

20. Lastly, the Judge considered, first, that, to demonstrate the foregoing assertion, one had to bear in mind that the representative of the complainant (B-Mex) had presented a document where it made known their disagreement with fulfillment of the judgment, on the basis that the Head of the Government Agency of the Ministry of Interior (*Unidad de Gobierno de la Secretaría de Gobernación* SEGOB), expressed in official letter UG/211/1103/2013 that there are no records on file of the original official letter UG/211/149/2006, from 1 February 2006. Second, it noted that in the file there is record of a certified copy of official letter UG/211/149/2006, from 1 February 2006, as well as diverse official letters which are reported as precedent for the modification of the federal permit, for which it is difficult to believe the fact that such order does not appear among the files and that there should only be a simple copy, which alone lacks evidentiary value, which results insufficient for fulfilling the judgment.[15]

21. Consequently, the Judge ruled that, "[o]n the other hand, the judgment cannot be considered as fulfilled with respect to the order DGAJS/SCEV/260/2009-BIS dated May twenty-seven of two thousand nine, rendered ineffective, in which the harmed third party, Exciting Games, variable capital corporation, is acknowledged as the independent operator of the federal permit related to gaming and lottery number DGAJS/SCEVF/P-06/2005, since the responsible authority must not forget that by ruling said permit as unsubstantiated, it is also obligated to render ineffective all other act or acts that have been issued as its consequence, on the understanding that it should evaluate if in its records appear various orders based on said permit, and that being the case, proceed to declare their lack of substantiation."[16] [Emphasis added]

22. The Judge finally decided as follows:

> "[…] Along these same lines, based on the third temporary article and 192, second paragraph of the current Amparo Law, the authorities shall hereby be required, in what will hereby be identified that within three days, from the notification of this order, to inform this Federal Court of the acts carried out for the effective fulfillment of the Amparo judgment, in the following terms:
>
> General Director of Gaming and Lottery of the Government Agency of the Ministry of Interior (SEGOB).

[14] Exhibit C-23, p. 1.

[15] Exhibit C-23, pp. 4-5.

[16] Exhibit C-23, p. 5.

> Send the evidentiary materials rendering ineffective order DGAJS/SCEV/0260/2009-BIS, dated May twenty-seven, two thousand nine, as well as the diverse acts which are substantiated by the same.
>
> Having been notified that by not carrying out said acts, in accordance with article 258 of the Amparo Law, a fine will be imposed valued at one hundred days of the current minimum wage in the Federal District and will continue with the proceedings established in article 193 of the same regulation."[17]

23. In conclusion, the cause and reason of the SEGOB orders that terminated the Claimants' permits were based on a court decision (Amparo 1668/2011) which determined the unconstitutionality and, thus, non-subsistence of such permits. In this regard, the revocation of the permits is nothing less than the direct implementation by the Federal Government's enforcement and control authorities of the principle of legality governing the Mexican legal system.

24. The Majority's assertion that the record evidence "…confirms that SEGOB did not terminate the Claimants' business because of any public or regulatory policy…," but on the basis of an arbitrary predisposition of the Government in breach of the FET standard under Article 1105, is definitely wrong and has no factual or legal basis.

II. THE CLAIMANTS FAILED TO SHOW THAT SEGOB'S ACTIONS WERE BASED ON ARBITRARY POLITICAL INTENT CONTRARY TO THEIR INTERESTS.

25. I disagree with the majority's statement that SEGOB's conduct was driven by the adverse political predisposition of the new administration.[18] The majority fails, both in fact and in law, to establish that the Claimants showed that termination by SEGOB of their permits was driven by an arbitrary decision of the new political administration in Mexico.

26. The majority relies exclusively on the witness statements of Ms. Salas, SEGOB's head since January 2013. Against this background, the majority cites the statement made by Ms. Salas to the press on the irregularities in the November 2012 permit, just two months after it was granted,[19] only to later maintain that such permit "*simplemente, llamaba la atención*"—it simply drew one's attention.[20] The majority gathers from said statement that "[w]hile the inference that phrase sought to elicit remains unclear […] it does not assist in evincing a meaningful examination of the relevant facts and law."[21]

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[17] Exhibit C-23, pp. 5-6.

[18] Award, ¶¶ 93 *et seq*.

[19] Award, ¶ 81.b.

[20] Award, ¶ 97.

[21] Award, ¶ 97.

27. It is evident that Ms. Salas did not engage in an in-depth examination before publicly denouncing that the 2012 permit had been granted with irregularities. However, Mexican courts ultimately acknowledged in Amparo 1668/2011 that such permit was unconstitutional, thus confirming Ms. Salas's mere—ungrounded—intuition.

28. Amongst Ms. Sala's misleading and sometimes uninformed statements, the majority cites her as testifying "…that SEGOB only revoked the 2012 Permit and closed the casinos because, she averred, the Enforcement Court's decision had left it with no choice."[22] Nonetheless, it should be noted that the decisions in the Amparo proceeding confirmed the understanding invoked by Ms. Salas.[23]

29. In addition, the statement by Ms. Salas regarding her intention to "regularise" the situation of *E-Games* is merely a subjective expression of a desire (or probably an excuse) that is inconsistent with the strict application of Mexican applicable law for the granting of permits under the LFJS and its regulations.

30. The inferences drawn in the Award from Ms. Salas' vague and sometimes inconsistent statements are not sufficient to prove an adverse political motivation in SEGOB's actions with respect to the Claimants. Nor are they effective in changing the legal consequences resulting from SEGOB's conduct regarding the Amparo proceeding and its effects. In sum, the Award fails to support or justify on the basis of facts its merely subjective conclusions on the vague and even inconsistent statements of SEGOB's head Ms. Salas.

31. As to the Claimants' allegation concerning arbitrariness due to the disparate treatment afforded by SEGOB to the Claimants' investments in relation to a similar—and also allegedly irregular—permit granted to *ProMov*, the Respondent contended that, in that case, after temporary closure of its casinos, it was able to continue its operations since there was no court order for closure in place.[24] Accordingly, Ms. Salas testified that SEGOB ultimately regularized the situation of *ProMov* in 2014 and 2015.

32. While such statement by Ms. Salas is not convincing, one would be expected to infer in principle, as the majority does,[25] that SEGOB should have initiated one of the several existing proceedings to seek its cancellation. However, SEGOB's failure to take action to sanction the

[22] Award, ¶ 79.

[23] Pursuant to Order of the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* dated 19 February 2014, Exhibit C-290, and Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* dated 10 March 2014, Exhibit C-291, p. 1.

[24] Award, ¶ 100.b, fn. 93; Tr. (ENG) Day 5, 1179:14-1180:5 (M. Salas).

[25] Award, ¶ 100.c.

alleged irregularity in the granting of *ProMov*'s permit does not warrant demanding "equitable treatment" on the basis of a failure by the government rendering it illegal.

33. The Claimants cannot rely on such conduct by the Respondent to claim equitable treatment that revolves around a potential illegal act. The mere infringement or nonfulfillment of an obligation owed to a concessionaire such as *ProMov* by SEGOB neither creates nor warrants a right to demand equitable treatment that is based on the breach of an applicable rule. The Tribunal lacks jurisdiction to determine the consequences of the alleged violations by SEGOB not directly affecting the Claimants. The Claimants cannot invoke the grant by the Respondent of a benefit to a third party that is based on a breach of applicable law. In other words, the Claimants cannot invoke "equitable treatment as that accorded to such third party" [Translation by the Dissenting Arbitrator] benefitting from illegal conduct attributable to a government authority.

34. I also differ from the majority's view in the Award that the manner in which, and the grounds on which, SEGOB denied *E-Games* a fresh permit in 2005 show that SEGOB was determined to terminate the Claimants' investments.[26]

35. It arises from the evidentiary record that SEGOB rejected the new permit application on the grounds that the requirements set forth in the applicable regulations, *i.e.*, Article 22 of the Law Regarding Gambling and Raffles and Article 17A of the Ley Federal de Procedimiento Administrativo, were not met. SEGOB argued that, pursuant to the regulations in force, with a closure order imposed as a sanction in place, SEGOB could not automatically grant the new permits without first having a resolution ordering the lifting of that sanction.[27]

36. The majority finds this argument uncompelling on the basis of the Claimants' expert statement—which it deems "more persuasive"— had SEGOB so wanted, it could have removed the closure order by granting the fresh permit.[28] [Emphasis added] But the Claimants' expert has no authority to make conjectures or assumptions that can validly replace the State in its sole and exclusive role of governing control activities in the specific area of gambling and raffles. Accordingly, the fact that "[t]he Tribunal finds his evidence on this point more persuasive than that of the Respondent's expert"[29] falls within the realm of sheer speculation.

[26] Award, ¶ 112.

[27] Rejoinder (ENG), ¶¶ 304-305.

[28] Matus First Report, ¶¶ 193-195, CER-3.

[29] Award, ¶ 116.b.

37. As to the content of Article 17A of the *Ley Federal de Procedimiento Administrativo*, the majority states that it is persuaded that this Article cannot be interpreted narrowly.[30] Nevertheless, from a plain reading of this Article, it is clear that the interpretation made by SEGOB's new administration is based on the ordinary meaning of the terms used in the text and context of such Law, this criterion being part of the basic criteria for interpreting laws within the Mexican legal system.

38. The majority's finding that if SEGOB had wanted to regularize the situation of *E-Games*, it could have done so by granting a fresh permit to the latter is based on an assumption which disregards the compliance of the requirements required by law to grant such permit.

39. Notably, in furtherance of the implementation of restrictive policies regarding gambling and raffles activities, Mexico had discretionary power to grant new permits. There is no acquired right for an automatic granting of a permit for such activities. The statement in the Award that the grounds for denying the permit, analyzed in their context, can only be seen as pretextual,[31] is not supported by a showing that SEGOB acted arbitrarily in rejecting the permit requested.

40. Again, the majority endeavors to determine what SEGOB should have done: "if it had wanted to, could have organised and resolved both procedures in such a manner that one would not stand in the way of the other."[32] The majority insists on attempting to base its position on a mere second-guess approach, encroaching upon the specific functions of a government authority.

41. In accordance with Mexican law, the closure of the Claimants' premises should have been lifted first for the assessment of a fresh permit application to proceed. SEGOB exercised its discretionary power in the assessment of the Claimants' application, noting that the existence of a procedure and a closure sanction prevented the processing of new requests before resolution thereof. On the basis of the evidence introduced into the record, the Claimants failed to show and the majority cannot warrant that SEGOB's actions were based on the mere change of political leadership starting in January 2013. What Ms. Salas has declared or what the Claimants may have inferred from her statements do not change the effects of SEGOB's conduct.

42. Contrary to the majority's statement,[33] I believe that the denial of the fresh permit applied for by the Claimants did not amount to arbitrary conduct by SEGOB, nor did it breach the

[30] Award, ¶ 117 a.
[31] Award, ¶ 81.e.
[32] Award, ¶ 116.b.
[33] Award, ¶ 107.

Respondent's obligation to accord fair and equitable treatment to their investments. To conclude, it is my opinion that there is no sufficient evidence on the record supporting the statement in the Award[34] that SEGOB's new political leadership acted on a hostile manner against the Claimants' permit granted in November 2012 and that it unjustifiably accorded more favourable treatment to *ProMov*.

43. In view of the foregoing, I dissent from the majority's statements in paragraph 119 of the Award. The majority failed to establish that the termination of the 2012 Permit or that the denial of *E-Games*'s new permit application were the necessary and obvious result of an adverse political predisposition by the new Mexican administration. As already stated, all the acts and omissions by SEGOB directly or indirectly related to the procedural saga in Amparo 1668/2011 bear no factual or legal relevance to justify a violation of the fair and equitable treatment standard as enshrined in Article 1105.1 of the NAFTA. Instead, all such acts and omissions were framed pursuant to the applicable law within the implementation of public policies that demand compliance with the principle of legality in the actions.

III. THE CLAIMANTS FAILED TO SHOW THAT SEGOB WAS REQUIRED TO PRESERVE THE CLAIMANTS' ALLEGED RIGHTS TO CONTINUE THEIR BUSINESS.

44. I disagree with the majority's statement in the Award that SEGOB chose to terminate the Claimants' business when it could have preserved it. For the majority, there were various instances where "SEGOB could have done so, reasonably, lawfully and unconstrained by any court decisions."[35] [Emphasis added]

45. Throughout that section, the majority uses idiomatic expressions that refer to what SEGOB "could" or "could have done," but at no point does the majority refer to the existence of any legal obligation or the inobservance of any legal mandate to deem the acts or omissions attributable to SEGOB in the context of its acts or omissions related to Amparo 1668/2011 in violation of Article 1105 of the NAFTA.

46. The majority holds that when the judge held in August 2013 that the Amparo decision should be understood to include within its scope any other resolutions issued as a consequence of the 2009 Permit, SEGOB immediately revoked the November 2012 Permit. The majority states that the record shows that alternatives other than revocation were available, and that, despite

[34] Award, ¶ 141.

[35] Award, ¶¶ 103 *et seq*.

those alternatives, SEGOB "…chose the one course that would place the Claimants' business in great jeopardy."[36]

47. The majority also contests that although in its submission to the Enforcement Court in December 2013 SEGOB referred to the lack of clarity regarding the scope of the Amparo Judge's August 2013 decision, it still chose to pursue a course of action that would ultimately be harmful to the Claimants.[37] For the majority, with other alternatives available, "…it is undisputed that SEGOB could have simply sought a clarification from the Amparo Judge."[38] And it adds: "Presented with the alternative of jeopardising a going concern that had been trading for several years, it is exceedingly difficult to comprehend why SEGOB chose not to pursue that prudent, zero-risk option."[39] The majority goes on to point out that "[h]aving reviewed the record evidence in this regard, the Tribunal is persuaded that SEGOB, after the Amparo Judge declared it in breach of the Amparo Judgment, had the ability to exercise this option of late compliance by reinstating the 2012 Permit."[40] [Emphasis added]

48. The majority insists on arguing that, rather than reinstate the 2012 permit, SEGOB decided to resort to the enforcement court to have such permit revoked. Accordingly, and in fertile ground for sheer speculation, the majority opines that "[h]ad SEGOB reinstated the 2012 Permit, the record shows that E-Mex would not have challenged that decision…."[41]

49. Likewise, such statement of the majority evinces a clear expression of a desire that lacks any legal basis. Put simply, the Award purports to replace the margin of discretion enjoyed by any government authority in the exercise of their functions as framed in the applicable rules themselves. Neither the Claimants nor the Tribunal are permitted to second-guess and infer the illegality of any government conduct.

50. In relation to SEGOB's refusal to grant a new permit as requested by *E-Games*, the majority held that if SEGOB had wanted to regularise the situation of the Claimants, it could have done so by granting a fresh permit to the Claimants. As already mentioned *supra*, the majority's statement attempts to suggest what, in the majority's view, should have been "a better option" by exercising a non-existent entitlement to propose a second-guess approach, even in breach of the requirements under applicable law.

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[36] Award, ¶ 104.
[37] Award, ¶ 105.b.
[38] Award, ¶ 106.
[39] Award, ¶ 106.
[40] Award, ¶ 110.
[41] Award, ¶ 111.

51. What is more, the Award seeks to establish as compulsory the courses of action that alternatively could have been taken by SEGOB. The Award admits, as already stated, that SEGOB chose to terminate the Claimants' business when it could have preserved it,[42] without even noting that the August 2013 Decision rendered by the Federal Court indubitably required SEGOB to comply promptly with what was decided in Amparo 1668/2011.

52. Similarly, the majority again attempts to impose its deliberate second-guess approach with respect to the acts and/or omissions that SEGOB should have taken or incurred throughout the proceeding concerning Amparo 1668/2011. According to the Award, "[a] second opportunity to preserve the Claimants' going concern presented itself to SEGOB […] [It] could have pursued late ("extemporaneous" in the relevant terminology) compliance with the Amparo Judgment by reinstating the 2012 Permit pursuant to Article 195 of the Amparo Law."[43]

53. Accordingly, I dissent from the majority's view that SEGOB, after the Amparo Judge found it had failed to comply with the Amparo decision, "… could have pursued late ("extemporaneous" in the relevant terminology) compliance with the Amparo Judgment by reinstating the 2012 Permit."[44] This conduct could be considered an option, but it is certainly not an obligation for SEGOB.

54. To sum up, the Award ignores that the "independent operator" and "independent permit holder" official letters were found to be non-subsistent by Mexican courts. Requiring SEGOB to act as an internal lobbyist for the Claimants is irrational. Neither the Claimants and even less the Tribunal can suggest as being more reasonable, and even compulsory, the actions sought to be imposed on SEGOB as desired by the Claimants.

55. In conclusion, I believe that para. 119 of the Award is a compilation of assertions based solely on the majority's subjective assessment or second-guess approach concerning the various alternatives available to SEGOB with respect to the Amparo proceeding filed by a third party. It follows from the applicable regulations that SEGOB was not required to implement any of those options. Further, it is gathered from an analysis of the different instances of the Amparo proceeding that SEGOB's conduct fell within the scope of legality as defined by both Mexican domestic law and international law. Indeed, this is acknowledged by the Majority's Award, which in finding the absence of a denial of justice, inexorably recognized the illegality of the permits granted by SEGOB in 2012.

[42] Award, ¶ 103.
[43] Award, ¶ 108.
[44] Award, ¶ 108.

IV. THE EFFECTS OF THE DECISION ON THE ABSENCE OF A DENIAL OF JUSTICE ON THE ALLEGED BREACH OF ARTICLE 1105.

56. I dissent from the assertion made in the Award[45] that, in the instant case, the absence of a denial of justice does not absolve the Respondent of international responsibility for SEGOB's conduct in breach of the FET standard.

57. Even though, in certain circumstances, it may be asserted that the absence of a denial of justice does not absolve the respondent of its international responsibility for its conduct in breach of fair and equitable treatment, this is not the case in this arbitration.

58. There is no question that an arbitral tribunal can and must hear claims on treaty breaches regarding a State's conduct that was not subject to judicial review. However, in the case at issue, court decisions support and confirm the non-subsistence of the 2009 and 2012 official letters, and, thus, SEGOB's procedural and substantive actions and omissions are framed within the realm of legality of Amparo proceedings.

59. The majority errs in finding that the Respondent, when relying upon the *Azinian* case, did not manage to prove that the Mexican courts forced SEGOB to terminate the Claimants' investments,[46] contending that: (i) if SEGOB had wanted to preserve the 2012 Permit, it could have done so seeking clarification of the Amparo decision; (ii) if SEGOB had wanted to reinstate the 2012 Permit after the Amparo Judge declared its revocation in breach of the Amparo decision, it could have done so before the Enforcement Court issued its first decision; and (iii) if SEGOB had wanted to grant *E-Games* a fresh permit, it could have done so.[47] [Emphasis added] As already explained in the foregoing chapter, the majority could not prove the existence of an obligation by SEGOB to act as the Claimants wanted. A nonexistent obligation cannot be breached.

60. In this context, it is at least surprising that the majority, in order to justify that the *Azinian* case does not apply to the instant case, states that, "…in one instance (the Amparo Judge's October 2013 decision declaring SEGOB non-compliance), SEGOB went directly against that decision […] Both before and after the Enforcement Court's decisions, SEGOB could have reasonably and lawfully chosen not to cause the demise of the Claimants' business…"[48] [Emphasis added]. It is evident that SEGOB, when exercising its powers to determine whether or not to challenge a judicial measure, is not breaching any rule of the legal system to which it is subject.

[45] Award, Item E., ¶¶ 137 *et seq*.
[46] Award, ¶ 139.
[47] Award, ¶ 139.a.
[48] Award, ¶ 139.b.

61. Firstly, I consider that the reading of the *Azinian* case in the Award is wrong. Within the reasoning of the *Azinian* case, there is no reference to a domestic or an international law rule whereby a denial of justice is subject to the nonexistence of alternative conducts, which, being compliant with law, should have been assumed by a State agency. Contrary to the majority's assertion, the *Azinian* tribunal held that:

> "[…] A governmental authority surely cannot be faulted for acting in a manner validated by its courts unless the courts themselves are disavowed at the international level. As the Mexican courts found that the Ayuntamiento's decision to nullify the Concession Contract was consistent with the Mexican law governing the validity of public service concessions, the question is whether the Mexican court decisions themselves breached Mexico's obligations under Chapter Eleven."[49]

62. By adjusting the text of paragraph 97 of *Azinian* to the circumstances of this case, it would be confirmed that:

> "[…] A governmental authority surely cannot be faulted for acting in a manner validated by its courts unless the courts themselves are disavowed at the international level. As the Mexican courts found that the [SEGOB's] ~~Ayuntamiento's~~ decision [*to terminate the Permits]* ~~to nullify the Concession Contract~~ was consistent with the Mexican law governing the validity of [activities regarding gambling and raffles] ~~public service concessions~~, the question is whether the Mexican court decisions themselves breached Mexico's obligations under Chapter Eleven."

63. It is worth recalling that the *Azinian* tribunal's decision was based on the conclusion stated in paragraph 99 of such award whereby:

> "The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA. *What must be shown is that the court decision itself constitutes a violation of the treaty.* Even if the Claimants were to convince this Arbitral Tribunal that the Mexican courts were wrong with respect to the invalidity of the Concession Contract, this would not *per se* be conclusive as to a violation of NAFTA. More is required; the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end."[50]

[49] *Azinian*, ¶ 97 (emphasis omitted).

[50] *Azinian,* ¶ 99.

64. It can be validly assumed that, as a matter of customary international law, international tribunals will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice.[51]

65. The interpretation of NAFTA State Parties of the existence or nonexistence of an alleged denial of justice becomes relevant in order to determine whether there was a breach of Article 1105. In this regard, the United States contended that, "[i]n this connection, it is well-established that international tribunals such as NAFTA Chapter Eleven tribunals are not empowered to be supranational courts of appeal on a court's application of domestic law. Thus, an investor's claim challenging judicial measures under Article 1105(1) is limited to a claim for denial of justice under the customary international law minimum standard of treatment. *Afortiori*, domestic courts performing their ordinary function in the application of domestic law as neutral arbiters of the legal rights of litigants before them are not subject to review by international tribunals absent a denial of justice under customary international law"[52]

66. Consequently, in the case at issue, the majority ignored the effects of the unconstitutionality of the 2012 Permit decided by the Mexican courts, which, in turn, were unanimously recognized by this Tribunal when deciding on the absence of a denial of justice in accordance with paragraphs 120 to 136 of this Award.

67. I also dissent from the majority's assertion in support of the inapplicability of paragraph 97 of the *Azinian* decision, by stating that, "[i]n the present case, the Enforcement Court disagreed with the Amparo Judge, not on the interpretation of a question of Mexican law, but on a discrete question of fact—i.e., whether or not the 2012 Permit was issued by SEGOB 'as a consequence of' the 2009 Permit."[53] [Emphasis added]

68. First, in the absence of a legal reasoning on the foregoing assertion, the majority' proposition is sheer speculation,[54] although it may be inferred that the majority seeks to find support in the submissions of the United States whereby "as a matter of customary international law,

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[51] "Indeed, as a matter of customary international law, international tribunals will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice" [Emphasis added]. Fourth Submission of the United States of America, ¶ 32, 13 June 2022.

[52] Fourth Submission of the United States of America, ¶ 33, 13 June 2022.

[53] Award, ¶ 140 b.

[54] The majority fails to support its assertion that "[i]n the present case, the Enforcement Court disagreed with the Amparo Judge, not on the interpretation of a question of Mexican Law, but on a discrete question of fact- ie., whether or not the 2012 Permit was issued by SEGOB 'as a consequence of the 2009 Permit'": Award, ¶ 140 b.

international tribunals will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice."[55]

69. The terminology used in the relevant paragraphs of the submissions of the United States and Canada cited in the Award neither shows nor can provide any basis to infer that the decisions adopted by domestic courts, which, through the application and interpretation of domestic law, resolve a question of fact or a question of law, should be given special treatment. The majority cites no conventional or customary rule, whether under Mexican domestic law or international law, in support of such contention.

70. Moreover, the Award unsuccessfully attempts to create law instead of applying and/or interpreting the applicable law. Therefore, if the Award intended to justify the existence of such rule by interpreting arbitral case law, it should have identified the case law proving the existence of such (conventional or customary) rule including States' consent or showing the repeated practice and *opinio iuris* of the States involved.[56]

71. The indispensable requirement for the identification of a rule of customary international law is that both a general practice and acceptance of such practice as law be ascertained.[57] Thus, a formulation of a purported rule of customary international law based entirely on a supposed arbitral precedent and lacking an examination of State practice and *opinio juris* fails to establish a rule of customary international law as incorporated by Article 1105(1).[58] Once a rule of customary international law has been established, the claimant must then show that the respondent State has engaged in conduct that violates that rule.

72. Furthermore, a determination of a breach of the minimum standard of treatment must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders. Chapter Eleven tribunals do not have an open-ended mandate to second-guess government decision-making.[59] Therefore, on the understanding that every arbitral tribunal must apply, not infer —much less create,—law, I dissent from what was stated in the Award at ¶¶ 137 to 141.

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[55] Award, ¶ 140 a., footnote 164; likewise, Canada maintained that "[i]t is well settled that absent a denial of justice, judgments of national courts interpreting domestic law cannot be challenged as a violation of international law:" Award, ¶ 140, footnote 165.

[56] Fourth Submission of the United States of America, ¶ 22, 13 June 2022. In this regard, it should be borne in mind that customary international law stems from States' general and consistent practice followed as compulsory: State practice and the existence of an *opinio iuris* are the fundamental elements for international custom to arise. The citations in this partial dissent to the submissions of NAFTA Non-Disputing Parties do not create law, but confirm its compulsory nature for the disputing Parties.

[57] Fourth Submission of the United States of America, ¶ 23, 13 June 2022.

[58] Fourth Submission of the United States of America, ¶ 26, 13 June 2022.

[59] Fourth Submission of the United States of America, ¶ 28, 13 June 2022.

73. But even if the majority's decision were viable, it runs counter to the decision rendered by the Seventh District Court,[60] which certainly shows that the judge grounded its determination to extend the scope of the 2009 Permit to all resolutions and orders that were issued as a consequence of such permit, in strict interpretation of and compliance with Mexican law.

74. Thus, the Award errs when assuming that the Enforcement Court disagreed with the Amparo Judge, not on the interpretation of a question of Mexican law, but on a "discrete question of fact." In this regard, it is noteworthy that, from a plain reading of the Seventh Court's decision, spanning 117 pages, the Court makes a comprehensive interpretation of all the regulations related to the Permits granted by SEGOB from 2005 onwards to eventually conclude that official letter DGAJS/SCEV/1426/2012 "[…] derives and is fully concatenated with the DGAJS/SCEV/0260/2009-BIS […] resolution."[61] It thus clearly follows that the Court referred to the fact that the petitioner had alleged and proved that its claim regarding the non-subsistence of the 2009 official letter was in conformity with Mexican law, and therefore extended to all its legal effects.

75. The Seventh Court upheld SEGOB's resolution when requiring the application of the general principle of law that the accessory follows the fate of the principal (*accessorium principale sequitur*). Through the agreement of July nineteen of two thousand thirteen resolution DGAJS/SCV/260/2009-BIS was left without effect, and also each one of the acts issued subsequently and as a consequence of the acts described in the aforementioned letter. It is for this reason that this administrative authority, in order to fully comply with the final judgment authorized the thirty first January of two thousand thirteen, from the judgment of Amparo 1668/2011, after a search of the records of this administrative unit, it is considered pertinent to leave unsubstantiated the permits granted as a consequence thereof.[62]

76. Similarly, the Court held that:

> "In the wording itself, the approach taken […] is rejected […], since the judgment made it is clear that the character of an independent permit holder by acquired rights was not applicable, in addition to the DGAJS/SCVEF/P-06/2005-BIS permit, it is clearly a consequence of the act claimed, whose declaration of unconstitutionality deprives of effectiveness every potential

[60] *Séptimo Tribunal Colegiado en materia Administrativa del Primer Circuito*, Exhibit C-290, *Incidente de Inejecución* No. 82/2013 dated 19 February 2014.

[61] Exhibit C-290, p. 100.

[62] Exhibit C-290, pp. 103 to 106.

effects and constitutes legal truth (res judicata) that cannot be disturbed, under risk of transgressing its strength and immutability."[63] [Emphasis added]

77. The Seventh Court finally ruled that, in consideration of the analysis of the applicable regulations and in accordance with Articles 192, 193, 195 and 196 of the Amparo Law, the proceeding of non-enforcement of judgment proposed by the Sixteenth District Judge in Administrative Matters in indirect Amparo 1668/2011, brought by E-Mex was UNFOUNDED.[64]

78. The Seventh Court returned the file to the District Judge to provide the conducive.[65] In compliance with the Seventh Court's decision, the Sixteenth Judge held on 10 March 2014 that "[b]ased on the foregoing, it is considered that compliance with the final judgement is fulfilled, therefore, pursuant to Articles 77, sections I, 192 and 214 of the Amparo Law, THE JUDGMENT HAS BEEN COMPLIED WITH."[66]

79. The Seventh Court did not merely determine the existence of a fact as the majority attempts to assert, but rather, as evidenced by a reading of the whereas clauses in the Seventh Court's decision, its decision was based on strict application of Mexican law.

V. SEGOB'S LIABILITY FOR GRANTING THE 2009 AND 2012 PERMITS IN BREACH OF APPLICABLE LAW.

80. In my view, it follows from the record the possibility for the Claimants to allege that SEGOB is liable for granting an independent Operator permit in 2009 (Official Letter DGAJSSCEV/02600) and then for granting permit holder status on 15 November 2012 (Official Letter DGJS/SCEV/1426/2012) to *E-Games*, in breach of applicable law.

81. The fact that such permits were ultimately declared non-subsistent by the courts of the Respondent through Amparo 1668/2011 confirms that the mere issuance thereof amounts to illegal conduct by SEGOB, attributable to the Respondent.

82. The granting of the permits in violation of applicable law raises the question of whether the beneficiaries, namely, the Claimants, knew or should have known about the irregularities

[63] Exhibit C-290, p. 99. The Court found that "[i]n such a way, the collegiate court considers that the DGAJS/SCEV/0827/2012 resolution was based on the declared unconstitutional (DGAJS/SCEV/0260/2009-BIS, of May 27 two thousand nine), and on the basis of it, the various DGAJS/SCEV/1426/2012, of November sixteen two thousand twelve, was issued and permit DGAJS/SCVEF/P-06/2005-BIS was granted to operate seven remote betting centers and seven raffles rooms, derives from a procedural sequel, that is, from acts concatenated together involving the application of the resolution DGAJS/SCEV/0260/2009-BIS, of May twenty-seven of two thousand nine, declared unconstitutional in the judgment to be completed." Award; Exhibit C-290, p. 93.

[64] Exhibit C-290, p. 111-112.

[65] Exhibit C-290, p. 112.

[66] Exhibit C-291, p. 3.

affecting them. The inconsistencies in the whereas clauses of the November 2012 Permit Holder BIS official letter could not be ignored or disregarded both by SEGOB and *E-Games*.

83. The Claimants failed to show or even justify the existence of any assessment and analysis of applicable law allowing them to avoid liability for their failure. However, the Claimants' purported liability for failure to exercise due diligence does not invalidate or release the Respondent from liability under the NAFTA. Such alleged failure could somehow be considered as a mitigating factor in the compensation for damages caused by the grant of flawed permits by the Respondent.

84. As gathered from the decisions regarding Amparo 1668/2011, and as demonstrated through the analysis of the applicable law that was in force at the time such permits were issued (Federal Law Regarding Gambling and Raffles and its Regulations), it was established that both the Operator BIS (Independent Operator) official letter of 27 May 2009 and the Permit Holder official letter of 15 August 2012, as well as the Permit Holder BIS (Independent Permit Holder) official letter of 15 November 2012, were declared invalid (non-subsistent) by Mexican courts for being contrary to law.

85. It was also shown in the record that only two legal concepts are envisaged in the LFJS and its Regulations for any individual or company to carry out, upon prior authorization, gambling and raffles activities in the Mexican territory. These are: i) Operator (Article 30) and ii) Permit Holder (Article 3, Section XVI). In addition, within Mexico's federal regulatory context, the laws on tax and prevention of money laundering only recognize, within the framework of gambling and raffles, the notions of Operator and Permit Holder.

86. Furthermore, SEGOB had no powers to make laws and, therefore, had no authority at all to grant rights beyond those the law expressly authorized it to apply.

87. The status of independent operator and later that of independent permit holder were not granted based on the Federal Law Regarding Gambling and Raffles and, therefore, they are in breach of the applicable law by which SEGOB was bound. This was what the Mexican courts held when deciding the effects of an Amparo action brought by a particular aggrieved company against another company. This was also confirmed by this Tribunal when determining the absence of a denial of justice, thus acknowledging the illegality of the Permits as breaching the legal rules in force.

88. SEGOB's violation of the LFJS when granting the status of independent Operator in 2009 and later that of independent Permit Holder to *E-Games* is sufficient to allege a breach of Article 1005(1) of the NAFTA. However, in the present case, the Claimants have ignored this legal

situation by wrongly and baselessly making a one-sided interpretation of the facts, in disregard of both the whereas clauses and the decision in Amparo 1668/2011.

89. The majority systematically ignores that the independent permit granted to *E-Games* by SEGOB in November 2012 was invalid, as ultimately established by the courts when declaring its non-subsistence. SEGOB's liability would arise from the grant of such permit in breach of applicable law. The Claimants do not claim for such breach but wrongly and baselessly assume that such permit was and still is valid. The consequences and effects of the 2012 permit non-subsistence cannot be rectified on the basis of a second-guess approach imposing alternative options that, according with the Claimants' subjective interests, SEGOB should have inextricably chosen.

90. Therefore, and in the absence of allegations or claims by the Claimants regarding the violation of applicable law for the granting of the Permits, this Tribunal must refrain from ruling on the potential consequences of SEGOB's violation with respect to both domestic and international laws in force at the time the referred 2009 and 2012 Permits were issued. In conclusion, the Tribunal must refrain from hearing and addressing issues not before it: Otherwise, there would be an abuse of authority by the Tribunal in purporting to decide *ultra petita*.

Based on the foregoing considerations, it is my opinion that the Tribunal should:

a) Declare that the treatment accorded by SEGOB to the Claimants' investments did not breach its obligations under Article 1105 of the Treaty;

b) Reject all the amounts claimed by the Claimants;

c) Order the Parties to bear the costs of the proceeding in equal shares and order that each Party bear its own costs and fees as incurred thereby.

Prof. Raúl Emilio Vinuesa
Arbitrator
Date:
JUN 14 2024