BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

ADDITIONAL FACILITY

BETWEEN:

Gordon G. Burr; Erin J. Burr; John Conley; Neil Ayervais; Deana Anthone; Douglas Black; Howard Burns; Mark Burr; David Figueiredo; Louis Fohn; Deborah Lombardi; P. Scott Lowery; Thomas Malley; Ralph Pittman; Daniel Rudden; Marjorie "Peg" Rudden; Robert E. Sawdon; Randall Taylor; James H. Watson, Jr.; B-Mex, LLC; B-Mex II, LLC; Oaxaca Investments, LLC; Palmas South, LLC; B-Cabo, LLC; Colorado Cancun, LLC; Santa Fe Mexico Investments, LLC; Caddis Capital, LLC; Diamond Financial Group, Inc.; Family Vacation Spending, LLC; Financial Visions, Inc.; J. Johnson Consulting, LLC; J. Paul Consulting; Las KDL, LLC; Mathis Family Partners, Ltd.; Palmas Holdings, Inc.; Trude Fund II, LLC; Trude Fund III, LLC; Victory Fund, LLC

Claimants

and

United Mexican States

Respondent

MEMORIAL ON THE MERITS

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21 April 2020

QUINN EMANUEL URQUHART & SULLIVAN LLP
1300 I STREET, N.W., 9TH FLOOR, WASHINGTON, D.C. 20005

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I. INTRODUCTION

1. On April 24, 2014, croupiers dealt, musicians sang, customers played, waiters served, and machines rang, a daily scene in the five casinos that Claimants owned and operated across the United Mexican States ("**Mexico**" or "**Respondent**"). Unbeknownst to the hundreds of Mexicans who played and worked in those casinos and to the U.S. investors that developed, built and operated them, a handful of bureaucrats empowered by officials at the highest levels of the Mexican government, escorted by dozens of police cars, and flanked by dozens and dozens of police clad in tactical attire and carrying long weapons assembled outside and prepared to execute a highly coordinated military-style operation in each casino. Despite appearances, however, this overwhelming show of force was not deployed to capture a dangerous fugitive, respond to a violent robbery or rescue kidnapping victims, but to illegaly close each of Claimants' casinos, which Claimants had been operating—legally and successfully—for 9 years pursuant to a valid permit.

2. Before that fateful day, Claimants' casinos were the most well-organized and profitable in Mexico. They were the envy of the entire gaming industry and made many powerful enemies at the highest levels of the Mexican government and business world due to their success. Within days of the change in political parties after the start of President Peña Nieto's government, the new administration took aim at Claimants' investment and began dismantling it. Mexico's systematic destruction of Claimants' investment culminated with its illegal revocation of Claimants' gaming permit and the permanent closure of their casinos. Mistaking Claimants for political allies of the prior administration and targeting them for having initially operated legally and with the approval of the Mexican government under the license of a foe of the governing Institutional Revolutionary Party ("**PRI**" by its Spanish acronym) and an ally of the ousted National Action Party ("**PAN**" by its Spanish acronym**)**, because President Peña Nieto had promised to out Claimants as political payback for the loyalty

of the family who owned Claimants' competitor—Grupo Caliente, and because Claimants were publicly trying to root out corruption in the gaming industry, President Peña Nieto's administration decided to run Claimants out of the country—and it did, completely destroying their investment in the process.

3. Mexico—in this paradigmatic case of unfair and discriminatory treatment, expropriation and denial of justice—chose retaliation, favoritism and corruption over its international obligations. It retaliated against companies and individuals it thought to be associated with the governing party's political enemies, favored domestic gaming companies more closely aligned with its political interests and coffers, and punished Claimants for refusing to participate in the PRI's quest to continue and grow the rampant corruption in the Mexican gaming industry. With the aim of advancing these illegal objectives, Mexico destroyed Claimants' thriving and growing gaming business and deprived Claimants of the fruits of nine years of hard work, substantial investments in Mexico, and what would have been a very fruitful 25-year gaming license that undoubtedly would have been renewed for at least one additional 15-year term.

4. Claimants' investment in the Mexican gaming industry began in 2005 when Claimants started to make substantial investments in the construction, development and operation of what eventually came to be five (5) dual-function gaming facilities in Mexico, each with remote gambling centers and lottery number rooms.[1] Claimants also had the legally-secured expectation of opening at least four (4) more gaming facilities (or two (2) dual-function gaming facilities).[2]

[1] Third Witness Statement of Gordon Burr ("Gordon Burr Statement"), **CWS-50**, ¶¶ 9, 10; Third Witness Statement of Erin Burr ("Erin Burr Statement"), **CWS-51**, ¶ 4.

[2] Claimants had a valid permit to operate fourteen gaming facilities (7 remote gambling centers and 7 lottery number rooms). Pursuant to the permit, Claimants opened 5 casinos in Mexico, all of which provided both remote gambling centers and lottery number rooms in each facility, thereby utilizing a total of 10 of the 14 gaming facilities permitted pursuant to their permit.

5. Claimants also had a substantial ownership interest in and control over the five (5) Mexican companies that were utilized to establish each of the dual-function casinos. The five initial casinos were located in the following Mexican cities: (1) Naucalpan, State of Mexico; (2) Villahermosa, State of Tabasco; (3) Puebla, State of Puebla; (4) Mexico City; and (5) Cuernavaca, State of Morelos (collectively the "**Casinos**," and individually, "**Casino**").[3] Each of the Casinos, and their assets, is owned by and through a Mexican corporate entity. Specifically:

- Juegos de Video y Entretenimiento de México, S. de R.L. de C.V. ("**JVE Mexico**") owns the Naucalpan Casino;
- Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. ("**JVE Sureste**") owns the Villahermosa Casino;
- Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V. ("**JVE Centro**") owns the Puebla Casino;
- Juegos y Videos de México, S de R.L. de C.V. ("**JyV Mexico**") owns the Cuernavaca Casino; and
- Juegos de Video y Entretenimiento del D.F., S de R.L de C.V. ("**JVE DF**") owns the Mexico City Casino.[4]

These five Mexican enterprises will be referred to as the ("**Juegos Companies**"). The Juegos Companies function as the asset holders in the casino business operation.

6. Additionally, certain of the Claimants established, had a majority interest in, and directly and indirectly controlled the operations of Exciting Games, S. de R.L. de C.V. ("**E-Games**"), which was organized to act as the operator and manager of the Claimants' investments in the Casinos.[5] The Juegos Companies and E-Games will collectively be referred to as the ("**Mexican Enterprises**").

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[3] Gordon Burr Statement, **CWS-50**, ¶ 10.

[4] *See* First Witness Statement of Gordon Burr, **CWS-1**, ¶ 13.

[5] First Witness Statement of Gordon Burr, **CWS-1**, ¶¶ 17–19; First Witness Statement of Erin Burr, **CWS-2**, ¶¶ 39–44.

7. Claimants also later formed B-Cabo, LLC to purse the opening of a gaming and hotel facility in Los Cabos ("**Cabo**"), Mexico, and Colorado Cancun, LLC to pursue the opening of a gaming and hotel facility in Cancun, Mexico.[6] They were substantially advanced in those projects, having made substantial investments, with the expectation to open them when Mexico precipitously canceled their gaming permit and later illegally closed their Casinos.

8. At all times since Claimants made their initial investments in Mexico, the Mexican Enterprises, including E-Games, operated their casino businesses in accordance with Mexican law and pursuant to valid authorizations and/or permits issued by the Government through its *Secretaría de Gobernación* ("**SEGOB**"), the Ministry of the Interior of the Government of Mexico and its *Juegos y Sorteos* ("**Games and Raffles**") Division.[7] Claimants' investments in Mexico generated substantial profits until Mexico adopted a series of arbitrary, discriminatory, and unlawful measures that destroyed Claimants' investments and deprived Claimants of the specific benefits they reasonably expected to receive from them.[8]

9. Following the defeat by the PRI of the ruling PAN, Mexico engaged in a systematic, politically-motivated campaign against Claimants and their investments, which culminated in the final taking and destruction of the highly profitable casino businesses they had worked over approximately nine years to build.[9] Mexico's various actions and omissions also destroyed Claimants' plans to finalize developing two gaming facilities and broader resort projects in Cabo and Cancun that were in development.[10]

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6 First Witness Statement of Erin Burr, **CWS-2**, ¶¶ 47–55; Gordon Burr Statement, **CWS-50**, ¶¶ 15, 66.

7 Gordon Burr Statement, **CWS-50**, ¶¶ 44, 54, 60, 101; Expert Report of Ezequiel González Matus, **CER-3**, ¶ Section III.A.

8 Gordon Burr Statement, **CWS-50**, ¶¶ 33, 123.

9 Gordon Burr Statement, **CWS-50**, ¶¶ 101, 104-105, 115, 131; Fourth Witness Statement of Julio Gutiérrez Morales ("Julio Gutiérrez Statement"), **CWS-52**, ¶ 40.

10 Gordon Burr Statement, **CWS-50**, ¶87.

10. Mexico's unlawful measures included, without limitation: (i) the gaming authority's arbitrary, discriminatory and improper invalidation of a 25-year Casino permit that had been granted to Claimants in November 2012 notwithstanding that it has allowed Producciones Móviles, S.A. de C.V. ("**Producciones Móviles**"), a Mexican casino company that obtained its casino permit under legally identical circumstances, to continue to operate its casinos; (ii) highly arbitrary and discriminatory administrative and judicial proceedings that resulted in the invalidation of Claimants' Casino permit; (iii) the unlawful and permanent closure of all of Claimants' Casinos in April 2014 notwithstanding that the closure was contrary to and not authorized by Mexican law and in violation of a judicial order prohibiting SEGOB from taking any actions to close the Casinos; (iv) the temporary, illegal closure of the Mexico City Casino on June 19, 2013; (v) the implementation of unlawful, discriminatory and highly retaliatory tax measures aimed to harass Claimants and extract illegally profits to which they are entitled; (vi) a retaliatory and illegal criminal investigation and charges against E-Games; (vii) the subsequent illegal intervention into Claimants' efforts to ameliorate the impact of Mexico's measures by attempting to sell and/or transfer certain of their Casino assets to third parties; and, (viii) the illegal reopening of the Casinos so that Claimants' competitors could operate some of them while at the same time unlawfully returning the Casino locales to third parties without notice to Claimants, resulting in the pilfering of Claimants' remaining assets.

II. THE PARTIES

A. The Claimants

11. There are 38 Claimants as follows: Gordon G. Burr, Erin J. Burr, John Conley, Neil Ayervais, Deana Anthone, Douglas Black, Howard Burns, Mark Burr, David Figueiredo, Louis Fohn, Deborah Lombardi, P. Scott Lowery, Thomas Malley, Ralph Pittman, Daniel Rudden, Marjorie "Peg" Rudden, Robert E. Sawdon, Randall Taylor, James H. Watson, Jr., B-Mex, LLC, B-Mex II, LLC, Oaxaca Investments, LLC, Palmas South, LLC, B-Cabo, LLC,

Colorado Cancun, LLC, Santa Fe Mexico Investments, LLC, Caddis Capital, LLC, Diamond Financial Group, Inc., LLC, Family Vacation Spending, LLC, Financial Visions, Inc., J. Johnson Consulting, LLC, J. Paul Consulting, Las KDL, LLC, Mathis Family Partners, Ltd., Palmas Holdings, Inc., Trude Fund II, LLC, Trude Fund III, LLC, and Victory Fund, LLC. Messrs. and Ms. Burr, Mr. Conley, Mr. Ayervais, Ms. Anthone, Mr. Black, Mr. Burns, Mr. Figueiredo, Mr. Fohn, Ms. Lombardi, Mr. Lowery, Mr. Malley, Mr. Pittman, Mr. and Ms. Rudden, Mr. Sawdon, Mr. Taylor, and Mr. Watson are nationals of the United States of America.[11] B-Mex, LLC, B-Mex II, LLC, Oaxaca Investments, LLC, Palmas South, LLC, B-Cabo, LLC, Colorado Cancun, LLC, and Santa Fe Mexico Investments, LLC are all companies organized and incorporated under the laws of the state of Colorado, United States of America.[12] Caddis Capital, LLC, Diamond Financial Group, Inc., Family Vacation Spending, LLC, Financial Visions, Inc., J. Johnson Consulting, LLC, J. Paul Consulting, Las KDL, LLC, Mathis Family Partners, Ltd., Palmas Holdings, Inc., Trude Fund II, LLC, Trude Fund III, LLC, and Victory Fund, LLC are all corporate entities organized and incorporated under the laws of the state of Colorado, United States of America.[13]

12. Claimants are considered investors of a Party, the United States of America, for purposes of Articles 1139 of the NAFTA and have made investments in the Mexican Enterprises, all of which they own and control, directly or indirectly.

B. The Respondent

13. The Respondent is Mexico. Claimants' claims arise principally out of the conduct of SEGOB and its Games and Raffles Division, the body which is responsible for regulating the gaming sector in Mexico. They also arise out of the conduct of the Mexican

[11] *See* Claimants' U.S. Passports, **C-1**.

[12] *See* Articles of Organization, **C-2**.

[13] *See* Articles of Organization, **C-2**.

courts, including, but not limited to, the Mexican Supreme Court, the Seventh Collegiate Tribunal on Administrative Matters in the First District and the Sixteenth District Judge on Administrative Matters for the Federal District. Under both the NAFTA and general principles of international law, the actions of Mexico's governmental agencies and its Federal court system are attributable to Mexico.

III. OVERVIEW OF SUBMISSION

A. Overview of this Memorial

14. The remainder of this Memorial is Organized as follows:

Section IV provides the factual background as relevant to Mexico's breaches of the NAFTA;

Section V lays out Claimants' legal arguments demonstrating Mexico's breaches of the NAFTA including the unlawful expropriation of Claimants' investments (Article 1110); the failure to accord Claimants fair and equitable treatment and to refrain from adopting unreasonable, arbitrary or discriminatory measures (Article 1105); the denial of justice to Claimants in judicial and administrative proceedings (Article 1105); and the failure to accord Claimants national treatment (Article 1102) and most favored nation treatment (Article 1103);

Section VI lays out Claimants' damages; and

Section VII sets out Claimants' request for relief.

15. Accompanying this Memorial are the statements from the following witnesses:

Gordon G. Burr (**CWS-50**);

Erin J. Burr (**CWS-51**);

Julio Gutiérrez Morales (**CWS-52**);

José Ramón Moreno (**CWS-53**);

Patricio Gerardo Chávez Nuño (**CWS-54**);

Héctor Ruiz (**CWS-55**);

Alfredo Galván Meneses (**CWS-56**);

Avi Yanus (**CWS-57**);

Óscar Alejandro Vargas Ramírez (**CWS-58**);

16. Claimants also submit with this Memorial the reports from the following experts:

Omar Guerrero (**CER-2**);

Ezequiel González Matus (**CER-3**);

Berkeley Research Group (**CER-4**);

17. The Memorial also is accompanied and supported by exhibits numbered consecutively from Exhibit **C-235 to** Exhibit **C-376** and legal authorities numbered consecutively from **CL-72** to **CL-256**. Pursuant to Procedural Order No. 1, exhibits and legal authorities in English have not been translated into Spanish. This submission along with all other supporting documents that must be translated will be translated in accordance with Procedural Order No 1. Claimants reserve the right to provide certified translations if a dispute over a translation arises or the Tribunal requests it.

IV. FACTUAL BACKGROUND

A. Claimants' Decision to Invest in Mexico

18. Beginning in or around 2004, Claimant Mr. Gordon Burr ("**Mr. Burr**"), a successful businessman in the United States with experience on Wall Street and investment banking, was introduced to an investor and casino owner in Mexico, Mr. Lee Young ("**Mr. Young**"). Mr. Young had operated gaming facilities in the United States and had obtained a gaming authorization to operate gaming facilities with gaming slot machines requiring skill ("**skilled slots**") in Mexico under a validly-issued SEGOB Resolution issued to a Mexican company called Juegos de Entretenimiento y Video de Monterrey, S.A. de C.V. (the company

will be referred to as "**JEV Monterrey**" and the resolution will be referred to as "**Monterrey's Resolution**") that operated skilled slots throughout Mexico.[14] Monterrey's Resolution permitted the installation and operation in Mexico of certain kinds of skilled slots.[15] In addition, pursuant to Monterrey's Resolution, skill gaming activities were permitted because they were outside the scope of the Mexican gambling laws, which at the time prohibited other types of gambling.[16] Accordingly, these machines did not require a permit from SEGOB to operate legally.[17] SEGOB would inspect the machines beforehand to certify that they were skilled slots and therefore not subject to its jurisdiction.

19. Mr. Young suggested that Mr. Burr, a person with extensive business experience and acumen, put together a group of investors to develop, own, and operate multiple gaming facilities that ran skill machines in Mexico under Monterrey's Resolution.[18] By this time, Mr. Young and his investment group already owned and operated a highly successful skilled slots facility in Monterrey, Mexico called Bella Vista which opened in October 2002, and another called Las Palmas which was set to open on October 15, 2004.[19]

20. Beginning in August 2004, Mr. Burr made several exploratory visits to Mexico.[20] During these trips, he conducted due diligence on the gaming industry in Mexico and met with several of the key players in the Mexican gaming industry.[21] During one of those visits, Mr. Burr was introduced to future investor and Claimant Mr. John Conley ("**Mr. Conley**"), a fellow businessman with over 20 years of business experience in Mexico.[22] Mr.

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14 Gordon Burr Statement, **CWS-50**, ¶ 3.

15 Gordon Burr Statement, **CWS-50**, ¶ 3.

16 Gordon Burr Statement, **CWS-50**, ¶ 5.

17 Gordon Burr Statement, **CWS-50**, ¶ 5.

18 Gordon Burr Statement, **CWS-50**, ¶ 3.

19 Gordon Burr Statement, **CWS-50**, ¶ 3.

20 Gordon Burr Statement, **CWS-50**, ¶ 4.

21 Gordon Burr Statement, **CWS-50**, ¶¶4–5.

22 Gordon Burr Statement, **CWS-50**, ¶ 7.

Burr learned through his careful due diligence that gaming operators were making substantial profits from their operations in Mexico and that the industry was ready for expansion.[23] Mr. Burr also consulted with lawyers in Mexico to ensure that operations under Monterrey's Resolution were legal.[24] Based upon this due diligence as well as his business judgment, Mr. Burr decided that he would put together a group of investors and get involved more directly in the industry.[25]

21. Around that time, Mexico was undergoing a comprehensive modernization of its gaming industry. On September 17, 2004 Mexico enacted a new Regulation of the Games and Raffles Federal Law (the "**2004 Gaming Regulation**" or the "**Gaming Regulation**").[26] The 2004 Gaming Regulation was designed to provide more transparency and uniformity in the regulation of gaming in Mexico as well as to expand the permissible scope of gaming activities in Mexico.[27] The 2004 Gaming Regulation also helped to formalize the gaming industry in Mexico, and to adequately regulate participants and promote competition within the industry. Specifically, by increasing competition in the industry, the 2004 Gaming Regulation attempted to encourage foreign and national corporations to invest formally in the Mexican gaming industry and eliminate the historic gaming monopoly established in favor of certain, powerful allies to the PRI in Mexico.[28] The prior gaming law was from 1947 and prohibited most gaming activities, but the new 2004 Gaming Regulation changed Mexico's approach to oversight and regulation of gaming, opening up the country's industry to more

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23 Gordon Burr Statement, **CWS-50**, ¶¶ 4, 7.

24 Julio Gutiérrez Statement, **CWS-52**, ¶ 7.

25 Gordon Burr Statement, **CWS-50**, ¶¶ 7–8 .

26 2004 Gaming Regulation, **CL-72**; Gordon Burr Statement, **CWS-50**, ¶ 6; Erin Burr Statement, **CWS-51**, ¶ 8.

27 Gordon Burr Statement, **CWS-50**, ¶ 6; Erin Burr Statement, **CWS-51**, ¶ 8.

28 Gordon Burr Statement, **CWS-50**, ¶ 6; Erin Burr Statement, **CWS-51**, ¶ 8.

investors, including foreign investors, as well as to other forms of gaming that previously were not legal.[29]

22. Under the newly enacted 2004 Gaming Regulation, SEGOB initially issued broad permits to several Mexican companies including Televisa, Grupo Caliente, and Grupo Ángeles, amongst others, that allowed for more expansive gaming operations than had previously been authorized under Monterrey's Resolution.[30] Certain Mexican principals of JEV Monterrey also were behind one of the Mexican companies that received this new broader type of permit. This company—Entretenimiento de Mexico, S.A. de C.V. ("**E-Mex**")—received a permit from SEGOB for the operation of 100 casino facilities (50 remote gambling centers and 50 lottery number rooms) for a period of at least 25 years, until 2030.[31] After a lengthy challenge to the new gaming law, the Mexican Supreme Court confirmed the legality and constitutionality of the 2004 Gaming Regulation as well as the permits issued by SEGOB pursuant to it in January 2007.[32]

23. From January 2005, and after the enactment of the 2004 Gaming Regulation, Mr. Burr continued his due diligence visits to Mexico, visiting casino locations in several Mexican States and conducting interviews with casino operators and other key players in the gaming industry.[33] This due diligence confirmed Mr. Burr's initial impressions about the Mexican gaming industry's potential for substantial profit and expansion, and he decided to invest directly, along with other investors, in the development and operation of the Casinos.[34]

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29 Gordon Burr Statement, **CWS-50**, ¶ 6; Erin Burr Statement, **CWS-51**, ¶ 8.

30 Julio Gutiérrez Statement, **CWS-52**, ¶ 12; Gordon Burr Statement, **CWS-50**, ¶¶ 6, 36.

31 E-Mex Permit No. DGAJS/SCEVF/P-06/2005 (May 25, 2005), **C-235**; Gordon Burr Statement, **CWS-50**, 36, Erin Burr Statement, **CWS-51**, ¶ 41; Julio Gutiérrez Statement, **CWS-52**, ¶ 14.

32 Julio Gutiérrez Statement, **CWS-52**, ¶ 103.

33 Gordon Burr Statement, **CWS-50**, ¶¶ 4, 7.

34 Gordon Burr Statement, **CWS-50**, ¶¶ 4, 7-8 .

24. As a key component of his due diligence and investment decision, Mr. Burr ensured himself that the Mexican casino business and facilities that he was contemplating investing in within Mexico were legal, both from a U.S. as well as a Mexican law perspective, including by obtaining opinions from various legal consultants and speaking with Mexican gaming officials.[35] He also ensured himself and prospective investors that they and the vehicles through which they invested would be entitled to protection of their investments under the NAFTA.[36] Once he confirmed that the prospects of investing in the gaming industry in Mexico were financially and legally sound, and that the investments would be protected under the NAFTA, Mr. Burr set out to recruit fellow investors for the development and operation of multiple casinos in Mexico.[37]

25. From May 2005 and well into the beginning of 2006, Mr. Burr and his daughter, Claimant Ms. Erin Burr ("**Ms. Burr**"), through counsel and with the involvement of accounting and other professionals and individuals, carried out all the necessary steps to incorporate B-Mex, B-Mex II, and Las Palmas South[38] as U.S. LLCs (collectively, the "**B-Mex Companies**") in the United States as well as the Mexican Enterprises in Mexico.[39] Once the B-Mex Companies and the Mexican Enterprises were duly incorporated and operational, the B-Mex Companies were able to secure approximately US$ 42.5 million in funds, of which approximately US$ 35 million were invested by US investors in the Mexican Enterprises and the Casinos.[40]

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35 Gordon Burr Statement, **CWS-50**, ¶ 7; Julio Gutiérrez Statement, **CWS-52**, ¶ 7.

36 Gordon Burr Statement, **CWS-50**, ¶ 7.

37 *See* Las Palmas Investment Opportunity (May 04, 2005), **C- 5**.

38 Originally named B-Mex III, LLC, but subsequently renamed Las Palmas South, LLC.

39 Gordon Burr Statement, **CWS-50**, ¶ 9-11; Erin Burr Statement, **CWS-51**, ¶¶ 3, 9-10; Julio Gutiérrez Statement, **CWS-52**, ¶ 4.

40 Gordon Burr Statement, **CWS-50**, ¶ 12; Erin Burr Statement, **CWS-51**, ¶ 11.

26. The B-Mex Companies were formed, in part, to create, capitalize and control the Mexican Enterprises. Once formed and capitalized, these companies transferred the funds they raised to the Mexican Enterprises for the construction and operation of the Casinos. The investments were used for various items that were necessary to establish the business, including: (i) leasing facilities; (ii) constructing the physical plant of the casino facilities and completely refurbishing the premises; (iii) purchasing the gaming machines that would be installed in the Casinos; (iv) purchasing ownership interests in the Mexican Enterprises to be used for their capital and operational needs; (v) paying JEV Monterrey a fee so that the Mexican Enterprises could operate their businesses under Monterrey's Resolution; (vi) retaining and paying legal and other advisors to assure the legality and most tax-effective formation and operation of the Mexican Enterprises; and (vii) investing in the authorizations and permits necessary for the operation of the Casinos, as well as additional permits for the development of new casino projects.[41]

27. Claimants collectively own majority ownership interests in, and directly and/or indirectly control the Mexican Enterprises.[42] The value of Claimants' ownership interest/investments in the Juegos Companies was tied to and partially dependent on the profitability of the Casinos. As such, Claimants stood to benefit from the capital gains generated by the successful operation of the Casinos. Moreover, Claimants, through E-Games, had a valid 25-year permit that provided them the legally secured expectation of operating the 5 dual-function Casinos and opening at least four more gaming facilities (2 remote gambling centers and 2 lottery room numbers) and operating them for the life of the permit with the possibility of extension.

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41 Gordon Burr Statement, **CWS-50**, ¶ 13.

42 Partial Award (Jul. 19, 2019), ¶¶ 232, 241.

28. Additionally, in carrying out their investments in the Casinos and casino business, certain of the Claimants (i) purchased personal property in Mexico related to the Casino operations; (ii) made investments in the form of loans to the Mexican Enterprises; (iii) invested in the provision of resources in the development and operation of the Casinos; (iv) invested considerable time and sweat equity in managing the casino project; and (v) executed contracts and other agreements to allow them to operate the Casinos for which they gave valuable consideration. For example, Claimants entered into different types of agreements, including, but not limited to, joint-venture agreements, concession agreements, machine lease agreements, software licensing and services agreements, all of which entitled them to share in the income or profits of the Mexican Enterprises and the Casinos. Certain of the Claimants also made investments, including, but not limited to, loans to develop a casino and hotel project in Cabo (the "**Cabo Project**"), including through the formation of B-Cabo, LLC and investment of funds into the Cabo Project through that entity, and formed Colorado Cancun, LLC for purposes of exploring the development of a casino and hotel venture in Cancun (the "**Cancun Project**").

29. Claimants also made additional capital investments in the Mexican Enterprises and the Casinos to improve the Casino facilities and expand the scope of their operations. These capital investments were used in remodeling, enhancing and expanding the Casino facilities, and updating and purchasing new gaming machines, as well as the development of new opportunities, including the online gaming business and new gaming and hospitality facilities in Cabo and Cancun, i.e., the Cabo and Cancun Projects.[43] By way of example, Claimants constructed new rooms/areas for gaming activities; enhanced/constructed stages for live music and entertainment; enhanced/purchased/constructed buffet-style restaurants and

[43] Gordon Burr Statement, **CWS-50**, ¶¶ 31, 66-69, 91.

other concession (food/beverage) areas; and built exclusive VIP and high stakes areas in the Casinos.[44]

30. Overall, Claimants' made various types of investments encompassed within the definition of "investments" in Article 1139 of the NAFTA, including, without limitation, investments in:

a) an enterprise;

b) an equity security of an enterprise;

c) a loan to an enterprise;

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

e) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan defined in Article 1139 of the NAFTA;

f) real estate or other property, tangible and intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

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

B. The Casinos – Initial Operations and Growth

31. Mexican law allows valid permit holders to transfer the management and operation of casinos under their permits to other entities interested in carrying out casino

[44] Gordon Burr Statement, **CWS-50**, ¶¶ 16, 31 .

operations in Mexico.[45] As mentioned previously, under the previous gaming law and while the new Gaming Regulation was being challenged in the Mexican courts, Claimants initially undertook to operate their Casinos pursuant to Monterrey's Resolution.[46]

32. Claimants conducted detailed and extensive due diligence before beginning their Casino operations under Monterrey's Resolution. In May 2005, Mr. Burr and his daughter Ms. Burr retained Mexican counsel, Mr. Julio Gutiérrez ("**Mr. Gutiérrez**") to oversee the formation of the B-Mex Companies as well as the Juegos Companies.[47] Mr. Burr also requested Mexican counsel to analyze Mexican law and oversee all the contractual documentation needed to operate the Casinos pursuant to Monterrey's Resolution.[48] To this end, Mr. Burr and Mexican counsel met in May 2005 with JEV Monterrey's principals, Messrs. Young and Rojas Cardona ("**Mr. Rojas Cardona**").[49] Following this meeting, Messrs. Young and Rojas Cardona provided Mr. and Ms. Burr with documentation regarding JEV Monterrey.[50]

33. Mr. Burr then retained two Mexican law firms to undertake extensive due diligence regarding all the documentation provided by Messrs. Young and Rojas Cardona on JEV Monterrey and to specifically assess whether JEV Monterrey was operating legally in Mexico.[51] These Mexican law firms also prepared the contracts through which the Juegos Companies would operate under Monterrey's Resolution.[52] Both Mexican law firms determined that JEV Monterrey's operations were legal and that Monterrey's Resolution was

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45 *See* Article 30 of the Federal Gambling and Lottery Law Regulations (Sep. 17, 2004) "The license holder shall request the Secretary for permission to exploit its permit jointly with an operator through a joint venture, service provider agreement, or any other type of agreement," **CL-72**.

46 Gordon Burr Statement, **CWS-50**, ¶34; Erin Burr Statement, **CWS-51**, ¶ 39.

47 Julio Gutiérrez Statement, **CWS-52**, ¶ 4.

48 Julio Gutiérrez Statement, **CWS-52**, ¶ 5.

49 Julio Gutiérrez Statement, **CWS-52**, ¶¶ 5-6.

50 Julio Gutiérrez Statement, **CWS-52**, ¶ 6.

51 Julio Gutiérrez Statement, **CWS-52**, ¶ 7.

52 Julio Gutiérrez Statement, **CWS-52**, ¶ 8.

a valid administrative instrument that allowed JEV Monterrey to operate certain skill gaming machines without SEGOB's further authorization.[53]

34. At this time, the 2004 Gaming Regulation was under review before the Mexican Supreme Court and it was uncertain whether the 2004 Gaming Regulation would remain valid or not.[54] Fully aware of this, Claimants decided that the best course of action was to partner with JEV Monterrey to operate the Casinos pursuant to and under Monterrey's Resolution.[55] Mexican counsel thus proceeded to prepare the joint venture agreements so that Claimants could operate casinos in Naucalpan, Villahermosa, Puebla, Cuernavaca, and Mexico City.[56] Accordingly, on June 13, 2005 and June 30, 2006, both later amended, the Juegos Companies entered into joint venture agreements with JEV Monterrey to operate seven casinos pursuant to and under the authorization that SEGOB had granted to JEV Monterrey.[57]

35. In 2005, B-Mex, LLC invested US$ 10,500,000 in connection with one of the Mexican Enterprises, JVE Mexico, for the construction, operation and other costs necessary to establish and launch operation of the Casino in Naucalpan.[58] Certain of the Claimants participated actively in the construction of this Casino which included routine discussions with the architects regarding the physical layout of the main hall, the entertainment areas and restaurants, and the layout of the exterior, including the main entrance.[59] SEGOB inspected Claimants' Naucalpan Casino before it opened and determined that the equipment in it was

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53 Julio Gutiérrez Statement, **CWS-52**, ¶ 8.

54 Julio Gutiérrez Statement, **CWS-52**, ¶ 9.

55 Julio Gutiérrez Statement, **CWS-52**, ¶ 10.

56 Julio Gutiérrez Statement, **CWS-52**, ¶ 11; Venture Agreements between JVE Monterrey and the Juegos Companies, **C-95-C-99**.

57 *See* Joint Venture Agreements between JVE Monterrey and the Juegos Companies, **C-95-C-99**.

58 Erin Burr Statement, **CWS-51**, ¶ 12; Gordon Burr Statement, **CWS-50**, ¶ 16; Julio Gutiérrez Statement, **CWS-52**, ¶ 11.

59 Gordon Burr Statement, **CWS-50**, ¶ 16 .

consistent with Monterrey's Resolution and thus that it could be operated legally.[60] Claimants were able to commence operations in the Naucalpan Casino in December 2005.

36. B-Mex II, LLC, Palmas South, LLC, and certain Claimants invested approximately US$ 24,056,000 in the other Mexican Enterprises for the construction, operation and others costs to establish and launch operation of the Casinos in Villahermosa, Puebla, Cuernavaca, and Mexico City, D.F.[61] Construction of these Casinos moved quickly in the wake of the successful construction and commencement of operations at Naucalpan. These Casinos commenced operations from mid-2006 to mid-2008.[62]

37. The selection process of the casino locations as well as the construction itself was painstakingly difficult and required considerable due diligence and work. Therefore, in 2005, Mr. Burr hired Mr. José Ramón Moreno ("**Mr. Moreno**"), to supervise the construction of the Casino in Naucalpan.[63] Mr. Moreno eventually oversaw the construction of the other four Casinos and would later become very involved in the Casinos' operations.[64]

38. With respect to the selection process for the Casino locations, Mr. Moreno explained that this was an essential aspect of the due diligence phase, because the selection of each Casino's location would play a critical role in the Juegos Companies' profitability and, ultimately, in Claimants' return on their investment.[65] As a result, Mr. Burr, Ms. Burr, Mr. Conley, and Mr. Moreno spent considerable time visiting numerous locations throughout

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60 Julio Gutiérrez Statement, **CWS-52**, ¶ 11.

61 Erin Burr Statement, **CWS-51**, ¶¶ 13, 15-16; Gordon Burr Statement, **CWS-50**, ¶¶ 17-20.

62 Gordon Burr Statement, **CWS-50**, ¶¶ 17-20 ; Erin Burr Statement, **CWS-51**, ¶¶ 12-16.

63 Second Witness Statement of José Ramón Moreno ("José Ramón Moreno Statement"), **CWS-53**, ¶ 4.

64 José Ramón Moreno Statement, **CWS-53**, ¶ 4.

65 José Ramón Moreno Statement, **CWS-53**, ¶ 5.

Mexico so as to better understand the socio-economic conditions of these cities and to the assess a casino's potential profitability therein.[66]

39. Mr. Moreno initially spent considerable time in Monterrey, because it was the most developed city in Mexico for gaming purposes.[67] During these visits, Mr. Moreno carefully studied different aspects of the casino business, such as: (i) how to establish a casino; (ii) what was needed in terms of operating a casino (for example how to determine the employee pool, security, catering services, entertainment, etc.); (iii) what made a casino profitable; and (iv) how to construct and operate a successful casino.[68] Once Mr. Burr, Ms. Burr, Mr. Conley, and Mr. Moreno agreed on a short list of possible casino locations, Claimants continued their due diligence by carrying out comprehensive socio-economic studies in the selected cities.[69] The studies assessed which part of the city was likely the most profitable for a casino operation, how already established casinos operated there, how the competition would react to a new casino, who would be the clientele, and whether there was room for a new casino to operate successfully there.[70]

40. Once Claimants' selected the specific cities where they would open their casinos, Mr. Moreno explained that Claimants undertook considerable efforts to select the perfect physical location for the casinos.[71] As part of these efforts, Claimants spoke to locals asking for recommendations, visited all neighborhoods and zones within the city, and visited

66 José Ramón Moreno Statement, **CWS-53**, ¶ 5.

67 José Ramón Moreno Statement, **CWS-53**, ¶ 6.

68 José Ramón Moreno Statement, **CWS-53**, ¶ 6.

69 José Ramón Moreno Statement, **CWS-53**, ¶ 7.

70 José Ramón Moreno Statement, **CWS-53**, ¶ 8.

71 José Ramón Moreno Statement, **CWS-53**, ¶ 9

countless locations and properties.[72] The results of these efforts led to the construction of five Casinos in Naucalpan, Villahermosa, Puebla, Cuernavaca, and Mexico City.

C. Casino Locations

41. The Naucalpan Casino was the first to open on December 22, 2005.[73] The Casino was located just off of the Anillo Periférico highway, a very busy highway that encircles Mexico City, and guests could access the Casino directly from the highway.[74] When it opened, it had nearly 700 gaming machines.[75] Initially, the gaming floor was approximately 25,00 square feet and the Casino could accommodate over 1,500 people at once.[76] This location also housed the corporate offices for the Casinos, a kitchen and food preparation area, two bars, and storage for records and equipment.[77] Shortly after opening, the Casino leased a larger parking area to accommodate valet parking for an additional 300 cars.[78] As this location remained extremely popular, parking was always in high demand. Before Mexico unlawfully closed the Casinos in 2014, Claimants were considering a two-story parking garage to better accommodate the customers' needs and had also secured additional offsite parking.[79]

42. The Casino in Villahermosa opened on July 14, 2006 and with the opening of the Casino, Claimants hoped to expand the existing entertainment options in the city.[80] Villahermosa is an important business center for the Mexican oil industry and the city had an

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72 José Ramón Moreno Statement, **CWS-53**, ¶ 4.

73 Images of Naucalpan Casino, **C-236**.

74 Gordon Burr Statement, **CWS-50**, ¶ 16; Erin Burr Statement, **CWS-51**, ¶ 12.

75 Gordon Burr Statement, **CWS-50**, ¶ 16; Erin Burr Statement, **CWS-51**, ¶ 12.

76 Gordon Burr Statement, **CWS-50**, ¶ 16; Erin Burr Statement, **CWS-51**, ¶ 12.

77 Gordon Burr Statement, **CWS-50**, ¶ 16; Erin Burr Statement, **CWS-51**, ¶ 12.

78 Gordon Burr Statement, **CWS-50**, ¶ 16; Erin Burr Statement, **CWS-51**, ¶ 12.

79 Gordon Burr Statement, **CWS-50**, ¶ 16; Erin Burr Statement, **CWS-51**, ¶ 12.

80 Images of Villahermosa Casino, **C-237**; Gordon Burr Statement, **CWS-50**, ¶ 17; Erin Burr Statement, **CWS-51**, ¶ 13.

unmet demand for entertainment and recreation options.[81] The Casino took over a portion of the city's entertainment center, and eventually tripled in size to take over nearly all of entertainment center.[82]

43. The Puebla Casino opened in August 2006 in a historic area of the city.[83] The Casino was initially located in a recently gentrified area of the city that never lived up to expectations.[84] In 2009, the Casino was relocated to a more densely populated area of the city.[85] This new location had roughly 200 machines and 6 tables, food, a bar, and a stage for live entertainment. In this location, profit margins improved significantly.[86] Claimants had also leased an adjacent space in order to expand this location, but had not had a chance to begin construction before the Casinos were closed in 2014.[87]

44. The Cuernavaca Casino opened on June 22, 2007.[88] The casino was located inside what had previously been a wedding and special events hall and it attracted full time and weekend residents.[89] Often called the "City of Eternal Spring", Cuernavaca is a getaway for the upper and middle class of Mexico City, many of whom maintain homes there.[90] The Casino was expanded in 2011 with nearly $2 million worth of new machines and tables to hold just over 350 machines, 6 electronic tables, food, bar, and live entertainment.[91]

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81 Gordon Burr Statement, **CWS-50**, ¶ 17; Erin Burr Statement, **CWS-51**, ¶ 13.

82 Gordon Burr Statement, **CWS-50**, ¶ 17; Erin Burr Statement, **CWS-51**, ¶ 13.

83 Images of Puebla Casino, **C-238**; Gordon Burr Statement, **CWS-50**, ¶ 18; Erin Burr Statement, **CWS-51**, ¶ 13.

84 Gordon Burr Statement, **CWS-50**, ¶ 18; Erin Burr Statement, **CWS-51**, ¶ 14.

85 Gordon Burr Statement, **CWS-50**, ¶ 18; Erin Burr Statement, **CWS-51**, ¶ 14.

86 Gordon Burr Statement, **CWS-50**, ¶ 18; Erin Burr Statement, **CWS-51**, ¶ 14.

87 Erin Burr Statement, **CWS-51**, ¶ 14.

88 Images of Cuernavaca Casino, **C-239**.

89 Gordon Burr Statement, **CWS-50**, ¶ 19; Erin Burr Statement, **CWS-51**, ¶ 15.

90 Gordon Burr Statement, **CWS-50**, ¶ 19; Erin Burr Statement, **CWS-51**, ¶ 15.

91 Gordon Burr Statement, **CWS-50**, ¶ 19; Erin Burr Statement, **CWS-51**, ¶ 15.

45. The Mexico City Casino opened in December 2007.[92] The Mexico City Casino was located in a stunning building with marble columns, a vaulted ceiling, and stained glass called the Ambrosilla building.[93] The building was very well known in the wealthy neighborhood of Mexico City where it was located, and as such, did not require much advertising or promotion when it first opened.[94] This location attracted a lot of high-end players and really took off with the introduction of table games.[95] Table games were especially popular at this location, which included a separate room inside the Casino to host poker tournaments.[96] Before the closure, the location had 267 machines, 6 electronic tables, 4 hybrid tables and 10 Texas Hold'em tables for poker, in addition to food, a bar and a stage for live entertainment.[97]

D. Key Casino Features

46. In accordance with Mexican law, the Casinos were cashless. In order to play in the Casinos, each customer needed to purchase a pre-loaded card.[98] The customer would load the card with money, which converted into a certain number of points, and the customer would then insert the card, which contained an electronic chip, into the machine to play games.[99] Using the cards, the Casinos could track the performance and spending of every customer. The cards also made operations more efficient, allowing customers to easily replace lost cards and cash out on their winnings.[100]

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92 Images of D.F. Casino, **C-240**.

93 Gordon Burr Statement, **CWS-50**, ¶ 20; Erin Burr Statement, **CWS-51**, ¶ 16.

94 Gordon Burr Statement, **CWS-50**, ¶ 20; Erin Burr Statement, **CWS-51**, ¶ 16.

95 Gordon Burr Statement, **CWS-50**, ¶ 20; Erin Burr Statement, **CWS-51**, ¶ 16.

96 Gordon Burr Statement, **CWS-50**, ¶ 20; Erin Burr Statement, **CWS-51**, ¶ 16.

97 Erin Burr Statement, **CWS-51**, ¶ 16.

98 Gordon Burr Statement, **CWS-50**, ¶ 21; Erin Burr Statement, **CWS-51**, ¶ 17.

99 Gordon Burr Statement, **CWS-50**, ¶ 21; Erin Burr Statement, **CWS-51**, ¶ 17.

100 Gordon Burr Statement, **CWS-50**, ¶ 21; Erin Burr Statement, **CWS-51**, ¶¶ 17-18.

47. Promotions were a key part of Claimants' business in all of the Casinos. Each of the five Casinos offered regular promotions.[101] Free play promotions, or offering customers additional points on their cards which allowed them additional play on the machines, were the most popular.[102] The Casinos also offered car giveaways, free trips, free food, and other promotions.[103] The Casinos would offer free play under various circumstances, including for bringing a friend to the Casino, if customers dressed up in a costume for Halloween, or if they wore an outfit supporting their favorite soccer team.[104] Sometimes, free play promotions were used for charitable causes. For instance, in 2007 after an awful flood in Villahermosa, the Casinos ran promotions where customers who brought water and food supplies were rewarded with free play for their contributions.[105]

48. Customers were drawn to the Casinos not just for the high level of play, but also for the experience in the Casinos as well as the hospitality. Each of the Casinos offered regular high-quality entertainment. Quality entertainment was important to Mr. Burr because it differentiated the Casinos from their competitors and provided atmosphere in the Casinos.[106] Mr. Burr felt that competitors' casinos did not have the same welcoming and friendly atmosphere.[107] Mr. Burr was inspired by trips he made to Las Vegas when he was a young man where visitors could see top artists in lounges just off the main casino floors.[108] In the Naucalpan Casino, for example, the entertainment includied well known singers and cover artists, Elvis impersonators, Michael Jackson impersonators, magicians, and mariachi bands

[101] Gordon Burr Statement, **CWS-50**, ¶ 23; Erin Burr Statement, **CWS-51**, ¶ 19.

[102] Gordon Burr Statement, **CWS-50**, ¶ 23; Erin Burr Statement, **CWS-51**, ¶ 19.

[103] Gordon Burr Statement, **CWS-50**, ¶ 23; Erin Burr Statement, **CWS-51**, ¶ 19.

[104] Gordon Burr Statement, **CWS-50**, ¶ 23; Erin Burr Statement, **CWS-51**, ¶ 19.

[105] Erin Burr Statement, **CWS-51**, ¶ 21.

[106] Gordon Burr Statement, **CWS-50**, ¶ 24; Erin Burr Statement, **CWS-51**, ¶ 22.

[107] Gordon Burr Statement, **CWS-50**, ¶¶ 24, 33; Erin Burr Statement, **CWS-51**, ¶ 22, 34.

[108] Erin Burr Statement, **CWS-51**, ¶ 24.

for 8-12 hours/day.[109] The other Casino locations also offered daily entertainment.[110] Mr. Burr knew that if he kept customers entertained and in the building, this would turn into profit.[111]

49. Each of the Casinos also offered high quality food. Offering good food inside the Casinos was also important to Mr. Burr.[112] Mr. Burr conducted extensive research on serving food inside the Casinos, including with experts in Las Vegas.[113] Those experts told Mr. Burr that it was important to offer high quality food, but not as a money maker in itself. Instead, the food was designed to keep customers entertained and in the Casino longer , which would turn into profits on the floor.[114] While the Casinos initially experimented with different food concepts, they eventually brought in an outside management company to manage the restaurants.[115] The Casinos eventually offered buffets, called Rolando's.[116] The idea for Rolando's was inspired by the Bellagio's buffet, which was ranked among the best buffets in Las Vegas for many years.[117]

50. The Casinos also looked for ways to improve the experience for different customers. Nearly all of the Casino locations also offered VIP and high stakes areas, designed and configured exclusively for the players who liked to place bigger bets.[118] In certain facilities, the Casinos also set up separate rooms for table games and poker.[119] VIP customers

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[109] Gordon Burr Statement, **CWS-50**, ¶ 24; Erin Burr Statement, **CWS-51**, ¶ 22, Images of Casino entertainment, **C-241**.

[110] Gordon Burr Statement, **CWS-50**, ¶ 24; Erin Burr Statement, **CWS-51**, ¶ 22.

[111] Gordon Burr Statement, **CWS-50**, ¶ 24; Erin Burr Statement, **CWS-51**, ¶ 22.

[112] Gordon Burr Statement, **CWS-50**, ¶ 25; Erin Burr Statement, **CWS-51**, ¶ 23.

[113] Gordon Burr Statement, **CWS-50**, ¶ 25; Erin Burr Statement, **CWS-51**, ¶ 23.

[114] Gordon Burr Statement, **CWS-50**, ¶ 25; Erin Burr Statement, **CWS-51**, ¶ 23.

[115] Gordon Burr Statement, **CWS-50**, ¶ 25; Erin Burr Statement, **CWS-51**, ¶ 23.

[116] Gordon Burr Statement, **CWS-50**, ¶ 25; Erin Burr Statement, **CWS-51**, ¶ 23; Images of Rolando's, **C-242**.

[117] Erin Burr Statement, **CWS-51**, ¶ 23.

[118] Gordon Burr Statement, **CWS-50**, ¶ 26; Erin Burr Statement, **CWS-51**, ¶ 24.

[119] Gordon Burr Statement, **CWS-50**, ¶ 26; Erin Burr Statement, **CWS-51**, ¶ 24.

and expert gamblers were given a black card that allowed them to enter the VIP area.[120] In order to become a VIP, customers had to achieve a monthly minimum spend in the Casino.[121] Each month, the management would look at the wager volume (or handle) of the top percentage of players by location to establish the thresholds that black card customers had to meet in order to retain their status.[122] The Casinos had various VIP customers who spent upwards of $10,000 on each visit and $100,000/month in the Casinos.[123] All of the Casinos also had security that would carefully monitor the floor, and would ensure the safety and security of all customers.

51. Mr. Burr, Ms. Burr, and management worked to diversify the floor with various games as well as machines made by a variety of manufacturers, optimizing the layout of each Casino to incorporate best practices, and configuring the machines to best suit the type of play for the various customer segments in each location. [124]

52. In 2010, the Mexican government made additional changes to the gaming industry, which allowed the top international machine manufacturers, most of which had not sold to Mexican operators given previous governmental restrictions, to enter the Mexican market for the first time. Shortly after the changes were implemented, Claimants, through the Casinos, began purchasing equipment from the top machine manufacturers in the world, including IGT, Bally, WMSs, Aristocrat, Shufflemaster, and Konami, among others.[125] Some of our customers' favorite games from these manufacturers included Miyoko, Raging Roosters, and the Brazilian Dancer.[126] The Casinos would also set the hold rate, or the payback rate on the machines. Mr. Burr preferred to keep the payout rate fairly high because this allowed

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120 Gordon Burr Statement, **CWS-50**, ¶ 26; Erin Burr Statement, **CWS-51**, ¶ 24.

121 Gordon Burr Statement, **CWS-50**, ¶ 26; Erin Burr Statement, **CWS-51**, ¶ 24.

122 Gordon Burr Statement, **CWS-50**, ¶ 26; Erin Burr Statement, **CWS-51**, ¶ 24.

123 Gordon Burr Statement, **CWS-50**, ¶ 26; Erin Burr Statement, **CWS-51**, ¶ 24.

124 Gordon Burr Statement, **CWS-50**, ¶ 27; Erin Burr Statement, **CWS-51**, ¶ 25.

125 Gordon Burr Statement, **CWS-50**, ¶ 27; Erin Burr Statement, **CWS-51**, ¶ 26.

126 Erin Burr Statement, **CWS-51**, ¶ 26.

customers to win more often, which kept customers engaged and wanting to play more.[127] On average, the Casinos maintained a hold rate of 93.5% across the locations.[128]

53. Mr. Burr and other management would closely monitor the performance of each Casino on a daily basis.[129] They would examine the gross win for each location each day, the total number of players in the Casino in a given day, prizes paid (which helped determine if a jackpot hit), as well as the amount of money bet on each machine (also called the handle).[130] A higher handle usually indicated more people were playing and for longer periods. A busy casino would add to the energy for all of the customers.[131] Gross win was also important because most of the Casino expenses were fixed.[132] Since staffing costs were generally fixed, the Casinos sought to break even on food, beverage and entertainment so that they could easily determine how profitable they were by looking at the daily gross win.[133] The number of active players helped the Casinos determine how well a promotion was working. If 70-80% of the machines were full at the same time on peak weekdays, management knew it was time to expand the location.[134] If a day with great handle and large crowds led to a lower gross win number than expected, management would look to see what prizes had been paid.[135] Mr. Burr would always look to see who hit the jackpot, whether they were a regular customer or someone without much history in the Casinos.[136] Mr. Burr and management would also review the

[127] Gordon Burr Statement, **CWS-50**, ¶ 27; Erin Burr Statement, **CWS-51**, ¶ 26.

[128] Gordon Burr Statement, **CWS-50**, ¶ 27; Erin Burr Statement, **CWS-51**, ¶ 26.

[129] Gordon Burr Statement, **CWS-50**, ¶ 28; Erin Burr Statement, **CWS-51**, ¶ 28.

[130] Gordon Burr Statement, **CWS-50**, ¶ 28; Erin Burr Statement, **CWS-51**, ¶ 28.

[131] Erin Burr Statement, **CWS-51**, ¶ 29.

[132] Gordon Burr Statement, **CWS-50**, ¶ 28; Erin Burr Statement, **CWS-51**, ¶ 29.

[133] Gordon Burr Statement, **CWS-50**, ¶ 28; Erin Burr Statement, **CWS-51**, ¶ 29.

[134] Erin Burr Statement, **CWS-51**, ¶ 29.

[135] Erin Burr Statement, **CWS-51**, ¶ 30.

[136] Erin Burr Statement, **CWS-51**, ¶ 30.

performance of the top VIP players.[137] This information allowed management to offer the VIPs special offers and promotions to build loyalty.[138]

54. In January 2009, Mexico changed its laws to allow table games, and shortly thereafter, the Casinos introduced table games.[139] The Casinos offered electronic tables area for blackjack and roulette.[140] All of the table games were electronic, meaning that they had no dealer. One advantage to electronic tables was that they could not be cheated and required fewer staffing needs.[141] The Casinos eventually purchased some hybrid and live tables as rules changed, but in general, the Casinos limited their use of live tables because management teams could more effectively manage electronic tables.[142] The only live tables were Texas Hold'em tables.[143] The Casinos also offered sportsbook, or betting on various sporting events. Sportsbook was generally popular with men, while slot machines were more popular with women. Mr. Burr noted that offering sportsbook encouraged couples to come to the Casino together. While the gaming machines were always the most profitable and consistent source of income, the tables and sports book attracted different types of players and expanded the Casinos' offerings so that couples and groups of people would stay longer.[144]

E. Casino Renovations

55. In 2010 through 2012, Claimants conducted major renovations to nearly all of the Casinos.[145] These renovations made the Casinos state of the art. The changes made in each

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137 Gordon Burr Statement, **CWS-50**, ¶ 26; Erin Burr Statement, **CWS-51**, ¶ 24.

138 Gordon Burr Statement, **CWS-50**, ¶¶ 26, 28; Erin Burr Statement, **CWS-51**, ¶ 24.

139 Gordon Burr Statement, **CWS-50**, ¶ 29; Erin Burr Statement, **CWS-51**, ¶ 24.

140 Images of table games, **C-243**.

141 Gordon Burr Statement, **CWS-50**, ¶ 29; Erin Burr Statement, **CWS-51**, ¶ 27.

142 Gordon Burr Statement, **CWS-50**, ¶ 29; Erin Burr Statement, **CWS-51**, ¶ 27.

143 Gordon Burr Statement, **CWS-50**, ¶ 29; Erin Burr Statement, **CWS-51**, ¶ 27.

144 Gordon Burr Statement, **CWS-50**, ¶¶ 29-30; Erin Burr Statement, **CWS-51**, ¶ 27.

145 José Ramón Moreno Statement, **CWS-53**, ¶ 10.

of the Casinos helped make the Casinos more efficient and durable.[146] For example, Claimants carried out extensive renovations in the following areas: (1) carpet and column replacement and remodeling; (2) improvements and replacement in lighting, decorations, and paint; (3) introduction of a new gaming equipment, including state of the art slot machines; (4) introduction of new restaurants, bars, and snack sections; (5) creation of smoke and smoke-free zones; and (6) introduction of new state of the art electrical equipment and software.[147]

56. In Villahermosa, Claimants took over the bowling alley next door to the Casino and tripled the size of the floor space by the end of 2012.[148] They also expanded the Casino to include nearly 400 machines, as well as an area for tables, a bar, full kitchen for a buffet restaurant, and a large stage capable of holding a 20-piece orchestra for live music performance.[149] Half of Villahermosa's gaming floor was closed down during the renovation.[150] Similarly, in Cuernavaca, they doubled the size of the Casino from 200 to 400 seats, adding nearly $2 million of new machines and new tables in March 2012.[151] As previously mentioned, they moved the Casino in Puebla to a new location in 2009 and had leased additional space for expansion.[152] In the Mexico City Casino, the tables area was expanded in 2011 and Claimants also constructed a live poker room for Texas Hold'em and tournaments.[153]

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146 Gordon Burr Statement, **CWS-50**, ¶ 32; Erin Burr Statement, **CWS-51**, ¶ 33.

147 José Ramón Moreno Statement, **CWS-53**, ¶ 10.

148 Gordon Burr Statement, **CWS-50**, ¶ 31; Erin Burr Statement, **CWS-51**, ¶ 32.

149 Gordon Burr Statement, **CWS-50**, ¶ 31; Erin Burr Statement, **CWS-51**, ¶ 32.

150 Erin Burr Statement, **CWS-51**, ¶ 32.

151 Images of remodeled locations, **C-244**.

152 Images of remodeled locations, **C-244**; Gordon Burr Statement, **CWS-50**, ¶ 31; Erin Burr Statement, **CWS-51**, ¶ 32.

153 Gordon Burr Statement, **CWS-50**, ¶ 18; Erin Burr Statement, **CWS-51**, ¶ 32.

57. Between 2010 and 2011, the Naucalpan Casino went through a complete renovation of the gaming floor.[154] Every aspect of the floor, from carpet to ceiling, was remodeled.[155] Claimants raised the ceiling; replaced the carpeting chairs and the stands the machines sat on with more durable products; encapsulated the columns in backlit stained glass; repainted the walls; and generally added color, light and excitement to the floor.[156] They also constructed a permanent stage for entertainment and upgraded their sound system.[157] They also updated the smoke ventilation extraction system, built new areas of the floor for tables and non-smoking customers, and expanded the restaurant area.[158] These changes also led to an increase in the Casino floor area of 40% to 50%.[159] The construction crew worked in sections so that the Casino did not need to close completely during the renovations.[160] These renovations made the Casinos even more modern and attractive to customers.

58. With these renovations, Mr. and Ms. Burr made deliberate changes that ensured that the gaming facilities would last for years to come.[161] For example, Mr. and Ms. Burr installed a more durable carpet, and improved cleaning of the facilities, which would extend the life of the renovations. Even after these renovations, Claimants had additional renovations and expansion plans in the pipeline, alongside the ongoing plan for renovations every 7 to 8 years.[162] For the Naucalpan location, Claimants were working on a 6,000 square meter expansion of the floor area. This expansion in the Naucalpan location's unoccupied lot would

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154 Gordon Burr Statement, **CWS-50**, ¶ 31; Erin Burr Statement, **CWS-51**, ¶ 32.

155 Gordon Burr Statement, **CWS-50**, ¶ 31; Erin Burr Statement, **CWS-51**, ¶ 32.

156 Gordon Burr Statement, **CWS-50**, ¶¶ 31-32; Erin Burr Statement, **CWS-51**, ¶ 31.

157 Erin Burr Statement, **CWS-51**, ¶ 31.

158 Gordon Burr Statement, **CWS-50**, ¶ 31; Erin Burr Statement, **CWS-51**, ¶ 31.

159 José Ramón Moreno Statement, **CWS-53**, ¶ 10.

160 Erin Burr Statement, **CWS-51**, ¶ 31.

161 Gordon Burr Statement, **CWS-50**, ¶ 32; Erin Burr Statement, **CWS-51**, ¶ 33.

162 José Ramón Moreno Statement, **CWS-53**, ¶ 13; Gordon Burr Statement, **CWS-50**, ¶ 32; Erin Burr Statement, **CWS-51**, ¶ 33.

have included space for additional gaming equipment, a theater, as well as multi-level parking garage. The Mexican government's illegal closure of the Casinos, however, prevented these expansion works from coming into fruition and ultimately put an end to Claimants' successful Casino operations in Mexico.[163]

59. While the facilities were modern and beautiful, the thing that made the Casinos most unique was their emphasis on customer experience and building relationships with customers. Mr. Burr was focused on creating a fun atmosphere and building customer loyalty through the experience inside the Casinos.[164] Mr. Burr was often on the floor of the Naucalpan Casino talking with customers, many of whom he knew by name.[165] Mr. Burr's brother, Claimant Mark Burr, also spent considerable time on the floor in Naucalpan with customers.[166] Mr. Burr expected that all of the employees who worked on the floor would also put the customer experience first.[167] Mr. Burr likened the experience inside the Casinos to the television show Cheers – the Casinos were a place where everybody knew your name.[168]

60. In light of the above, from the outset, most of Claimants' Casino operations were profitable and, had it not been for Mexico's illegal actions, they would have continued to be profitable and increased in profitability for the duration of their operations. The profitability of the Casinos is evidenced by their being the most profitable and fastest growing casino operations in Mexico almost since inception.

F. Expansion Projects in Cabo and Cancun

61. It had always been Mr. Burr's dream to expand the Casino operations in Mexico to resort communities. In resort communities, where tourists were the primary customers, the

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163 José Ramón Moreno Statement, **CWS-53**, ¶ 13.

164 Gordon Burr Statement, **CWS-50**, ¶ 33; Erin Burr Statement, **CWS-51**, ¶ 34.

165 Gordon Burr Statement, **CWS-50**, ¶ 33; Erin Burr Statement, **CWS-51**, ¶ 34.

166 Erin Burr Statement, **CWS-51**, ¶ 34; Gordon Burr Statement, **CWS-50**, ¶ 33.

167 Erin Burr Statement, **CWS-51**, ¶ 34; Gordon Burr Statement, **CWS-50**, ¶ 33.

168 Gordon Burr Statement, **CWS-50**, ¶ 64.

profit margins would be higher and the Casinos would attract international attention. Mr. Burr conducted extensive research into potential sites for these new locations.[169] Mr. Burr determined that the best opportunities to fully utilize the dual-function capabilities of the permit would be to establish casino and hotel ventures in resort communities in Mexico, such as Cabo and Cancun.[170]

62. As a first step, Mr. and Ms. Burr formed and capitalized B-Cabo, LLC and Colorado Cancun, LLC to develop these projects.[171] To this end, in June 2011, E-Games' Board directed and authorized Mr. Burr to "take all actions reasonable and necessary to establish the Cancun Company that will purchase a license under the Current Permit or New Permit to capitalize, construct and operate a casino in Cancun" and further resolved that Mr. Burr would serve as the "initial manager" of the Cancun project.[172]

63. Mr. and Ms. Burr performed market research, prepared financial models, drafted agreements, and met with prospective investors and partners to advance the expansion plans.[173] Mr. Burr was actively involved in all aspects of these projects, including selecting potential sites, managing efforts to obtain local permitting, and conducting negotiations with partners, landowners, and new investors.

64. Mr. and Ms. Burr made considerable progress and investment in the development of the two hotel-casino ventures in Cabo and Cancun. They dedicated significant time and effort preparing subscription agreements, performing due diligence, and negotiating with business partners. The potential partners believed that the hotel-casino projects would be extremely successful, given their deep knowledge of the relevant markets. Mr. and Ms. Burr

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169 Gordon Burr Statement, **CWS-50**, ¶ 64; Erin Burr Statement, **CWS-51**, ¶ 67.

170 Gordon Burr Statement, **CWS-50**, ¶ 66; Erin Burr Statement, **CWS-51**, ¶ 67.

171 Gordon Burr Statement, **CWS-50**, ¶ 66; Erin Burr Statement, **CWS-51**, ¶¶ 75, 77.

172 Consent to Action in Lieu of Organizational Meeting of the Directors of Exciting Games, S de R.L. de S.V. (June 7, 2011), **C-64**.

173 Gordon Burr Statement, **CWS-50**, ¶ 67; Erin Burr Statement, **CWS-51**, ¶ 78.

were in the process of finalizing terms with partners, including having a finalized agreement with the Cabo Project partners, so they could begin accepting capital when Mexico unlawfully revoked their Casino permit.

65. In addition to the significant time and effort put into the pursuit of the resort projects, Claimants invested an additional US$ 250,000 into the Cancun Project and US$ 600,000 into the Cabo Project. These investments are comprised of loans not fully repaid, option payments and related investments, capital expenditures for the purchase of permits and down payments on property. Specifically, with respect to the Cancun project, Colorado Cancun, LLC invested US$ 250,000 towards an option to purchase a gaming license from B-Mex II under our permit.[174] B-Cabo, LLC invested US$ 600,000 through loans to Medano Beach, S. de R.L. de C.V.,[175] who used the majority of these funds to purchase property for the Cabo Project.

66. In Cancun, Mr. and Ms. Burr worked on and discussed various alternatives with prominent developers who were eager to work with the Claimant group. In April 2013, Mr. and Ms. Burr had solidified a business plan for a casino in Cancun and were trying to find the right partner. Claimants had developed plans with the Marcos family, a very wealthy family and large landowner in Mexico. The Marcos family owns numerous 5-star resorts across Mexico and Latin America. Specifically, the Marcos family wanted Claimants to build out a Casino in a new hotel that they planned to build in Cancun.[176] For purposes of this project, the Marcos family would have raised all necessary funds.[177] In the business plan, Claimants

[174] Right of First Refusal Agreement between Colorado Cancun, LLC and B-Mex II, LLC (Apr. 27, 2011), **C-88**.

[175] Investment/Loan Agreement between B-Cabo, LLC and Medano Beach Hotel (Apr. 5, 2013), **C-65**; Letter from Gordon Burr to Farzin Ferdosi and Tim Brasel (May 16, 2013), **C-66**.

[176] Gordon Burr Statement, **CWS-50**, ¶ 84; Erin Burr Statement, **CWS-51**, ¶ 78.

[177] Gordon Burr Statement, **CWS-50**, ¶ 84; Erin Burr Statement, **CWS-51**, ¶ 78.

estimated that net profits would be $19 million annually after 5 years of operations.[178] The Marcos family, along with Mr. and Ms. Burr, selected a location for the Cancun project that would have been just off the beach and in the midst of the prime hotel zone in Cancun.[179] This hotel and casino complex would have been luxurious, modern, and the first of its kind in the area.

67. In Cancun, Claimants hoped to attract tourists, focusing primarily on Russian and Brazilian tourists, because gambling had recently been outlawed in both Russia and Brazil. Mr. Burr estimated that the customers would spend an average of $200 per player each day.[180] These assumptions, which were sound, were based upon looking at similar facilities located in the Caribbean and other comparable markets.[181] Unfortunately, because of uncertainty regarding the status of the Claimants' permit given the hostile measures implemented by Mexico, Claimants put on hold further plans for the Cancun location.[182]

68. In Cabo, Claimants, in 2007, entered into a Nondisclosure and Noncircumvention Agreement with Discovery Land Company ("**Discovery**"), a high-end real estate developer.[183] The agreement was to pursue a casino project in Cabo through which Discovery would be in charge of the financing, and Claimants would be in charge of operating the Casino facility.[184] Discovery owns the El Dorado Golf and Beach Club in Cabo, an exclusive members only community on the coast between San José del Cabo and Cabo San Lucas.[185] It was a very exclusive property, with many celebrities owning waterfront properties

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178 Cancun business plan, **C-245**; Cancun architect rendering, **C-374**.

179 Google map showing proposed Cancun location, **C-246**.

180 Gordon Burr Statement, **CWS-50**, ¶ 86.

181 Gordon Burr Statement, **CWS-50**, ¶ 86.

182 Gordon Burr Statement, **CWS-50**, ¶ 86; Erin Burr Statement, **CWS-51**, ¶ 80.

183 Nondisclosure and Noncircumvention Agreement with Discovery Land Company, **C-247**.

184 Gordon Burr Statement, **CWS-50**, ¶ 73; Erin Burr Statement, **CWS-51**, ¶ 69.

185 Gordon Burr Statement, **CWS-50**, ¶ 70; Erin Burr Statement, **CWS-51**, ¶ 69.

there. Under this proposed project, Discovery would own 90% of the project, and E-Games would own 10%.[186] Discovery and Claimants identified the property, created projections, lined up financing, researched various tax and legal issues, and created floor layouts.[187] Claimants estimated that the development cost for the project would be between USD $8-12 million, depending upon the type and size of the location.[188] The proposals for the deal with Discovery included the possibility of opening an exclusive private poker room in the facility with a very high buy in.[189] Mr. Burr was working on ways to facilitate this type of exclusive poker room.[190] Ultimately, Claimants did not move forward with Discovery because of the aggressive measures taken by Mexico against Claimants and Mexico's inaction in approving Claimants' own permit, and because they wanted to secure their own independent permit from SEGOB given the uncertainties related to E-Mex's permit under which they had been operating.[191]

69. In 2012, Mr. Burr was introduced to Farzin Ferdosi ("**Mr. Ferdosi**") and Chris Erikson ("**Mr. Erikson**") who had already been working together to build a luxury hotel/casino in Cabo which was to be called the Medano Beach Hotel.[192] Shortly thereafter, Claimants executed an agreement in which Mr. Burr agreed to provide $500,000 to be applied towards the purchase price of interests in a Mexican company that owned the land on which the Cabo hotel and casino were to be constructed.[193] Claimants negotiated various draft agreements, which were in advanced stages when our Casinos were closed.

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[186] Gordon Burr Statement, **CWS-50**, ¶ 73; Erin Burr Statement, **CWS-51**, ¶ 71.

[187] Gordon Burr Statement, **CWS-50**, ¶ 73; Erin Burr Statement, **CWS-51**, ¶ 71.

[188] Gordon Burr Statement, **CWS-50**, ¶ 73; Erin Burr Statement, **CWS-51**, ¶ 71.

[189] Gordon Burr Statement, **CWS-50**, ¶ 73.

[190] Gordon Burr Statement, **CWS-50**, ¶ 73.

[191] Gordon Burr Statement, **CWS-50**, ¶ 74; Erin Burr Statement, **CWS-51**, ¶ 72.

[192] Medano Beach Project Booklet, **C-248**; Gordon Burr Statement, **CWS-50**, ¶ 75; Erin Burr Statement, **CWS-51**, ¶ 73.

[193] Investment/Loan Agreement between B-Cabo, LLC and Medano Beach Hotel (Apr. 5, 2013) **C-65**; Gordon Burr Statement, **CWS-50**, ¶ 76; Erin Burr Statement, **CWS-51**, ¶ 76.

70. Mr. Burr knew that Cabo attracted a very wealthy clientele, many of whom were elite gamblers.[194] Mr. Burr focused on attracting Americans who spent time in Cabo. The proposed property was in Medano Beach, which is located right next to Cabo's marina and the main area of downtown Cabo.[195] The property had previously been a time share, and Mr. Burr, along with Mr. Ferdosi and Mr. Erickson, were planning to convert it into an exclusive, high-end hotel and Casino.[196] Mr. Burr had various ideas to attract customers to the Casino, including running cruise ships from various locations down the coastline, including el Dorado, to the Casino.[197] The cruise ships would serve drinks, hors' d'oeuvres, and would entertain the elite clients who would come to the hotel to gamble.[198] Mr. Burr expected that the average spend per customer in Cabo would be very high, as they were targeting tourists, in particular wealthy Americans and celebrities, who spent time in Cabo.[199] Like with the proposed plans with Discovery, Mr. Burr hoped to incorporate a high stakes poker room into the Casino, appealing to elite clientele, and providing them with entertainment while they were in Cabo.[200]

71. For both the Cabo and Cancun projects, Mr. and Ms. Burr were in very advanced stages of planning and negotiation when Mexico unlawfully shuttered the Casinos.[201] None of Claimants' competitors had developed similar casinos within resorts like Claimants planned to do. Both of these proposed locations would have attracted very high-end tourists, willing to

194 Gordon Burr Statement, **CWS-50**, ¶ 76; Erin Burr Statement, **CWS-51**, ¶ 75.

195 Gordon Burr Statement, **CWS-50**, ¶ 75; Erin Burr Statement, **CWS-51**, ¶ 74.

196 Gordon Burr Statement, **CWS-50**, ¶ 75; Erin Burr Statement, **CWS-51**, ¶ 73.

197 Gordon Burr Statement, **CWS-50**, ¶ 76; Erin Burr Statement, **CWS-51**, ¶ 75.

198 Gordon Burr Statement, **CWS-50**, ¶ 76; Erin Burr Statement, **CWS-51**, ¶ 75.

199 Gordon Burr Statement, **CWS-50**, ¶ 77; Erin Burr Statement, **CWS-51**, ¶ 75.

200 Gordon Burr Statement, **CWS-50**, ¶ 76; Erin Burr Statement, **CWS-51**, ¶ 75.

201 Gordon Burr Statement, **CWS-50**, ¶ 87; Erin Burr Statement, **CWS-51**, ¶ 80.

spend significant sums of money.[202] If the Casinos had not been shut down, Claimants would have developed an extremely successful business both in Cabo and Cancun.[203]

G. Online Gaming

72. When Mexico unlawfully closed the Casinos on April 24, 2014, Claimants were about to launch an online gaming business, which was (and remains) very popular in Mexico.[204] Claimants had been working for about a year on the development on this business for about a year.[205] These efforts were thwarted when the Mexican government closed Claimants' Casinos.[206]

73. In 2012 or 2013, Bally Technologies, Inc. ("**Bally**") a Nevada based manufacturer of slot machines and other gaming technology, and a major player in the gaming industry, approached Mr. Burr about partnering with Claimants to expand their business into online gaming.[207] As a large and successful company, Bally told Mr. Burr that they chose to approach E-Games, because E-Games was a rapidly growing company in Mexico and because it was very well managed.[208]

74. On behalf of the Claimant group, Mr. Moreno had several meetings with Carlos Engle, Bally's Sales Director, and Ramiro Salazar, Bally's Director for Latin America, after which decided that Claimants would use Bally's services and platform to develop their online

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[202] Gordon Burr Statement, **CWS-50**, ¶¶ 77, 87; Erin Burr Statement, **CWS-51**, ¶ 80.

[203] Gordon Burr Statement, **CWS-50**, ¶ 87; Erin Burr Statement, **CWS-51**, ¶ 80.

[204] Gordon Burr Statement, **CWS-50**, ¶ 88; Erin Burr Statement, **CWS-51**, ¶ 84; José Ramón Moreno Statement, **CWS-53**, ¶ 25.

[205] Gordon Burr Statement, **CWS-50**, ¶¶ 89-91; Erin Burr Statement, **CWS-51**, ¶ 81; José Ramón Moreno Statement, **CWS-53**, ¶ 25.

[206] Gordon Burr Statement, **CWS-50**, ¶ 91; Erin Burr Statement, **CWS-51**, ¶ 84; José Ramón Moreno Statement, **CWS-53**, ¶ 25.

[207] Gordon Burr Statement, **CWS-50**, ¶ 89; Erin Burr Statement, **CWS-51**, ¶ 83; José Ramón Moreno Statement, **CWS-53**, ¶ 26.

[208] Gordon Burr Statement, **CWS-50**, ¶ 89; Erin Burr Statement, **CWS-51**, ¶ 83; José Ramón Moreno Statement, **CWS-53**, ¶ 26.

business.[209] Bally's platform was comprehensive and handled the account management, collection of funds, user registration, and payment methods.[210] Bally also had a library of online games, and also allowed game developers to join their platform and add their own games.[211] One of the reasons Claimants chose to work with Bally was because their platform was comprehensive and reputable, and they knew that it would work well once it was established.[212] All that Claimants had left to do to have online gaming up and running was to install servers on Bally's platform.[213]

75. When the Casinos were closed, Claimants were also in the process of entering into an agreement with Poker Stars, which runs the largest real money online poker site in the world.[214] Through the agreement, Poker Stars also would have offered online gaming in Mexico under E-Games' permit.[215]

76. For various financial and tax reasons, they decided to install Bally's servers in Querétaro.[216] Claimants conducted various cost studies on how much it would cost to install the servers, as well as to maintain the data room.[217] They also conducted extensive due diligence to understand the online gaming landscape and only proceeded once they were

[209] Gordon Burr Statement, **CWS-50**, ¶ 90; Erin Burr Statement, **CWS-51**, ¶ 83; José Ramón Moreno Statement, **CWS-53**, ¶ 27.

[210] Gordon Burr Statement, **CWS-50**, ¶ 90; Erin Burr Statement, **CWS-51**, ¶ 83; José Ramón Moreno Statement, **CWS-53**, ¶ 27.

[211] Gordon Burr Statement, **CWS-50**, ¶ 90; Erin Burr Statement, **CWS-51**, ¶ 83; José Ramón Moreno Statement, **CWS-53**, ¶ 27.

[212] Gordon Burr Statement, **CWS-50**, ¶ 90; Erin Burr Statement, **CWS-51**, ¶ 83; José Ramón Moreno Statement, **CWS-53**, ¶ 27.

[213] Gordon Burr Statement, **CWS-50**, ¶ 90; Erin Burr Statement, **CWS-51**, ¶ 83; José Ramón Moreno Statement, **CWS-53**, ¶ 27.

[214] Erin Burr Statement, **CWS-51**, ¶ 84; José Ramón Moreno Statement, **CWS-53**, ¶ 33.

[215] Erin Burr Statement, **CWS-51**, ¶ 84; José Ramón Moreno Statement, **CWS-53**, ¶ 33.

[216] Gordon Burr Statement, **CWS-50**, ¶ 91; Erin Burr Statement, **CWS-51**, ¶ 83; José Ramón Moreno Statement, **CWS-53**, ¶ 29.

[217] Gordon Burr Statement, **CWS-50**, ¶ 91; José Ramón Moreno Statement, **CWS-53**, ¶ 29.

confident that their operation would be successful.[218] Claimants were ready and about to sign the contract to install the servers when the Casinos were shut down.[219] They would have proceeded with this contract had Mexico not shut down their Casinos.[220] Once Claimants' Casinos were shut down, they lost the possibility to advance their online gaming operations in Mexico.[221] Since 2014, online gaming has expanded in Mexico and has become very popular, as well as very lucrative.[222] If Claimants' business had not been shut down, they would have had a very successful online gaming business.[223]

H. Claimants' Efforts to Purchase a Permit and Eventually Obtain an Independent Permit

77. In 2008, things started to evolve for Claimants. By then, the Mexican Supreme Court had rendered a verdict that validated the 2004 Gaming Regulation and thus provided legal certainty to recent permit holders, such as Grupo Televisa, Grupo Caliente, and Grupo Ángeles.[224] In addition, new casinos were emerging under the 2004 Gaming Regulation which incorporated the sort of gaming equipment that Claimants wanted to install in their Casinos.[225] Given that Claimants had secured a strong foothold in the Mexican gaming industry by this

[218] Gordon Burr Statement, **CWS-50**, ¶ 91; Erin Burr Statement, **CWS-51**, ¶ 81; José Ramón Moreno Statement, **CWS-53**, ¶ 30.

[219] Gordon Burr Statement, **CWS-50**, ¶ 91; Erin Burr Statement, **CWS-51**, ¶ 83; José Ramón Moreno Statement, **CWS-53**, ¶ 30.

[220] Gordon Burr Statement, **CWS-50**, ¶ 91; José Ramón Moreno Statement, **CWS-53**, ¶ 32.

[221] Gordon Burr Statement, **CWS-50**, ¶ 91; Erin Burr Statement, **CWS-51**, ¶ 83; José Ramón Moreno Statement, **CWS-53**, ¶ 32.

[222] Gordon Burr Statement, **CWS-50**, ¶ 91; Erin Burr Statement, **CWS-51**, ¶ 83; José Ramón Moreno Statement, **CWS-53**, ¶ 32.

[223] Gordon Burr Statement, **CWS-50**, ¶ 91; Erin Burr Statement, **CWS-51**, ¶ 83; José Ramón Moreno Statement, **CWS-53**, ¶ 34.

[224] Julio Gutiérrez Statement, **CWS-52**, ¶ 12.

[225] Julio Gutiérrez Statement, **CWS-52**, ¶ 12.

time, Mr. Burr wanted to further expand their operations.[226] In consultation with various advisors, Claimants ultimately decided to explore possibilities to obtain their own permit.[227]

78. At first, Claimants, through Mr. Burr and other principals within the B-Mex Companies and the Mexican Enterprises, negotiated with an existing permit holder, Eventos Festivos de Mexico ("**Eventos Festivos**") to purchase their permit.[228] Eventos Festivos had a total of 20 authorized locations, three of which had been fully developed and two of which were temporary.[229] In early 2008, Claimants engaged Mexican counsel to oversee the due diligence work and prepare drafts of the forthcoming letter of intent and share purchase agreement.[230] Claimants then paid a significant down payment of aproximately US $ 1 million to purchase the Eventos Festivos Permit and subsequently negotiated the terms of the permit.[231] Claimants eventually signed a share purchase agreement with Eventos Festivos in order to purchase the permit because in order to purchase the permit, they needed to purchase Eventos Festivos itself.[232]

79. The Eventos Festivos permit offered the Claimants the possibility to open more than seven Casino locations, allowing them to continue to operate their five existing Casino locations, as well as additional locations in Cabo, Cancun, and other tourist locations.[233] Eventos Festivos specifically negotiated these terms and requested approval from SEGOB in

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226 Gordon Burr Statement, **CWS-50**, ¶ 35; Erin Burr Statement, **CWS-51**, ¶ 40.

227 Julio Gutiérrez Statement, **CWS-52**, ¶ 14; Gordon Burr Statement, **CWS-50**, ¶ 35; Erin Burr Statement, **CWS-51**, ¶ 40.

228 Eventos Festivos Permit, **C-249**; Gordon Burr Statement, **CWS-50**, ¶ 35; Erin Burr Statement, **CWS-51**, ¶ 40.

229 Erin Burr Statement, **CWS-51**, ¶ 40.

230 Julio Gutiérrez Statement, **CWS-52**, ¶ 13.

231 Gordon Burr Statement, **CWS-50**, ¶ 35; Erin Burr Statement, **CWS-51**, ¶ 40.

232 Eventos Festivos Share Purchase Agreement, **C-250**.

233 Gordon Burr Statement, **CWS-50**, ¶ 35; Erin Burr Statement, **CWS-51**, ¶ 40.

order to formalize those locations.[234] Claimants negotiated with Eventos Festivos throughout the first half of 2008 to try and purchase their permit.[235]

80. In early 2008, while Claimants were finalizing their deal to obtain a permit from Eventos Festivos, BlueCrest Capital ("**BlueCrest**"), a British-American hedge fund, and Advent International ("**Advent**"), an American private equity firm with a major presence in Latin America, approached Mr. Burr about the possibility of a potential transaction to grow the Claimants' business exponentially.[236] Specifically, BlueCrest and Advent wanted to enter the Mexican casino market. Advent had recently closed on a US$ 1.3 billion Latin America fund and were planning to acquire the gaming permit held by E-Mex.[237] In the wake of the newly enacted gaming regulations, E-Mex had received an expansive permit from SEGOB for the operation of 100 casino facilities (50 remote gambling centers and 50 lottery number rooms) for a period of 25 years, until 2030.[238] The E-Mex permit was widely regarded as the one of the broadest gaming permits in all of Mexico.[239] Importantly, E-Mex's permit offered allowed for the operation of a much broader range of machines in comparison to other Mexican permits at the time, including the Eventos Festivos permit.[240] E-Mex's permit, unlike the Eventos Festivos permit, also had no geographical restrictions on where the casino locations under the permit were located.[241]

81. The opportunity for the Claimants to partner with BlueCrest and Advent came into being, because BlueCrest had extended US$ 75 million in loans to E-Mex, which was

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234 Eventos Festivos Letter to SEGOB (Dec. 20, 2007), **C-251**; Gordon Burr Statement, **CWS-50**, ¶ 35; Erin Burr Statement, **CWS-51**, ¶ 40.

235 Gordon Burr Statement, **CWS-50**, ¶ 35; Erin Burr Statement, **CWS-51**, ¶ 40.

236 Gordon Burr Statement, **CWS-50**, ¶ 36; Erin Burr Statement, **CWS-51**, ¶ 41.

237 Gordon Burr Statement, **CWS-50**, ¶ 36; Erin Burr Statement, **CWS-51**, ¶ 41.

238 Gordon Burr Statement, **CWS-50**, ¶ 36; Erin Burr Statement, **CWS-51**, ¶ 41.

239 Gordon Burr Statement, **CWS-50**, ¶ 36; Erin Burr Statement, **CWS-51**, ¶ 41.

240 Gordon Burr Statement, **CWS-50**, ¶ 36; Erin Burr Statement, **CWS-51**, ¶ 41.

241 Gordon Burr Statement, **CWS-50**, ¶ 36; Erin Burr Statement, **CWS-51**, ¶ 41.

collateralized by the E-Mex permit, and E-Mex was in default and not able to pay this debt to BlueCrest.[242] BlueCrest wanted to acquire the E-Mex permit to recoup its investment and brought in Advent to help them acquire the E-Mex permit and develop operations.[243] Advent was introduced to Mr. Burr through the due diligence process and was impressed with the Claimants' Casinos and operations.[244] Advent eventually decided that it would only proceed with the plan to acquire the E-Mex permit if the Claimants were responsible for developing and operating all the casinos under the E-Mex permit, with Mr. Burr as CEO and Ms. Burr as VP of Business Development.[245] BlueCrest agreed with this condition.[246] Further, Advent and BlueCrest's proposal was that they would acquire the E-Mex permit and some of its existing facilities, and that the Claimants would move their existing five Casinos under the E-Mex permit and receive credit for their two remaining licenses for 2 remote gambling centers and 2 lottery number rooms.[247] Advent would also provide financing to develop the remaining locations that were not funded out of cash flow.[248]

82. Given the prevalence and size of BlueCrest and Advent, Claimants thought it was likely that they would be successful in acquiring the E-Mex permit and moving the project forward.[249] Additionally, Claimants viewed BlueCrest's US$ 75 million investment as an additional indicator of their very strong interest and commitment to the deal.[250]

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242 Gordon Burr Statement, **CWS-50**, ¶ 36; Erin Burr Statement, **CWS-51**, ¶ 42.

243 Gordon Burr Statement, **CWS-50**, ¶ 36; Erin Burr Statement, **CWS-51**, ¶ 42.

244 Gordon Burr Statement, **CWS-50**, ¶ 36; Erin Burr Statement, **CWS-51**, ¶ 42.

245 Gordon Burr Statement, **CWS-50**, ¶¶ 37, 40; Erin Burr Statement, **CWS-51**, ¶ 43.

246 Gordon Burr Statement, **CWS-50**, ¶ 37; Erin Burr Statement, **CWS-51**, ¶ 43.

247 Gordon Burr Statement, **CWS-50**, ¶¶ 37-38 ; Erin Burr Statement, **CWS-51**, ¶ 43.

248 Erin Burr Statement, **CWS-51**, ¶ 43.

249 Gordon Burr Statement, **CWS-50**, ¶ 37; Erin Burr Statement, **CWS-51**, ¶ 43.

250 Gordon Burr Statement, **CWS-50**, ¶¶ 37 , 48; Erin Burr Statement, **CWS-51**, ¶ 43.

83. Claimants engaged in extensive due diligence with BlueCrest and Advent.[251] Claimants deemed that the proposed transaction with BlueCrest and Advent would offer them an invaluable opportunity to grow their business, dominate the Mexican market, and give investors increased liquidity.[252] Additionally, the proposed partnership provided potential opportunities to expand into other countries in Latin America, something that they could not do with Eventos Festivos.[253] Given the potential to grow the business through this transaction, Claimants decided to abandon negotiations for the Eventos Festivos permit and to focus on the transaction with BlueCrest and Advent. [254]

84. It should be noted that the Claimants' decision to work with E-Mex through the proposed transaction with BlueCrest and Advent did not come without some reluctance. Claimants had come to find out that Mr. Rojas Cardona, E-Mex's founder and principal, was allegedly involved in activities that could be detrimental to the Claimants' businesses.[255] Although quite concerned about Mr. Rojas Cardona's illicit activities about which they had just learned, Claimants' (as well as that of BlueCrest and Advent) due diligence did not turn up any illegalities associated with E-Mex's permit, Claimants decided that the transaction with BlueCrest and Advent had tremendous potential.[256] If the transaction came to fruition, the private equity firms would operate the business in accordance with the law, E-Mex and its owner would be out of the picture, and Claimants would be running all of the casinos and would operate them in accordance with all applicable laws just as they had been operating their Casinos.[257] BlueCrest and Advent repeatedly assured Mr. and Ms. Burr that once the

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251 Julio Gutiérrez Statement, **CWS-52**, ¶ 14.

252 Gordon Burr Statement, **CWS-50**, ¶¶ 37, 46; Erin Burr Statement, **CWS-51**, ¶ 44.

253 Gordon Burr Statement, **CWS-50**, ¶ 46; Erin Burr Statement, **CWS-51**, ¶ 45.

254 Gordon Burr Statement, **CWS-50**, ¶ 39; Erin Burr Statement, **CWS-51**, ¶¶ 41, 45.

255 Gordon Burr Statement, **CWS-50**, ¶ 38; Erin Burr Statement, **CWS-51**, ¶ 44.

256 Gordon Burr Statement, **CWS-50**, ¶ 40.

257 Gordon Burr Statement, **CWS-50**, ¶¶ 39-40; Erin Burr Statement, **CWS-51**, ¶ 45.

transaction came to fruition, Mr. Rojas Cardona would no longer have any association with the E-Mex permit.[258] In addition, Claimants' legal team assured Mr. and Ms. Burr that there was legal precedent that they could rely on to separate their operations from E-Mex in case that the proposed deal did not materialize.[259] Mr. and Ms. Burr made the decision to move under the E-Mex permit at the request of BlueCrest and Advent, and while with some trepidation, given the overall circumstances they thought that it was the best business decision with the greatest potential for growth.[260] Claimants also immediately began taking steps to protect the group in case that the proposed deal did not come to fruition or BlueCrest forced E-Mex into bankruptcy.[261]

85. As a condition of the proposed transaction with BlueCrest and Advent, Claimants moved under E-Mex's permit as an operator in April 2008.[262] Claimants continued to negotiate with BlueCrest and Advent through 2008 and 2009, but ultimately, the transaction did not materialize, because Mr. Rojas Cardona would not agree to the terms.[263] While negotiations continued, Claimants completed the process to function as an operator under E-Mex's permit, as has been requested by the private equity firms.[264]

86. On April 1, 2008, Claimants entered into an agreement with JEV Monterrey and E-Mex, through which the Juegos Companies terminated their previous joint venture agreements with JEV Monterrey and agreed to operate the Casinos under E-Mex's permit.[265] Moreover, the agreement recognized: (1) the Juegos Companies' right to operate the already

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[258] Gordon Burr Statement, **CWS-50**, ¶ 40; Erin Burr Statement, **CWS-51**, ¶ 45.

[259] Gordon Burr Statement, **CWS-50**, ¶ 39; Erin Burr Statement, **CWS-51**, ¶ 45.

[260] Gordon Burr Statement, **CWS-50**, ¶ 46; Erin Burr Statement, **CWS-51**, ¶ 45.

[261] Gordon Burr Statement, **CWS-50**, ¶ 49; Erin Burr Statement, **CWS-51**, ¶ 45.

[262] Gordon Burr Statement, **CWS-50**, ¶ 41; Erin Burr Statement, **CWS-51**, ¶ 46.

[263] Gordon Burr Statement, **CWS-50**, ¶ 41; Erin Burr Statement, **CWS-51**, ¶ 47.

[264] Gordon Burr Statement, **CWS-50**, ¶¶ 41-43; Erin Burr Statement, **CWS-51**, ¶ 46.

[265] Transaction Agreement (Apr. 01, 2008), **C-6**; Julio Gutiérrez Statement, **CWS-52**, ¶ 16.

existing 5 casinos, plus two other dual-function locations at no additional cost; (2) a series of releases and waivers between the Juegos Companies and E-Mex; (3) a final settlement agreement between the Juegos Companies and E-Mex over outstanding royalty payments under the previous joint venture agreements with JEV Monterrey; and (4) the Juegos Companies' right to operate under another permit if they so wished.[266] Claimants, with the advice of counsel, decided that they would enter into the Operating Agreement with E-Mex through E-Games.[267]

87. On November 1, 2008, E-Games and E-Mex entered into an Operating Agreement, whereby E-Games acquired the rights and obligations to operate fourteen casino facilities (7 remote gambling centers and 7 lottery number rooms, or up to 7 dual-function gaming facilities), under E-Mex's permit, as provided for and in accordance with the Gaming Regulation and other applicable Mexican laws.[268] E-Games, in turn, committed to pay royalties to E-Mex arising from the operation of the Casino facilities that Claimants were authorized to establish and operate under E-Mex's permit.[269] Throughout this process, Claimants' Mexican counsel was deeply involved in the negotiations with E-Mex's counsel, Mr. Guillermo Santillán Ortega (who was a former SEGOB official and was also a principal of Producciones Móviles, which will be discussed in more detail below).[270] Mexican counsel even reviewed E-Mex's permit closely to ensure that it was valid and compliant with the Gaming Regulation, and also reviewed all official acts issued by SEGOB in relation to E-Mex's permit up to that point.[271] Although Claimants were now operating under E-Mex's permit,

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266 Transaction Agreement (Apr. 01, 2008), **C-6**; Julio Gutiérrez Statement, **CWS-52**, ¶ 16.

267 Julio Gutiérrez Statement, **CWS-52**, ¶ 16.

268 Operating Agreement (Nov. 01, 2008), **C-7**; Julio Gutiérrez Statement, **CWS-52**, ¶ 17.

269 Operating Agreement (Nov. 01, 2008), **C-7**; Julio Gutiérrez Statement, **CWS-52**, ¶ 17.

270 Julio Gutiérrez Statement, **CWS-52**, ¶ 17.

271 Julio Gutiérrez Statement, **CWS-52**, ¶ 17.

they immediately took various steps to separate themselves from E-Mex and investigate the possibility of obtaining their own independent permit.[272] They did so, because of the uncertainties surrounding the continued viability of E-Mex's permit should the deal with Advent and BlueCrest not materialize, because they eventually ran into certain disputes with E-Mex and because they had learned about Mr. Rojas Cardona's involvement in certain illicit activities, and, for all of these reasons, did not want to remain tied to E-Mex's permit.[273]

I. E-Games Becomes an Operator Under E-Mex's Permit

88. Through its actions, SEGOB repeatedly and consistently recognized and authorized E-Games' status as a legal casino operator under E-Mex's permit. In order for E-Games to become an operator under E-Mex's permit, both companies had to fulfill a series of requirements under the Gaming Regulation, and SEGOB has to authorize E-Games to operate under the permit.[274] More specifically, Article 30 of the Gaming Regulation sets forth three requirements to become an operator: (1) the existence of an agreement between a permit holder and the operator; (2) compliance with all requirements in Article 30 of the Gaming Regulation; and (3) SEGOB's approval to become an operator.[275] The first requirement has already been discussed in the previous section. SEGOB confirmed the other two requirements on three separate occasions.

89. The first occasion occurred on December 9, 2008, when SEGOB issued a Resolution authorizing E-Mex to use an operator under its permit and recognized E-Games as E-Mex's operator.[276] This recognition is significant because SEGOB indicated in unequivocal

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[272] Gordon Burr Statement, **CWS-50**, ¶ 49; Erin Burr Statement, **CWS-51**, ¶¶ 48-52; Julio Gutiérrez Statement, **CWS-52**, ¶ 17.

[273] Gordon Burr Statement, **CWS-50**, ¶¶ 49-51; Erin Burr Statement, **CWS-51**, ¶¶ 44, 56-57.

[274] González Report, **CER-3**, ¶ 6-11.

[275] González Report, **CER-3**, ¶ 8.

[276] *See* SEGOB Resolution No. DGAJS/SCEV/00619/2008 (Dec. 09, 2008), **C-8**; Julio Gutiérrez Statement, **CWS-52**, ¶ 19; Expert Report of Omar Guerrero ("Guerrero Report"), **CER-2**, ¶ 11; González Report, **CER-3**, ¶ 9.

terms that E-Mex complied with *all* requirements in Article 30 of the Gaming Resolution in its 2005 permit.[277]

90. The second occasion occurred on February 13, 2009, when SEGOB issued a Resolution informing E-Mex that E-Games was authorized to operate its 5 casinos under E-Mex's permit.[278]

91. And the third occasion occurred on May 8, 2009, when SEGOB issued a Resolution in which it again expressly recognized E-Games as an operator under E-Mex's permit, because E-Mex had complied with all requirements in Article 30 of the Gaming Regulation.[279] Distinguished fromprior administrative resolutions made pursuant to E-Mex's request, this latter one from May 2009 was issued directly to E-Games recognizing it as an operator.[280]

92. In light of the above, all three administrative acts expressly recognized E-Games' status as a valid operator under E-Mex's permit, because both E-Games and E-Mex complied with SEGOB's Gaming Regulation.[281] But it should also be noted that, other than the permittee-operator relationship, which was repeatedly recognized by SEGOB, E-Mex and E-Games were entirely independent of each other, had no investments or ownership in common, and Claimants had nothing whatsoever to do with E-Mex, or its operations, investments or corporate decisions.[282]

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[277] González Report, **CER-3**, ¶ 9(a).

[278] *See* SEGOB Resolution No. DGAJS/SCEV/0059/2009 (Feb. 13, 2009), **C-252**; González Report, **CER-3**, ¶ 9(b).

[279] *See* SEGOB Resolution No. DGAJS/SCEV/0194/2009 (May 08, 2009), **C-9**; González Report, **CER-3**, ¶ 9(c).

[280] *See* SEGOB Resolution No. DGAJS/SCEV/0194/2009 (May 08, 2009), **C-9**; González Report, **CER-3**, ¶ 9(c).

[281] González Report, **CER-3**, ¶¶ 10–11.

[282] Gordon Burr Statement, **CWS-50**, ¶ 44.

J. Claimants Decide to Move Away from E-Mex's Permit

93. While Claimants successfully operated the Casinos under E-Mex's permit and complied with all requirements under the Gaming Regulation, Claimants knew that they needed to separate their Casino operations from E-Mex.[283]

94. E-Mex had engaged in certain risky behavior that had the potential to put the Claimants' significant investments at risk. First, E-Mex breached its obligations to pay outstanding debts to BlueCrest.[284] As previously mentioned, between December 2006 and September 2007, BlueCrest provided US$ 75 million in loans to E-Mex as part of its initiative to invest in and acquire E-Mex's permit.[285] BlueCrest's substantial investment in E-Mex is partly why Claimants believed that the BlueCrest investment opportunity had good prospects of coming to fruition and one of the reasons why Claimants pursued the opportunity under the E-Mex permit, rather than some of the other opportunities they were exploring to transition out of Monterrey's Resolution. This would all change once BlueCrest initiated debt collection proceedings.

95. On September 24, 2009, after E-Games has been recognized by SEGOB as a legal operator of the Casinos under E-Mex's permit and following E-Mex's default on BlueCrest's loans, BlueCrest filed a complaint to execute a promissory note against E-Mex.[286] Given the size of the debt, Claimants were fully aware that BlueCrest could force E-Mex into bankruptcy and, in fact, BlueCrest soon initiated bankruptcy proceedings to declare E-Mex insolvent.[287]

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283 Gordon Burr Statement, **CWS-50**, ¶ 51; Julio Gutiérrez Statement, **CWS-52**, ¶ 24.

284 Julio Gutiérrez Statement, **CWS-52**, ¶ 21.

285 Gordon Burr Statement, **CWS-50**, ¶ 36.

286 *El gran estafador* (Sep. 17, 2011). Retrieved from http://www.proceso.com.mx/281668/el-gran-estafador-2, **C-10**.

287 Gordon Burr Statement, **CWS-50**, ¶¶ 47-48; Julio Gutiérrez Statement, **CWS-52**, ¶ 20.

96. A declaration of bankruptcy or insolvency, which appeared imminent in light of BlueCrest's actions, would have allowed SEGOB to extinguish E-Mex's gaming permit under which E-Games acted as operator of the Casinos.[288] This is because a permit holder's falling into bankruptcy status is one of the grounds for which SEGOB can revoke a permit holder's permit.[289] This, in turn, would have had disastrous consequences for E-Games and the Claimants.[290] As such, Claimants had to take measures to protect their investments.[291]

97. Second, Claimants subsequently found out that E-Mex, without Claimants' consent, had illegally pledged the Claimants' gaming equipment as collateral for its debt obligations to BlueCrest and Advent.[292] By subjecting Claimants' property to the risk of seizure, E-Mex placed Claimants' casino operations in jeopardy.[293]

98. Third, there was a contractual disagreement regarding E-Games' payment of royalties to E-Mex.[294] On the one hand, E-Mex claimed royalties should be paid on revenues before taxes, while E-Games' argued that this was not legal under Mexican law and thus royalties could only be paid on gaming revenues after taxes.[295] On the other hand, as part of the bankruptcy proceedings pending against E-Mex, the court ordered E-Games to cease all royalty payments under the Operating Agreement to E-Mex and instead to deposit them in a court-controlled escrow account.[296] Unhappy with the court's order and E-Games' compliance with it, E-Mex sent a notification attempting to unilaterally terminate the Operating Agreement

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288 Julio Gutiérrez Statement, **CWS-52**, ¶ 20; under section V of Article 151 of the 2004 Gaming Regulation, it a permit may be revoked if the permittee is declared in bankruptcy, **CL-72**.

289 Julio Gutiérrez Statement, **CWS-52**, ¶ 20; under section V of Article 151 of the 2004 Gaming Regulation, it a permit may be revoked if the permittee is declared in bankruptcy, **CL-72**.

290 Gordon Burr Statement, **CWS-50**, ¶ 48; Julio Gutiérrez Statement, **CWS-52**, ¶ 20.

291 Gordon Burr Statement, **CWS-50**, ¶ 49; Erin Burr Statement, **CWS-51**, ¶ 51.

292 Julio Gutiérrez Statement, **CWS-52**, ¶ 20.

293 Julio Gutiérrez Statement, **CWS-52**, ¶ 20.

294 Julio Gutiérrez Statement, **CWS-52**, ¶ 20.

295 Julio Gutiérrez Statement, **CWS-52**, ¶ 20.

296 Gordon Burr Statement, **CWS-50**, ¶ 50.

with E-Games on December 23, 2009.[297] By the agreement's terms, E-Mex could not unilaterally terminate the Agreement.[298] This further soured E-Games' relationship with E-Mex, while at the same time underscoring the great risk for E-Games and Claimants to continue to operate under E-Mex's permit.[299]

99. Mr. Rojas Cardona also threatened Mr. Burr with the termination of the Operating Agreement and reporting to SEGOB of said termination if Mr. Burr did not comply with E-Mex's interpretation of the payment of royalties.[300] As will be discussed further below, however, the relationship between E-Mex and E-Games worsened further when, on September 20, 2010, E-Mex filed a domestic arbitration in Mexico against E-Games seeking, among other things, (i) payment of additional royalties under the Operating Agreement; and (ii) termination of the Operating Agreement.[301]

100. Fourth, Mr. Burr became aware through several sources that Mr. Rojas Cardona was involved in illicit activities in Mexico, including a web of corruption involving politicians and members of Mexico's judiciary.[302]

101. And lastly, Mr. Burr's efforts to reach a deal with BlueCrest and Advent for the purchase of E-Games' and E-Mex's casinos fell through in late 2009, because Mr. Roajs Cardona persistently refused to reach an agreement with them.[303]

102. In light of the above, E-Mex's business decisions placed E-Games' ability to continue acting as operator of the Casinos under E-Mex's permit at serious peril.[304] Given all

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297 Gordon Burr Statement, **CWS-50**, ¶ 50.

298 Operating Agreement (Nov. 01. 2008), **C-7**.

299 Gordon Burr Statement, **CWS-50**, ¶ 50.

300 Julio Gutiérrez Statement, **CWS-52**, ¶ 21.

301 Gordon Burr Statement, **CWS-50**, ¶ 50.

302 Julio Gutiérrez Statement, **CWS-52**, ¶ 20; Gordon Burr Statement, **CWS-50**, ¶ 45.

303 Julio Gutiérrez Statement, **CWS-52**, ¶ 21; Gordon Burr Statement, **CWS-50**, ¶ 47.

304 Gordon Burr Statement, **CWS-50**, ¶ 51; Erin Burr Statement, **CWS-51**, ¶ 48.

of these circumstances, Claimants understood that they had to become independent from E-Mex and its permit in order for Claimants to continue operating the Casinos in Mexico without placing their legal status for doing so in jeopardy.[305] Claimants by this time had developed, constructed, operated and managed the Casinos successfully, starting with the Naucalpan facility in December 2005, with SEGOB's continued seal of approval.[306] Claimants could not have all of their investments at risk under E-Mex's permit.[307]

K. E-Games is Allowed to Operate Independently from E-Mex's Permit and to Report Directly to SEGOB on its Casino Operations

103. Claimants always wanted to be a permit holder in their own right, but were very aware that the process to become one within SEGOB could be cumbersome and/or that becoming a permit holder could never really happen given the Mexican government's remarks that it would not be issuing any new permits, largely for political reasons and cronyism to protect the business of existing permit holders.[308] Given these uncertainties and before being irremediably affected by E-Mex's actions and Mr. Rojas Cardona's threats, Claimants initially sought to become an *independent operator* who would no longer need to depend on E-Mex to fulfill their reporting and other obligations to SEGOB or on its status as a valid permit holder to continue operating the Casinos under E-Mex's permit.[309] They did so by going directly to SEGOB and seeking its permission to so operate. This was the Claimants' pre-emptive measure to protect their investment and the first of many steps that Claimants took to completely liberate themselves from E-Mex's permit.[310] Through the process, Claimants' Mexican counsel worked closely with Claimants' in-house counsel to seek guidance from

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305 Gordon Burr Statement, **CWS-50**, ¶ 51; Erin Burr Statement, **CWS-51**, ¶ 48.

306 Gordon Burr Statement, **CWS-50**, ¶ 51; Erin Burr Statement, **CWS-51**, ¶ 48.

307 Gordon Burr Statement, **CWS-50**, ¶ 51; Erin Burr Statement, **CWS-51**, ¶ 48.

308 Julio Gutiérrez Statement, **CWS-52**, ¶ 22; Gordon Burr Statement, **CWS-50**, ¶ 35.

309 Gordon Burr Statement, **CWS-50**, ¶ 52; Erin Burr Statement, **CWS-51**, ¶¶ 49, 52.

310 Julio Gutiérrez Statement, **CWS-52**, ¶ 22.

SEGOB and ensure that Claimants' efforts within SEGOB shielded them from E-Mex and Mr. Rojas Cardona's acts and threats.[311]

104. As explained in greater detail below, on May 27, 2009, SEGOB issued a Resolution officially recognizing E-Games as an independent operator under E-Mex's permit, and allowed E-Games to continue operating the Casinos independently from E-Mex's permit.[312] In doing so, SEGOB relied on the legal principle of acquired rights (*derechos adquiridos*), which had been previously applied by SEGOB to grant the same status to another casino operator—Petolof—under similar circumstances.

L. SEGOB grants E-Games the status of independent operator

105. On May 18, 2009, E-Games requested that SEGOB formally recognize it as an independent operator of the Casinos under E-Mex's permit and that E-Games be allowed to continue to operate the Casinos based on rights it has acquired by virtue of its prior, proper and SEGOB-sanctioned operation of the Casinos in compliance with Mexican law.[313]

106. Shortly thereafter, on May 27, 2009, SEGOB granted E-Games' request to operate its Casinos autonomously and issued Resolution DGAJS/SCEV/0260/2009-BIS (the "**May 27, 2009 Resolution**").[314] This officially approved E-Games' legal right to operate the Casinos independently of any permission from E-Mex.[315] E-Games was also instructed to report directly to SEGOB all of the information that a permit holder itself is required to report to SEGOB under the Mexican gaming law and regulations.[316]

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311 Julio Gutiérrez Statement, **CWS-52**, ¶ 22.

312 SEGOB Resolution No. DGAJS/SCEV/0260/2009-BIS (May 27, 2009), **C-11**.

313 Gordon Burr Statement, **CWS-50**, ¶ 52; Julio Gutiérrez Statement, **CWS-52**, ¶ 25; González Report, **CER-3**, ¶ 22.

314 *See* SEGOB Resolution No. DGAJS/SCEV/0260/2009-BIS (May 27, 2009), **C-11**; Julio Gutiérrez Statement, **CWS-52**, ¶ 23; González Report, **CER-3**, ¶¶ 12-14.

315 *See* SEGOB Resolution No. DGAJS/SCEV/0260/2009-BIS (May 27, 2009), **C-11**; Julio Gutiérrez Statement, **CWS-52**, ¶ 24; González Report, **CER-3**, ¶ 13; Guerrero Report, **CER-2**, ¶ 12.

316 *See* SEGOB Resolution No. DGAJS/SCEV/0260/2009-BIS (May 27, 2009), **C-11**; Julio Gutiérrez Statement, **CWS-52**, ¶ 23; González Report, **CER-3**, ¶ 27(d);.

107. Importantly, in the May 27, 2009 Resolution, SEGOB determined that E-Games had "acquired rights" under Mexican law to operate its Casino facilities within the scope of E-Mex's permit, having previously qualified as an operator and given its successful track record in complying with all requirements set forth in the Gaming Regulation to operate as such.[317]

108. The legal principle of "acquired rights" is not codified in Mexico's gaming laws and regulations,[318] yet it is a principle firmly recognized in Mexican administrative law.[319] Pursuant to Mexican administrative law, a property right, benefit or faculty, once "acquired", becomes protected property and cannot be taken away by either the person who bestowed that right in the first place or by any subsequent legal provision contradicting it.[320] Of particular importance is, as Claimants' legal expert Mr. Ezequiel González ("**Mr. González**") concludes, that a Mexican administrative body may rely on this valid legal principle to protect a person's property rights:

> This means that under Mexican administrative law, 'acquired rights' serve as a valid instrument to protect a person's property rights. It is a principle enshrined in Mexican law, which requires court or judicial action for its recognition, as the case may be.[321] (English translation of Spanish original).

109. Accordingly, Mr. González concludes that while the principle of acquired rights is not codified in the Gaming Regulation, E-Games' right to become an independent operator arose from SEGOB's use of its decision-making powers to interpret its own Gaming Regulation, and SEGOB rightfully concluded that E-Games had acquired rights to operate the

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317 *See* SEGOB Resolution No. DGAJS/SCEV/0260/2009-BIS (May 27, 2009), **C-11**; Julio Gutiérrez Statement, **CWS-52**, ¶ 25; González Report, **CER-3**, ¶ 27.

318 González Report, **CER-3**, ¶¶ 18.

319 González Report, **CER-3**, ¶ 19.

320 González Report, **CER-3**, ¶ 21; Julio Gutiérrez Statement, **CWS-52**, ¶ 25.

321 González Report, **CER-3**, ¶ 21 ("*Esto quiere decir que en el derecho administrativo mexicano los derechos adquiridos constituyen un instrumento válido de protección del patrimonio jurídico de una persona. Se trata de una figura reconocida por el derecho mexicano, aunque para su concreción se requiere del reconocimiento de una autoridad administrativa o judicial, según el caso*".)

Casinos independent from E-Mex's permit.[322] Mr. González further notes that SEGOB recognized E-Games' acquired rights for three main reasons:

> a) Because E-Games obtained authorization as an operator;
> b) Because E-Games had operative control of the Casinos;
> c) Because E-Games directly submitted revenue and pay participation reports [to SEGOB], paid federal taxes, and submitted financial reports, among other obligations.[323] (English translation of Spanish original).

110. Indeed, SEGOB's May 27, 2009 Resolution refers to the following previous resolutions as motivations for recognizing E-Games' independent operator status: (1) the December 9, 2008 Resolution paved a way for E-Games' possible acquisition of rights as an operator; (2) the February 13, 2009 Resolution consolidated E-Games' acquisition of rights as an operator; (3) the May 8, 2009 Resolution solidified E-Games' acquired rights as an operator, because it recognized directly E-Games' compliance with all requirements under Mexico's gaming law and regulations; and (4) the May 27, 2009 Resolution acknowledged E-Games' protected property rights, because by directly submitting the revenue and pay participation report to SEGOB, it had established property rights which could not be taken away.[324]

111. In light of these numerous administrative resolutions acknowledging E-Games' direct compliance with Mexico's gaming laws and regulations (such as submitting revenue and financial reports in accordance with Article 29 of the Gaming Regulation, as well as payment of federal taxes, among other obligations), Mr. González concludes that SEGOB correctly

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[322] González Report, **CER-3**, ¶¶ 22-25.

[323] González Report, **CER-3**, ¶ 17 ("*El criterio de la SEGOB expresado en el oficio implica que, a juicio de la autoridad, el derecho a explotar el permiso empezó a formar parte del patrimonio jurídico de Exciting Games por tres razones principales:*

a) Porque Exciting Games obtuvo autorización como operador del permiso.

b) Porque Exciting Games tenía la operación material de los establecimientos.

c) Porque Exciting Games presentó informe de ingresos, pagó participaciones (contribuciones fiscales especiales) de forma directa, pagó impuestos federales, y presentó estados financieros, entre otras obligaciones.".)

[324] *See* SEGOB Resolution No. DGAJS/SCEV/0260/2009-BIS (May 27, 2009), **C-11**; González Report, **CER-3**, ¶ 27.

found that E-Games had acquired rights to continue to operate the Casinos independent of E-Mex's permit.[325]

112. Mr. González also concludes that SEGOB's May 27, 2009 Resolution complied with all procedural requirements for the administrative body's recognition and application of the legal principle of "acquired rights." According to Mr. González, for an administrative body, like SEGOB's Games and Raffles Division, to issue an interpretation of its own Gaming Regulation, the administrative body has to meet the following requirements: (1) that SEGOB's Games and Raffles division is the competent authority for addressing E-Games' request; (2) that SEGOB's Games and Raffles Division is the competent authority to interpret the Gaming Regulation; (3) that said interpretation is in fact an interpretation of the Gaming Regulation; and (4) that said interpretation is reasoned.[326]

113. Mr. González concludes that the first two requirements are easily met, as Article 2 of the Gaming Regulation clearly states that SEGOB's Games and Raffles Division is competent to resolve any issues involving Mexico's gaming laws and Regulations and, as a result, it is authorized to interpret said laws and regulations.[327]

114. With respect to the third requirement, Mr. González concludes that SEGOB complied because, as the competent authority to interpret its own Gaming Regulation, it had authority to issue a definitive administrative decision in a specific case regarding an issue not codified in the Gaming Regulation.[328] In other words:

> SEGOB's Games and Raffles Division ruled on E-Games' request, as it related to the existence of acquired rights,' by interpreting Articles 29, 30, and 31 of the Gaming

[325] González Report, **CER-3**, ¶¶ 27-29.

[326] González Report, **CER-3**, ¶ 32.

[327] González Report, **CER-3**, ¶¶ 33 – 34.

[328] González Report, **CER-3**, ¶ 35.

Regulation to a situation not expressly codified in the Gaming Regulation.[329] (English translation of Spanish original).

115. And as to the fourth requirement, Mr. González concludes that this requirement is met, because SEGOB based its decisions on several legal grounds and provided reasoning for its conclusions, as discussed above.[330] More specifically, Mr. González illustrates that SEGOB relied on Articles 8, 14, and 16 of the Mexican Constitution, Article 27 of the Federal Administrative Act, Articles 2 and 3 of the Mexican Gaming Law, and Articles 1, 2, 29, 30, and 31 of the Gaming Regulation.[331]

116. As a result of all the above-mentioned considerations, through its May 27, 2009 Resolution, SEGOB recognized E-Games' independent status as a valid and autonomous operator of the Casinos further clarifying that from that moment on, E-Games would (1) report directly to SEGOB instead of to E-Mex regarding its operation of the Casinos; and (2) would no longer need to rely on E-Mex's permission, including through the Operating Agreement, in order to operate its Casinos in Mexico. That is, SEGOB ruled that E-Games' right to continue to operate the Casinos was subject only to the terms of the permit and that such rights could only be terminated pursuant to SEGOB's right to terminate a permit-holder's right to exercise its casino permit pursuant to the Mexican Gaming Regulation and law (citing to articles 34, 149 and 151 of the Gaming Regulation).[332]

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329 González Report, **CER-3**, ¶ 35(d) ("*Así, la DGAJS resolvió la solicitud de Exciting Games, en relación con la existencia de derechos adquiridos, con base en una interpretación administrativa de los artículos 29, 30 y 31 del RLFJS, al tratarse de una hipótesis no prevista en la regulación*.").

330 González Report, **CER-3**, ¶ 36.

331 González Report, **CER-3**, ¶ 36.1.(a).

332 *See* SEGOB Resolution No. DGAJS/SCEV/0260/2009-BIS (May 27, 2009), **C-11**; Julio Gutiérrez Statement, **CWS-52**, ¶ 25.

1. E-Games' status as an independent operator is based on SEGOB precedent

117. E-Games' request to obtain independent operator status—and SEGOB's granting of the same—was based on a precedent from 2008, where SEGOB had recognized that another gaming operator in a similar situation as E-Games had acquired certain rights and obligations in connection with a third party's permit, and was thus allowed to continue operating gaming establishments independently from the permit holder, even when the permittee had lost the permit. Therefore, when SEGOB issued its decision in Resolution DGAJS/SCEV/0260/2009-BIS, it did not reach a new interpretation of the Gaming Regulation, but rather was being consistent with prior application and interpretation of the Gaming Regulation and with its previous precedent.[333]

a. E-Games' request relied on the Petolof S.A. de C.V. case

118. E-Games relied on a resolution that SEGOB issued to Petolof, S.A. de C.V. ("**Petolof"**), on October 28, 2008, where it applied the same legal principle of "acquired rights" to grant Petolof the status of independent operator.[334]

119. Similar to E-Games, Petolof began its casino operation under the permit of a third-party permittee. Specifically, in 1999, Petolof had entered into a services and distribution agreement with Espectáculos y Deportes del Norte S.A. de C.V. ("**EDN**"), to use 7 of EDN's properties in Mexico.[335] At some point in time, SEGOB initiated administrative proceedings to revoke EDN's permit. [336] While the administrative proceedings were ongoing, Petolof initiated an *amparo* proceeding requesting a right to due process and to participate in EDN's

[333] González Report, **CER-3**, ¶ 41.

[334] SEGOB Resolution Granting Petolof Independent Operator Status (Oct. 28, 2008), **C-253**.

[335] González Report, **CER-3**, ¶ 50.

[336] González Report, **CER-3**, ¶ 51.

administrative proceeding.[337] The Mexican court granted Petolof's request and, as a result, SEGOB issued a resolution regarding Petolof's rights under EDN's permit.[338]

120. SEGOB's October 28, 2008 resolution held that Petolof had acquired rights over EDN's permit to use 7 of EDN's gaming establishments (the "**October 28, 2008 Resolution**").[339] SEGOB further ruled that Petolof had complied with all requirements and obligations as set forth in EDN's permit.[340] SEGOB finally ruled that it was revoking EDN's permit as to EDN only.[341]

121. SEGOB thus modified Petolof's status and granted it the status of independent operator based on the following: (1) while Petolof requested that it should be considered a permit holder in light of the services and distribution agreement with EDN, SEGOB determined that it could not recognize Petolof as a permit holder because the permit was granted only to EDN; and (2) that even though SEGOB could not recognize Petolof as a permit holder, it did have authority to modify Petolof's status so as to acknowledge the rights it had acquired with respect to the 7 establishments it was using.[342]

122. In light of the above, Mr. González identifies several key factors to be considered when comparing the May 27, 2009 Resolution and the October 28, 2008 Resolution that respectively granted E-Games and Petolof their independent operator status.

123. First, the October 28, 2008 Resolution granted to Petolof predates the May 27, 2009 Resolution.[343] Accordingly, SEGOB was following a precedent and its prior

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337 González Report, **CER-3**, ¶ 52.

338 González Report, **CER-3**, ¶¶ 53, 54.

339 González Report, **CER-3**, ¶ 53(a).

340 González Report, **CER-3**, ¶ 53(b).

341 González Report, **CER-3**, ¶ 53(c).

342 González Report, **CER-3**, ¶ 54.

343 González Report, **CER-3**, ¶ 44.

interpretation of the Gaming Regulation under very similar circumstances when it granted E-Games' status as an independent operator.

124. Second, there are two striking similarities between the May 27, 2009 and October 28, 2008 Resolutions. Both resolutions aimed to give a third party (E-Games or Petolof) an independent right to operate certain gaming establishments that were once being operated under another permit holder's permit (E-Mex's or EDN's permit) and were now being passed on to the third party based on the legal principle of "acquired rights".[344] Additionally, both resolutions recognized that a third party (E-Games or Petolof) had acquired rights based on its contractual relationship with the permit holder (E-Mex or EDN), to the extent that this contractual relationship gave the third party a right to operate establishments without the permit holder's permission.[345] As Mr. González describes:

> The main similarity is that the principle of acquired rights, which originated in a contractual agreement between the permit holder and a third party (Petolof or Exciting Games), generated rights to exploit in favor of the third party, and totally independent from the permit holder.[346] (English translation of Spanish original).

125. The only difference that Mr. González identifies between the May 27, 2009 and October 28, 2008 Resolutions is that Petolof was not considered an operator under EDN's permit when SEGOB issued its resolution recognizing Petolof's "acquired rights" because the contractual relationship between Petolof and EDN predated the 2004 Gaming Resolution.[347] The operator status was not yet expressly defined in the previous gaming law that governed the relationship between Petolof and EDN, whereas the status of operator was expressly codified

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344 González Report, **CER-3**, ¶ 45.

345 González Report, **CER-3**, ¶ 47.

346 González Report, **CER-3**, ¶ 47 ("*La semejanza principal radica en que la figura de los derechos adquiridos, emanados de un acuerdo contractual entre el permisionario y un tercero (PETOLOF o Exciting Games), fue generadora de derechos de explotación a favor de éste, de manera independiente al permisionario*").

347 González Report, **CER-3**, ¶¶ 48 – 49.

in the 2004 Gaming Regulation that governed the relationship between E-Games and E-Mex.[348] That said, the noted difference is not significant because under both contractual relationships a permit holder was bestowing the right to use and operate certain establishments to a third party under the permit holder's permit.

b. Petolof's status today proves that Mexico is applying different standards under similar circumstances

126. As will be discussed further in Section IV.X.3.j, on 27 May 2016, SEGOB issued Resolution No. DGJS/DGAAD/DCRCA/P-01/2016, granting Petolof the status of permit holder.[349] As such, today Petolof operates casinos as a permit holder in its own right and is no longer identified on SEGOB's website as an independent operator.[350]

127. In addition to confirming that SEGOB is applying different standards to different permit holders, SEGOB's ruling changing Petolof's status to permit holder in 2016 is telling for several reasons. First, by 2016 E-Mex had already initiated the *amparo* proceedings against E-Games resulting in the illegal revocation of E-Games' permit and prior SEGOB Resolutions related to E-Games (DGAJS/SCEV/0260/2009-BIS, DGAJS/SCEV/0827/2012 and DGJS/SCEV/1426/2012), and the Mexican courts had ordered SEGOB to revoke E-Games' permit. Yet, SEGOB was applying a different standard to Petolof by allowing it to become a permit holder in its own right even though it stood in nearly identical circumstances to E-Games who was afforded that right when SEGOB issued a permit to it in November 2012 but then was denied that right when SEGOB later revoked E-Games' permit.[351] Mr. González explains:

> That is, it becomes apparent that SEGOB is applying two different legal standards in similar cases, given that in Exciting Games' case it advocated for the revocation of permits DGAJS/SCEV/0260/2009-BIS,

[348] González Report, **CER-3**, ¶¶ 48 – 49.

[349] González Report, **CER-3**, ¶¶ 55 – 56.

[350] González Report, **CER-3**, ¶¶ 55 – 56.

[351] González Report, **CER-3**, ¶ 59-60.

> DGAJS/SCEV/0827/2012 and DGJS/SCEV/1426/2012, based on the fact that revocation ensued as a result of the application of 'acquired rights'; whereas in the Petolof case it first maintained the notion that it could operate based on acquired rights to later grant it its own permit.[352] (English translation of Spanish original).

128. In light of the above, Mr. González concludes that SEGOB's actions denote a total lack of legal certainty in administrative law, in the sense that legal certainty requires administrative bodies to act in ways which are legally sound, consistent, and homogenous so as to avoid any indication of bias or irregularity.[353] Mr. González also concludes that when an administrative body does not act in a consistent matter, it breaches a party's legitimate expectations in the sense that an administrative body should act in the manner it is supposed to in accordance with the law.[354]

M. E-Games' Efforts to Become an Independent Permit Holder

129. Following the May 27, 2009 Resolution, on December 28, 2009, E-Games requested that SEGOB maintain in effect its resolutions recognizing E-Games' independent status as an operator under E-Mex's permit. It did so, in part, because it was concerned that E-Mex would cause SEGOB to close Claimants' Casinos in view of the dispute between E-Mex and E-Games over royalty payments and because E-Mex sent a letter to SEGOB informing them that E-Mex had unilaterally terminated the Operating Agreement between E-Mex and E-Games.[355] SEGOB replied to E-Games' request on July 21, 2010, stating that E-Games remained validly authorized under the Gaming Regulation to operate the Casinos under E-Mex's permit and that it should submit documentation demonstrating its continued compliance

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[352] González Report, **CER-3**, ¶ 59 ("*Es decir que se ponen de manifiesto dos posturas jurídicas distintas de la SEGOB ante casos semejantes, pues mientras que en el caso de Exciting Games postuló la insubsistencia de los oficios DGAJS/SCEV/0260/2009-BIS, DGAJS/SCEV/0827/2012 y DGJS/SCEV/1426/2012, a partir de la revocación de la autorización basada en derechos adquiridos, respecto de PETOLOF primero preservó el criterio de operación con base en derechos adquiridos y posteriormente le otorgó un permiso propio a dicha empresa.*").

[353] González Report, **CER-3**, ¶ 60.

[354] González Report, **CER-3**, ¶ 60.

[355] Julio Gutiérrez Statement, **CWS-52**, ¶ 28.

with the reporting obligations required by the Gaming Regulation and other applicable Mexican law.[356]

130. E-Games complied with SEGOB's information requests by letter dated October 26, 2010, and requested that SEGOB issue a resolution declaring that E-Games could continue to operate "regardless of the consequences and effects that the restructuring/bankruptcy proceedings may have against [E-Mex]."[357] On December 8, 2010, SEGOB informed E-Games that: (1) E-Games had complied with SEGOB's request made on July 21, 2010; (2) E-Games was recognized as an independent operator under E-Mex's permit; and (3) E-Games could apply for an autonomous, independent permit under its own name if E-Mex's permit was revoked or threatened with revocation.[358] SEGOB's December 8, 2010 Resolution thus not only reiterated and underscored E-Games' continued compliance with Mexican law and its status as an independent operator of the Casinos, but it also constituted SEGOB's formal invitation for E-Games to apply for its own, autonomous permit.

N. E-Games Applies for its Own Independent Permit

131. Just a couple of months following SEGOB's invitation, on February 22, 2011 E-Games applied with SEGOB for its own Casino permit, requesting that its status as a permit holder be in the same conditions as E-Mex's permit in Resolution DGAJS/SCEVF/P-06/2005.[359] Mexican counsel closely assisted Claimants in the preparation of this request, particularly in the preparation of voluminous documentation in compliance with Articles 21, 22, and 28 of the Gaming Regulation.[360]

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356 *See* SEGOB Resolution No. DGAJS/SCEV/0321/2010 (July 21, 2010), **C-12**.

357 *See* SEGOB Resolution No. DGAJS/SCEV/0550/2010 (Dec. 8, 2010), **C-13**.

358 *See* SEGOB Resolution No. DGAJS/SCEV/0550/2010 (Dec. 8, 2010) (emphasis added), **C-13**.

359 *See* E-Games Permit Application (Feb. 22, 2011), **C-14**; Julio Gutiérrez Statement, **CWS-52**, ¶ 30; González Report, **CER-3**, ¶¶ 61 – 62.

360 Julio Gutiérrez Statement, **CWS-52**, ¶ 30.

132. Of particular note, Mexican counsel recounts that the preparation of the documents for this request was considerably more nuanced than the preparation of the request to become an operator, given that Article 30 of the Gaming Regulation contemplates that the operator will act according to the permit holder's permit and, as a result, the requirements for becoming an operator are less stringent.[361] Importantly, E-Games' request to become a permit holder included an entire section of the submission explaining how the Mexican government had an obligation to provide equal treatment to E-Games vis-à-vis other permit holders in similar circumstances who had already obtained permits.[362]

133. On November 18, 2011, SEGOB informed E-Games that it had to submit additional information regarding its request, even though E-Games had complied with all requirements under Mexican law.[363] Ironically, SEGOB also informed E-Games that *while it had complied with the requirements to become a permit holder*, it had to wait until E-Mex was formally declared insolvent by a Mexican court before SEGOB could proceed to change E-Games' status and grant it an independent permit to operate the Casinos.[364] Mr. Burr and Mexican counsel were surprised by this decision, because it did not seem logical that the fate of E-Games' permit depended on a situation that was completely outside E-Games' control.[365] In fact, this decision was consistent with the statements by the Calderon administration that it would not grant any additional gaming permits; one that again seemed motivated by political cronyism rather than a transparent application of the Gaming Regulation.[366] On behalf of Claimants, Mr. Burr thus sought advice from Mexican counsel to see if they could challenge

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361 Julio Gutiérrez Statement, **CWS-52**, ¶ 31.

362 Julio Gutiérrez Statement, **CWS-52**, ¶ 31.

363 Julio Gutiérrez Statement, **CWS-52**, ¶ 33.

364 Julio Gutiérrez Statement, **CWS-52**, ¶ 33.

365 Julio Gutiérrez Statement, **CWS-52**, ¶ 33.

366 Julio Gutiérrez Statement, **CWS-52**, ¶ 33; *Ni un casino mas en el pais advierte Blake* (Sept. 29, 2011). Retrieved from https://www.proceso.com.mx/282783/ni-un-casino-mas-en-el-pais-advierte-blake, **C-366**.

that resolution, but after careful consideration, Mr. Burr decided not to challenge that resolution from SEGOB and to wait until E-Mex was formally declared insolvent to re-apply for the permit.[367]

134. On June 14, 2012, E-Games informed SEGOB that, on March 5, 2012, a Mexican court formally declared E-Mex insolvent and placed it in restructuring/liquidation proceedings.[368] Pursuant to SEGOB's previous resolution from May 18, 2011, E-Games requested that its status be changed to an independent permit holder as previously requested on February 22, 2011.[369]

135. On August 13, 2012, SEGOB initiated an administrative proceeding against E-Mex following the Mexican court's declaration of E-Mex's bankruptcy in order to revoke E-Mex's permit.[370]

136. On August 15, 2012, SEGOB issued Resolution DGJS/SCEV/0827/2012, in which it recognized that E-Games had acquired rights for the use and operation of E-Mex's permit and, as a result, was entitled to the rights and obligations under E-Mex's permit in its own name (the "**August 15, 2012 Resolution**").[371] As explained below, SEGOB's August 15, 2012 Resolution thus conferred upon E-Games the rights and obligations of a permit holder for purposes of continuing to operate the Casinos.[372]

137. Just as in the case of E-Games' request to become an independent operator, SEGOB expressly recognized in its August 15, 2012 Resolution that E-Games had acquired

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367 Julio Gutiérrez Statement, **CWS-52**, ¶ 33.

368 Julio Gutiérrez Statement, **CWS-52**, ¶ 33.

369 Julio Gutiérrez Statement, **CWS-52**, ¶ 33.

370 *See* SEGOB Resolution No. DGAJS/SAAJ/1227/2012 (Aug. 13, 2012), **C-15**.

371 SEGOB Resolution No. DGJS/SCEV/0827/2012 (Aug. 15, 2012). **C-254**.

372 SEGOB Resolution No. DGJS/SCEV/0827/2012 (Aug. 15, 2012). **C-254**; Julio Gutiérrez Statement, **CWS-52**, ¶ 34; González Report, **CER-3**, ¶ 67.

rights for the use and operation of E-Mex's permit.[373] SEGOB also confirmed, as before, that said rights could not be modified, absent cause for revoking a permit-holder's rights under the Gaming Regulation, and that E-Games' rights were independent of any previous contractual relationship E-Games may have had with E-Mex or any other entity.[374]

138. In addition, SEGOB approved E-Games' change of status and recognized that it was entitled to the independent use and operation of the Casinos as established in E-Mex's permit, particularly since it verified that, at all times, E-Games *had complied with every requirement under the Gaming Regulation* and because SEGOB now had official grounds to revoke E-Mex's permit as a result of the Mexican court's declaration of E-Mex's insolvency.[375]

139. In light of the above, Mr. González confirms that SEGOB's decision in its August 15, 2012 Resolution had the same effect as changing E-Games' status to permit holder.[376] Mr. González explains that "the phrase 'holder of the right to use and operate a permit' [as used in this Resolution] is equivalent to referring to someone as a permit holder." (English translation of Spanish original).[377] Therefore, Mr. González concludes that the SEBOB's decision to change E-Games' status from independent operator to holder of the right to use and operate of E-Mex's permit had the same effect as changing the status to permit holder of E-Mex's permit.[378] In doing so, SEGOB allowed E-Games to become a permit holder, along with E-Mex, of E-Mex's permit pending E-Mex's revocation proceedings in SEGOB.[379] However, it is important to note that SEGOB's August 15, 2012 Resolution did

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373 SEGOB Resolution No. DGJS/SCEV/0827/2012 (Aug. 15, 2012). **C-254**; González Report, **CER-3**, ¶ 64.

374 SEGOB Resolution No. DGJS/SCEV/0827/2012 (Aug. 15, 2012). **C-254**; González Report, **CER-3**, ¶ 65.

375 SEGOB Resolution No. DGJS/SCEV/0827/2012 (Aug. 15, 2012). **C-254**; Julio Gutiérrez Statement, **CWS-52**, ¶ 35; González Report, **CER-3**, ¶ 69.

376 González Report, **CER-3**, ¶ 67.

377 González Report, **CER-3**, ¶ 67(ii).

378 González Report, **CER-3**, ¶ 67(iii).

379 González Report, **CER-3**, ¶ 67(iv).

not grant E-Games its own independent permit, which is what E-Games has been requesting since February 2011. As explained below, E-Games persisted with its request and obtained its own independent permit through SEGOB's November 16, 2012 Resolution.

O. E-Games obtains its own Independent Permit

140. On November 7, 2012, E-Games requested SEGOB's Director General to correct the August 15, 2012 Resolution and, as a separate matter, to grant E-Games its own independent permit with a permit number separate and distinct from E-Mex's permit.[380] Claimants also made the November 7 request, in part, because the official who had issued the August 15, 2012 Resolution was the Sub-Director of the Director General's Office of the Gaming Authority, rather than the Director General.[381] This concerned Claimants, who wanted their request for an independent and autonomous permit resolved by the highest and direct authority in the office to make that determination, the Director General.[382]

141. On November 16, 2012, SEGOB issued Resolution DGJS/SCEV/1426/2012, granting E-Games its own independent permit with its distinct permit number: DGAJS/SCEVF/P-06/2005-BIS (the "**November 16, 2012 Resolution**").[383] SEGOB's Resolution also reached the following conclusions: (1) the August 15, 2012 Resolution complied with all SEGOB requirements for it to be a valid administrative resolution and, as a result, was valid and in effect from its issuance; (2) since there was nothing to rectify in the August 15, 2012 Resolution, SEGOB was reiterating that the effects of the August 15, 2012 Resolution were in effect since its issuance; and (3) SEGOB was formally changing E-Games' status to independent permit holder, subject to the same conditions and obligations as E-Mex's permit, to operate up to fourteen gaming establishments (7 remote gambling centers and 7

380 Julio Gutiérrez Statement, **CWS-52**, ¶ 36; González Report, **CER-3**, ¶¶ 71, 75(a).

381 SEGOB Resolution No. DGJS/SCEV/0827/2012 (Aug. 15, 2012). **C-254**.

382 González Report, **CER-3**, ¶ 71.

383 *See* SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16**.

lottery number rooms), or up to 7 dual-function gaming establishments.[384] In other words, while E-Games—and Claimants' ability to operate their Casinos—was no longer tied legally to E-Mex's permit, Claimants' new permit was officially a new independent permit encompassing the same rights and obligations as E-Mex's permit to operate up to fourteen gaming establishments as described above.[385] Importantly, the Director General noted in his November 12th resolution that, unlike what has been stated in the August 15, 2012 Resolution, SEGOB was not relying on E-Games' status as an "independent operator" to grant E-Games its own permit; rather, it granted E-Games its permit because it met all of the requirements to obtain one as per the Gaming Resolution.[386] This meant that the permit would remain valid until 2037.

1. The November 16, 2012 Resolution complied with all requirements under Mexican law

142. In issuing the November 16, 2012 Resolution, SEGOB confirmed that its August 15, 2012 Resolution complied with all material requirements under Mexican law and, as such, constituted a valid administrative act to the fullest extent of Mexican law.[387] It also confirmed that E-Games had independently complied in its new request with all the legal requirements under Mexican law to become an independent permit holder.

143. First, SEGOB determined that it ruled on E-Games' request applying its interpretative powers in accordance with Mexico's gaming laws and regulations, in particular SEGOB's discretionary power to rule on issues not contemplated in the Gaming law and Gaming Regulation.[388] As Mr. González notes, SEGOB found that E-Games' request was

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384 *See* SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16**; Julio Gutiérrez Statement, **CWS-52**, ¶ 37; González Report, **CER-3**, ¶ 73.

385 González Report, **CER-3**, ¶¶ 74, 75 (d).

386 *See* SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16**.

387 *See* SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16**; González Report, **CER-3**, ¶ 106.

388 González Report, **CER-3**, ¶ 80 (a).

unique given E-Mex's pending revocation proceedings.[389] Accordingly, SEGOB found that it was necessary to issue the November 16, 2012 Resolution in order to protect E-Games' acquired rights and independent permit, particularly while E-Mex's revocation was pending before SEGOB.[390] SEGOB thus concluded that E-Games' rights could not be modified, regardless of any contractual relationship it may have had with E-Mex.[391]

144. Second, SEGOB determined that E-Games, when it was an operator, had at all times complied with all requirements as set forth in E-Mex's permit, as well as the Gaming law and Gaming Regulation.[392] In light of the above, SEGOB concluded that E-Games should be allowed to continue operating its establishments.[393]

145. Third, SEGOB took into account public policy considerations that warranted safeguarding E-Games' rights as an employer and provider of services in Mexico.[394]

146. Fourth, SEGOB found that E-Games had complied with all material requirements for SEGOB to grant E-Games an independent permit in accordance with Articles 20, 22, and 23 of the Gaming Regulation.[395] Mr. González notes that SEGOB's findings amounted to SEGOB's acknowledgement that E-Games was entitled to a permit that afforded it the same rights and obligations as E-Mex's permit and, as a result, "E-Games should continue using and operating its establishments independently from permit DGAJS/SCEVF/P-06/2005 [E-Mex's permit]."[396]

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389 González Report, **CER-3**, ¶ 80 (a).

390 González Report, **CER-3**, ¶ 80 (f).

391 González Report, **CER-3**, ¶ 80 (f).

392 González Report, **CER-3**, ¶ 80 (b).

393 González Report, **CER-3**, ¶ 80 (c).

394 González Report, **CER-3**, ¶ 80 (d).

395 González Report, **CER-3**, ¶¶ 75(b), 80 (g).

396 González Report, **CER-3**, ¶ 80 (g) ("*En consecuencia de lo anterior, Exciting Games debía continuar con la explotación de los establecimientos autorizados de manera completamente autónoma al permiso DGAJS/SCEVF/P-06/2005.")*.

147. Of particular importance is SEGOB's conclusion that the November 16, 2012 Resolution was not motivated by E-Games' request to correct the August 15, 2012 Resolution or by E-Games' prior status as an independent operator that had, in part and erroneously, motivated the August 2012 Resolution, but rather by E-Games' independent request to become an independent permit holder pursuant to Article 20, 21, and 22 of the Gaming Regulation, and its having fulfilled all of the requirements under the Gaming Regulation to become a permit holder.[397] As Mr. González explains:

> Notably, the DGJS [Games and Raffles Division] established that the resolution that gave rise to Exciting Games' primary request was not the change of status referenced in the DGAJS/SCEV/0827/2012 resolution [August 15, 2012 Resolution], but Exciting Games' request for its own permit under the terms of articles 20, 21, 22 and other applicable articles of the RLFJS [Gaming Regulation][398] (English translation of Spanish original).

148. Therefore, in its November 16, 2012 Resolution, SEGOB concluded that since E-Games had complied with all legal requirements, it was entitled to a permit in its own name where it would have the same rights and obligations, in equal terms, as before under Resolution DGAJS/SCEVF/P-06/2005.[399]

149. Simply put, SEGOB underscored that it was issuing the November 16, 2012 Resolution because E-Games requested a permit under its own name and because it had meticulously complied with all material requirements under the Gaming Regulation to have an independent and autonomous permit issued to it, not because of its prior status as an independent operator.[400]

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397 González Report, **CER-3**, ¶ 80 (h); Julio Gutiérrez Statement, **CWS-52**, ¶ 37.

398 González Report, **CER-3**, ¶ 80 (h) ("*Destacadamente, la DGJS estableció que la resolución que dio origen a la petición primaria de Exciting Games no fue el cambio de estatus a que se refiere el oficio DGAJS/SCEV/0827/2012 (derechos de explotación y operación), sino la solicitud presentada por Exciting Games para un permiso propio en los términos de los artículos 20, 21, 22 y demás relativos y aplicables del RLFJS").*

399 González Report, **CER-3**, ¶ 80 (4).

400 *See* SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), p. 6, **C-16**.

150. And fifth, SEGOB determined that E-Games should be allowed to use and operate its establishments completely independent from E-Mex's permit.[401] As a result, SEGOB ruled that E-Games' current operations of its establishments now emanated from the independent permit number granted in the November 16, 2012 Resolution: No. DGAJS/SCEVF/P-06/2005-BIS.[402]

151. While the Gaming Regulation makes no reference to an "independent" permit, Mr. González concludes that the specific numbering in E-Games' permit indicates SEGOB's clear intention to confer a new and independent permit to E-Games.[403] In reaching this conclusion, Mr. González relies on Articles 3 and 32 of the Gaming Resolution, as well as SEGOB's conclusions in the November 16, 2012 Resolution.[404] More specifically, Mr. González concludes that SEGOB wanted to expressly indicate in the November 16, 2012 Resolution that it was issuing a new permit to E-Games by adopting an exclusive permit number for E-Games.[405] The fact that E-Games' permit number may have any similarities with E-Mex's permit number is, in Mr. González's experience, a common practice for SEGOB, as SEGOB wanted to denote that the new permit holder's permit derived from a previously-issued permit from which certain of its conditioned were linked.[406]

152. It follows, as confirmed by Mexican counsel,[407] that the November 16, 2012 Resolution confirmed E-Games' legal entitlement under the Gaming Regulation to have its own valid, independent casino permit. SEGOB took all necessary steps to make sure that it

401 González Report, **CER-3**, ¶ 81 (i).

402 González Report, **CER-3**, ¶ 81.

403 González Report, **CER-3**, ¶ 75.

404 González Report, **CER-3**, ¶¶ 76–77.

405 González Report, **CER-3**, ¶ 77(a).

406 González Report, **CER-3**, ¶¶ 77 (b) and (c).

407 Julio Gutiérrez Statement, **CWS-52**, ¶ 37.

was issuing a valid administrative resolution recognizing this and ensuring it had no link whatsoever to E-Mex's permit.

2. E-Games' Permit was valid until at least 2037 and more likely until at least 2052

153. As previously indicated, the November 16, 2012 Resolution grants E-Games an independent permit in the same terms and conditions as E-Mex's permit, including the duration of E-Mex's permit for a period of 25 years. According to Mr. González, however, the November 16, 2012 Resolution granting E-Games' permit does not precisely indicate when it comes into effect, and it ties the duration to the duration of E-Mex's permit.

154. Pursuant to Article 9 of the Federal Law of Administrative Procedure,[408] the general principle is that the effects of an administrative act granting a certain right or obligation begin to run on the date on which the administrative act is issued.[409]

155. Therefore, the validity of E-Games' 25-year permit began on November 16, 2012, the date in which SEGOB granted favorably to E-Games an independent permit to operate the Casinos. E-Games' permit would have been valid for 25 years from 2012, or through 2037, had it not been for Mexico's unlawful rescission of the November 16, 2012 Resolution, as further discussed below. Furthermore, pursuant to Article 33 of the Gaming Regulation, after the expiration of the 25 year permit, E-Games' permit could—and in all likelihood would—have been further extended for subsequent 15-year periods and could be

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[408] Federal Law of Administrative Procedure, Article 9 *("El acto administrativo válido será eficaz y exigible a partir de que surta efectos la notificación legalmente efectuada.*

Se exceptúa de lo dispuesto en el párrafo anterior, el acto administrativo por el cual se otorgue un beneficio al particular, caso en el cual su cumplimiento será exigible por éste al órgano administrativo que lo emitió desde la fecha en que se dictó o aquélla que tenga señalada para iniciar su vigencia; así como los casos en virtud de los cuales se realicen actos de inspección, investigación o vigilancia conforme a las disposiciones de ésta u otras leyes, los cuales son exigibles a partir de la fecha en que la Administración Pública Federal los efectúe.").

[409] Id.

extended indefinitely with successive 15-year renewals.[410] The Gaming Regulation does not establish a limit to the number of 15 year extensions that a permit holder may request and receive. Since 2012, SEGOB has modified the term of various permits to have an indefinite validity.[411] As with E-Games' independent permit, another gaming operator who was operating under E-Mex's permit and who stood in essentially identical circumstances to E-Games, also sought and obtained an independent permit at essentially the same time as E-Games. That operator, Producciones Móviles, whose owner is Mexican, continues to own its permit and operate casinos today.

a. **Producciones Móviles' Resolution is identical to E-Games'**

156. Producciones Móviles' November 22, 2012 Resolution granting Producciones Móviles its own independent permit is essentially an exact reproduction of E-Games' November 16, 2012 Resolution, not only in terms of the circumstances leading to SEGOB's ruling, but also in SEGOB's written findings and conclusions in both resolutions.[412]

157. For starters, both E-Games and Producciones Móviles were operators under E-Mex's permit and both individually requested directly to SEGOB to change their status from operator to independent permit holder, in the same terms and conditions as E-Mex's permit.[413]

158. Once within SEGOB, both companies received identical resolutions where SEGOB made the following findings and conclusions: (1) both SEGOB resolutions were motivated by direct requests from the operator; (2) both operators had complied with all requirements to become a permit holder, particularly Articles 20, 21 and 22 of the Gaming

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[410] 2004 Gaming Regulation, Article 33 ("*Los permisos señalados en la fracción I podrán ser prorrogados por periodos subsecuentes de hasta 15 años, siempre que los permisionarios se encuentren al corriente en el cumplimiento de todas sus obligaciones*."), **CL-72**.

[411] *See* e.g. Grupo Océano Haman, S. A. de C. V. Screenshot, **C-255**; Impulsora Géminis, S. A. de C. V. Screenshot, **C-256**; Espectáculos Deportivos de Cancun, S. A. de C. V. Screenshot, **C-257** available at http://www.juegosysorteos.gob.mx/es/Juegos_y_Sorteos/Salas_de_Sorteos_de_Numeros.

[412] Julio Gutiérrez Statement, **CWS-52**, ¶¶ 40 – 41; González Report, **CER-3**, ¶¶ 82 – 90.

[413] Julio Gutiérrez Statement, **CWS-52**, ¶ 40; González Report, **CER-3**, ¶¶ 83 - 84.

Regulation; (3) both companies' acquired rights are limited to the same terms and conditions as E-Mex's permit; and (4) both companies were able to formally change their status to independent permit holder.[414]

159. In light of the above, Mr. González concludes that E-Games' Resolution served as precedent for Producciones Móviles' Resolution, given that SEGOB issued the latter a few days after E-Games' Resolution was issued.[415] Furthermore, Producciones Móviles specifically invoked E-Games' permit as justification for its permit. Accordingly, SEGOB was following E-Games as a precedent when it granted Producciones Móviles' independent permit.[416] Producciones Móviles' status today as a permit holder that continues to operate its casinos proves that Mexico is applying different standards under similar circumstances.

160. Even though SEGOB issued identical resolutions to E-Games and Producciones Móviles granting them independent permits in the same terms and conditions as E-Mex's permit, Producciones Móviles' permit is still valid today while SEGOB revoked all of the resolutions issued in favor of E-Games, including the November 16, 2012 Resolution.[417] In other words, as Mr. González suggests, SEGOB's actions in respect to E-Games should have prompted the same reaction with respect to Producciones Móviles, if they were in fact motivated by a sound legal justification (which they were not):

> In this regard, even though the Mexican court's judgment in Amparo 1668/2011 did not order SEGOB to act in any way with respect to Producciones Móviles' permit, said judgment does constitute a judicial precedent in a similar case, thus creating a standard to follow as required by the principle of legal certainty.[418] (Translation of Spanish original).

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414 Julio Gutiérrez Statement, **CWS-52**, ¶ 41; González Report, **CER-3**, ¶¶ 84.

415 González Report, **CER-3**, ¶¶ 85-86.

416 González Report, **CER-3**, ¶ 85.

417 González Report, **CER-3**, ¶ 91.

418 González Report, **CER-3**, ¶ 91 (b) *("En este sentido, si bien la sentencia dictada en el Juicio de Amparo 1668/2011 no ordenó a la SEGOB a actuar de determinada manera en relación con el permiso otorgado a Producciones Móviles, esa sentencia en teoría debería constituir un precedente judicial sobre un caso semejante,*

161. Mr. González thus concludes that SEGOB's actions denote a total lack of legal certainty in administrative law, in the sense that legal certainty requires administrative bodies to act in ways which are legally sound, consistent, and homogenous so as to avoid any indication of bias or irregularity.[419] Mr. González also concludes that when an administrative body does not act in a consistent matter, it breaches a party's legitimate expectations in the sense that an administrative body should act in the manner it is supposed to.[420]

P. There Is No Procedural or Legal Correlation Between E-Games' Independent Operator Permit and E-Games' Independent Permit

162. Sections IV.F – I of this Statement of Claim have described the evolution of E-Games' permit, explaining in detail how E-Games' status under E-Mex's permit changed from an independent operator to an independent permit holder in its own name and with a distinctive number. As the following section explains, there is no procedural correlation or legal nexus between the independent operator status SEGOB granted to E-Games in the May 27, 2009 Resolution and the independent permit SEGOB granted to E-Games in the November 16, 2012.[421] SEGOB itself says this in the November 16, 2012 Resolution.[422] The lack of procedural correlation between the May 27, 2009 Resolution and November 16, 2012 Resolution is highly relevant in discerning the failures within SEGOB and in the Mexican judiciary and their highly inconsistent treatment of E-Games' permit.

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de manera que razonablemente puede ser un elemento para modular el criterio de la autoridad conforme al principio de seguridad jurídica.").

419 González Report, **CER-3**, ¶ 92.

420 González Report, **CER-3**, ¶ 93.

421 González Report, **CER-3**, ¶ 95.

422 *See* SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), p. 6, **C-16**.

1. There is no logical sequence or procedural correlation between E-Games' independent operator status and E-Games' independent permit

163. Mr. González explains in his expert report that there are two requirements for there to be a logical or procedural connection between one administrative act or resolution and another: (1) a SEGOB administrative act or resolution must predate another; and (2) the former SEGOB administrative act or resolution must be either the cause or justification for the subsequent act or resolution.[423]

164. Mr. González identifies three possible scenarios to determine whether there could be a logical sequence between E-Games' independent operator status and E-Games' independent permit. The first scenario considers a correlation between SEGOB's May 27, 2009 Resolution (granting E-Games independent operator status) and SEGOB's August 15, 2012 Resolution (granting E-Games permit holder status). The second scenario considers a correlation between SEGOB's August 15, 2012 Resolution (granting E-Games permit holder status) and SEGOB's November 16, 2012 Resolution (granting E-Games an independent permit). And the third scenarios considers a correlation between SEGOB's May 27, 2009 Resolution (granting E-Games independent operator status) and SEGOB's November 16, 2012 Resolution (granting E-Games an independent permit). Each scenario is addressed below.

a. There is a correlation between SEGOB's May 27, 2009 Resolution and SEGOB's August 15, 2012 Resolution

165. The May 27, 2012 Resolution granting E-Games' status as independent operator predates the August 15, 2012 Resolution granting E-Games the right to use and operate E-Mex's permit.[424] Therefore, the first condition identified by Mr. González is met.

166. The August 15, 2012 Resolution then states that it acknowledges the rights E-Games has acquired over the use and operation of E-Mex's permit through different SEGOB

[423] González Report, **CER-3**, ¶ 98.

[424] González Report, **CER-3**, ¶ 101.

resolutions, naming specifically the May 27, 2009 Resolution and that this was a motivating factor for the issuance of the August resolution.[425] In light of the above, Mr. González concludes that the rights E-Games acquired to become an independent operator served as a justification or cause for E-Games' change of status to a holder of the right to use and operate E-Mex's permit, as recognized in the August 15, 2012 Resolution.[426]

167. Therefore, Mr. González concludes that there is a correlation between these two resolutions.[427]

b. There is no correlation between SEGOB's August 15, 2012 Resolution and SEGOB's November 16, 2012 Resolution

168. The August 15, 2012 Resolution granting E-Games the right to use and operate E-Mex's permit predates the November 16, 2012 Resolution granting E-Games an independent permit in its own name and with a distinctive number.[428] Thus, the first condition is met.

169. In terms of SEGOB's reasoning for granting E-Games an independent permit in November 2012, it is important to remember that E-Games' request motivating the November 16, 2012 Resolution had two separate requests. On the one hand, E-Games requested SEGOB to rectify the August 15, 2012 Resolution. On the other hand, as a totally separate matter, E-Games requested SEGOB to grant it an independent permit given E-Games' compliance with all material requirements under Mexico's laws and Gaming Regulation.

170. Because E-Games requested that SEGOB grant it its own independent permit with a distinct permit number, SEGOB analyzed *de novo* E-Games' request for an independent and autonomous permit.[429] In so doing, SEGOB issued a separate and distinct administrative

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[425] González Report, **CER-3**, ¶ 103.

[426] González Report, **CER-3**, ¶ 103.

[427] González Report, **CER-3**, ¶ 104.

[428] González Report, **CER-3**, ¶ 105.

[429] *See* SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16;** González Report, **CER-3**, ¶ 107.

resolution under Mexican law when it issued the November 16, 2012 Resolution.[430] This administrative resolution was a standalone resolution issued pursuant to the Gaming Regulation and other applicable Mexican law and thus was not dependent on the August 15, 2012 Resolution or any prior SEGOB resolutions regarding Claimants' right to operate the Casinos.[431]

171. This is confirmed by SEGOB itself, when it indicated, in categorical terms, that:

> In this sense, it is clarified that the resolution that gave rise to the primary petition of its represented, was not the change of status referred to in ... [the August 15, 2015 resolution], but on the contrary, it was the application for a Permit under terms of articles 10, 21, 22 and other related and applicable Regulations of the Federal Gaming Law, as observed in its brief dated June 26, 2012, submitted to the parties officials the same day ...(Translation of Spanish original).[432]

172. All references made to the August 15, 2012 Resolution were thus limited in scope and in no way served as a justification or cause for SEGOB to grant E-Games the independent permit that it issued in November 2012. As a result, Mr. González explains that the conclusions to be adopted in the November 16, 2012 Resolution were not motivated by this previous resolution, but rather by E-Games' new request for an independent permit.[433]

173. Mr. González then concludes that the November 16, 2012 Resolution neither modified the August 15, 2012 Resolution nor did it require the modification of the August 15, 2012 Resolution for purposes of granting E-Games an independent permit:

> This means that to issue Resolution DGJS/SCEV/1426/2012 and grant permit DGAJS/SCEVF/P-06/2005-BIS it was not necessary as a legal precondition to issue Resolution DGAJS/SCEV/0827/2012 previously granting [E-Games'] the right to use and operate permit DGAJS/SCEVF/P-06/2005.

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430 *See* SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16**.

431 *See* SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16**.

432 *See* SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16**.

433 González Report, **CER-3**, ¶ 107.

> In fact, Resolutions DGAJS/SCEV/0827/2012 and DGJS/SCEV/1426/2012 address two different issues: one has to do with granting a right to use and operate permit DGAJS/SCEVF/P-06/2005; and the other grants a specific independent permit DGAJS/SCEVF/P-06/2005-BIS once all conditions in the Gaming Regulation are met.[434] (English translation of Spanish original).

174. In any event, Mr. González emphasizes that the August 15, 2012 Resolution and the November 16, 2012 Resolution had two very different objectives, which is made evident by the permit that SEGOB handed down respectively.[435] Therefore, Mr. González concludes that there is no logical or procedural correlation between the August 15, 2012 Resolution and the November 16, 2012 Resolution.

175. Mr. González goes a step further, pointing out that the Director of Games & Raffles, in resolving E-Games' request for an independent permit, went about it differently than the Sub-Director, who had relied in part on the May 2009 Resolution in issuing his findings.[436] In the November 16, 2012 Resolution, the Director saw no need to rely on the May 2009 Resolution at all.[437] Instead, the Director carefully analyzed E-Games' request from February of 2011 (and renewed request from June 2012 after E-Mex was formally declared insolvent) with all of its extensive supporting documentation and concluded that E-Games met each and every requirement set forth in the Gaming Regulation to obtain a permit and issued E-Games an independent permit to it *for that reason*.[438]

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[434] González Report, **CER-3**, ¶¶ 111 – 112 ("*Esto quiere decir que para expedir el oficio DGJS/SCEV/1426/2012 y otorgar el permiso DGAJS/SCEVF/P-06/2005-BIS no era una condición jurídica necesaria emitir el oficio DGAJS/SCEV/0827/2012 y otorgar previamente la condición de titular de los derechos de explotación y operación del permiso DGAJS/SCEVF/P-06/2005. En realidad, los oficios DGAJS/SCEV/0827/2012 y DGJS/SCEV/1426/2012 se refieren a cuestiones distintas: en un caso, otorgar la titularidad de los derechos de explotación y operación del permiso DGAJS/SCEVF/P-06/2005; y en otro caso, otorgar el permiso independiente DGAJS/SCEVF/P-06/2005-BIS una vez satisfechos los requisitos del RLFJS.*").

[435] González Report, **CER-3**, ¶ 112.

[436] González Report, **CER-3**, ¶ 113.

[437] González Report, **CER-3**, ¶ 113.

[438] González Report, **CER-3**, ¶ 113.

176. Mr. Omar Guerrero ("**Mr. Guerrero**"), Claimants' other legal expert, reaches the very same conclusion regarding the lack of procedural correlation between both resolutions. As Mr. Guerrero acknowledges, even the November 16, 2012 Resolution made it crystal clear that it was not relying on the August 15, 2012 Resolution (or the May 2009 Resolution) in reaching its decision to grant E-Games an independent permit.[439]

177. Accordingly, as Mr. Guerrero concludes, SEGOB's own determination that these two resolutions are not related for purposes of granting E-Games an independent permit constitutes a valid administrative act, which under Mexican law is presumed to be legal with full force and effect.[440] And since SEGOB carries the legal burden to prove otherwise and has never done so,[441] Mr. Guerrero concludes that the November 16, 2012 Resolution remains valid as it pertains to the lack of procedural correlation between the August 15, 2012 and the November 16, 2012 Resolution.[442]

c. There is no correlation between SEGOB's May 27, 2009 Resolution and SEGOB's November 16, 2012 Resolution

178. The May 27, 2009 Resolution granting E-Games an independent operator status predates the November 16, 2012 Resolution granting E-Games an independent permit in its own name and with a distinctive number.[443] Again, the first condition is met.

179. In this scenario, however, it is abundantly clear that the Director of Games & Raffles in the November 16, 2012 Resolution does not rely on the May 27, 2009 Resolution in reaching its decision to grant E-Games an independent permit nor does it indicate that E-

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439 Guerrero Report, **CER-2**, ¶¶ 232-233, 235.

440 GuerreroReport, **CER-2**, ¶ 236 *("Tal determinación de Juegos y Sorteos (de que los oficios no están relacionados) constituye un acto administrativo, por lo que, como ha sido dicho, se presume válida y dictada conforme a derecho, salvo que se demuestre lo contrario, ya sea en un procedimiento administrativo o en un juicio. La carga de combatirla recae en la parte interesada.").*

441 Guerrero Report, **CER-2**, ¶¶ 236-237.

442 Guerrero Report, **CER-2**, ¶ 237

443 González Report, **CER-3**, ¶ 101.

Games' independent operator status was in any way a precondition for granting E-Games' independent permit.[444]

180. Mr. González explains that the above is of utmost importance because it clearly demonstrates that SEGOB did not rely on the May 27, 2009 Resolution to grant E-Games' independent permit and, most importantly, that E-Games' independent permit could and did have a life of its own, even if E-Games had not been an independent operator:

> This means that, regarding the purpose or cause of each resolution, it can be reasonably interpreted that the issuance of the independent permit was not subject necessarily to the to the issuance of Resolution DGAJS/SCEV/0260/2009-BIS (independent operator status resolution); and that the independent permit could have its own existence even without the existence of the independent operator resolution.[445] (English translation of Spanish original).

181. As a result, Mr. González concludes that there is no correlation whatsoever between the May 27, 2009 Resolution and the November 16, 2012 Resolution.[446]

182. Mr. Guerrero reaches the exact same conclusion.[447]

2. E-Games' independent operator status and E-Games' independent permit had substantially different legal effects

183. On its face, the May 27, 2009 Resolution had a completely different purpose and legal effect than the November 12, 2012 Resolution. Not only was it motivated by different requests, but SEGOB made it entirely clear that both requests regulated different aspects when it indicated that the purpose of the May 27, 2009 Resolution was for E-Games to become *an independent operator under E-Mex's permit*, while the purpose of the November 16, 2012

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444 González Report, **CER-3**, ¶¶ 113, 118.

445 González Report, **CER-3**, ¶ 118 *("Esto quiere decir que, en razón del objeto o materia de cada oficio, conforme al derecho administrativo mexicano se puede afirmar que la expedición del permiso independiente no estaba sujeta necesariamente a la existencia previa del oficio DGAJS/SCEV/0260/2009-BIS (operador independiente), y que el permiso independiente en efecto tenía existencia jurídica propia aun si Exciting Games no hubiera sido reconocido previamente como operador independiente.").*

446 González Report, **CER-3**, ¶¶ 119 – 120.

447 Guerrero Report, **CER-2**, ¶¶ 232-233, 241-248.

Resolution was for *E-Games to obtain its own independent permit* with its own distinctive number.[448] Several other factors under the Gaming Regulation underscore this difference between an independent operator and an independent permit holder.

184. First, Article 3 of the Gaming Regulation has different definitions for each status, thereby denoting that under the Gaming Regulation each status performs a different function.[449] Even more importantly, the Gaming Regulation makes clear that a permit holder is an owner in its own right of to use and operate a permit, while an operator only has the right to use another party's permit provided they have some contractual relationship or association with that party.[450]

185. Second, the Gaming Regulation makes clear that the status of an operator is dependent on the existence of a valid permit issued to a third party.[451] This means that an operator will only be able to operate gaming establishments if the following conditions are met: (1) a third party is owner of a gaming permit; (2) there is a contract or association between the third party permit holder and the would be operator; and (3) SEGOB grants a permit to the operator to operate under the third party's permit.[452] As to the third requirement, it is worth noting that Article 30 of the Gaming Regulation expressly requires the existence of a contractual relationship in order for SEGOB to grant an authorization for an entity to act as an operator.[453]

186. Third, the Gaming Regulation sets forth different requirements for each permit so that a request for an independent permit must comply with Articles 20, 21, and 22 of the

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448 González Report, **CER-3**, ¶¶ 123 – 124; Guerrero Report, **CER-2**, ¶¶ 241-245, 247.

449 González Report, **CER-3**, ¶ 125; Guerrero Report, **CER-2**, ¶ 246-247.

450 González Report, **CER-3**, ¶ 126; Guerrero Report, **CER-2**, ¶ 246.

451 González Report, **CER-3**, ¶ 126.

452 González Report, **CER-3**, ¶ 127.

453 González Report, **CER-3**, ¶ 128.

Gaming Regulation, while a request for an operator permit is only required to comply with Article 30 of the Gaming Regulation.[454]

187. And fourth, and quite importantly, the Gaming Regulation does not require a permit holder to have been an operator previously in order to obtain an independent permit under Articles 20, 21, and 22 of the Gaming Regulation.[455] Therefore, Mr. González concludes that for SEGOB to grant E-Games an independent permit with a distinctive number, it was not a precondition for SEGOB to have recognized E-Games' prior status as an independent operator.[456]

Q. Mexico's Various Interferences with Claimants' Operations

188. While the Claimants' multi-year campaign to obtain an independent permit was ongoing, Mexico engaged in systematic, unlawful and discriminatory interferences with Claimants' Casino operations, despite their scrupulous compliance with all laws, regulations, and requirements governing the Mexican casino industry. These interferences culminated in the closure of Claimants' Mexico City facility in June 2013.

189. For instance, in the wake of the deadly firebombing at Casino Royale in Monterrey in August 2011, various local, state and federal authorities targeted each of Claimants' Casinos for pretextual site inspections.[457] During one of such inspections, on August 26, 2011, 73 gaming machines were seized from the Mexico City Casino on the basis that there were some errors in importation paperwork regarding the machines.[458] On this occasion, although they had not inspected the Mexico City location previously, government

[454] González Report, **CER-3**, ¶¶ 129–130.

[455] González Report, **CER-3**, ¶ 131.

[456] González Report, **CER**-3, ¶ 132.

[457] Gordon Burr Statement, **CWS-50**, ¶ 92; Erin Burr Statement, **CWS-51**, ¶ 99; Alfredo Galván Meneses Witness Statement ("Galván Statement"), **CWS-56**, ¶ 11.

[458] Gordon Burr Statement, **CWS-50**, ¶ 93; Erin Burr Statement, **CWS-51**, ¶ 100.

agents arrived with large trucks, evidencing that they had intended to seize the gaming machines upon arrival.[459]

190. To recover the seized machines, Claimants had to initiate a court action, which resulted in administrative rulings finding that the seizure was illegal and ordering the return of the machines.[460] Even then, government officials only returned the machines after considerable delays and unsuccessfully attempting to levy invalid fines (in the amount of US $140,000) in violation of the court order. Claimants thus had to obtain another court order mandating the return of machines without any payment.[461]

191. Similarly on September 22, 2011, the Mexican Tax Administration Service ("**SAT**") arrived at the Naucalpan Casino with federal police in full SWAT gear, including shields, hoods and automatic weapons and inspected the location for 23 ½ hours.[462] The SAT seized 24 machines from the Naucalpan Casino for the same specious reason that was used to seize machines from Naucalpan.[463] At the time, Claimants' locations and a nearby Televisa facility were operating the exact same machines from the very same manufacturer who acknowledged that Televisa's machines hadthe same alleged importation errors as Claimants', but the Televisa machines continued in operation without interruption.[464] As discussed further below in Section IV.T, Televisa is one of the key players in the Mexican gaming industry with longstanding political connections to the Mexican government.

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[459] Gordon Burr Statement, **CWS-50**, ¶ 93; Erin Burr Statement, **CWS-51**, ¶ 100; Witness Statement of Patricio Gerardo Chávez Nuño ("Chávez Statement"), **CWS-54**, ¶ 38.

[460] Gordon Burr Statement, **CWS-50**, ¶ 95; Erin Burr Statement, **CWS-51**, ¶ 103.

[461] Gordon Burr Statement, **CWS-50**, ¶ 95; Erin Burr Statement, **CWS-51**, ¶ 103.

[462] Gordon Burr Statement, **CWS-50**, ¶ 94; Erin Burr Statement, **CWS-51**, ¶ 102; Chávez Statement, **CWS-54**, ¶ 36.

[463] Gordon Burr Statement, **CWS-50**, ¶ 94; Erin Burr Statement, **CWS-51**, ¶ 102; Chávez Statement, **CWS-54**, ¶ 37.

[464] Gordon Burr Statement, **CWS-50**, ¶ 94; Erin Burr Statement, **CWS-51**, ¶ 102.

192. Furthermore, after the Casino Royale incident, SEGOB placed severe restrictions on promotional activities and a temporary ban on the use of all table games, both electronic and live card. As a result, Claimants were forced to remove tables from all of their establishments to prevent government seizures.[465] However, other Mexican casino operators, including Televisa, were not disturbed by governments inspections and were allowed to continue to conduct the table games and promotions during this period, all to the detriment of Claimants' Casinos.[466]

193. Even after public criticism over the tragedy in Monterrey subdued, Mexico continued to endanger Claimants' investments by engaging in unjustified and discriminatory site inspections that led to temporary closures of Claimants' Casino facilities. For example, in November 2012, the Mexico City Casino was closed by the SAT for 16 days, based upon a claim that the Casino had violated a regulation by not connecting its computer system to the government's.[467] Notwithstanding that no other casino in Mexico had complied with that purported regulation, only the Claimants' Mexico City Casino was targeted and closed on that basis.[468] Again, Claimants were required to seek judicial recourse, and the court ruled the closure improper.[469] Despite the court order, the SAT did not immediately allow the Casino to reopen. The facility finally re-opened on November 23, 2012.[470]

R. Closure of Mexico City Casino on June 19, 2013

194. Against the backdrop of these repeated and unlawful efforts by the Mexican government to interfere with Claimants' Casino operations, including unwarranted site

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[465] Gordon Burr Statement, **CWS-50**, ¶ 92; Erin Burr Statement, **CWS-51**, ¶ 104.

[466] Gordon Burr Statement, **CWS-50**, ¶ 92; Erin Burr Statement, **CWS-51**, ¶ 104.

[467] Gordon Burr Statement, **CWS-50**, ¶ 96; Erin Burr Statement, **CWS-51**, ¶ 105.

[468] Gordon Burr Statement, **CWS-50**, ¶ 96; Erin Burr Statement, **CWS-51**, ¶ 105.

[469] Gordon Burr Statement, **CWS-50**, ¶ 96; Erin Burr Statement, **CWS-51**, ¶ 105.

[470] Gordon Burr Statement, **CWS-50**, ¶ 96; Erin Burr Statement, **CWS-51**, ¶ 105. Claimants note that they are not seeking any damages for the measures cited prior to June 2013, but they include them for context in relation to the measures for which they are seeking damages in this proceeding.

inspections, property seizures, and closures, Mexico, acting through the municipal government (*Secretaria de Proteccion Civil de la Ciudad de México*), again illegally closed the Mexico City Casino on June 19, 2013 based on a fabricated civil safety violation.[471] The local authorities alleged that a particular wire within slot machine cabinets needed to be enclosed in conduit, although the voltage and current that runs through this wire generates approximately 75 mW (milliwatts, which is equal to one thousandth of a watt) of power and is not considered a hazard by the manufacturers and by all certifying agencies.[472] No other country or jurisdiction in Mexico required this wire to be encased in protective tubing, and none of the Claimants' competitors, who had identical wires in their machine cabinets, was closed for the alleged infraction.[473]

195. Within three days of the closure, Claimants obtained a court order allowing the Casino to reopen.[474] But the municipality obstructed the reopening until July 24, 2013, resulting in a 34-day-long closure and significant revenue loss. Claimants were told informally that a competitor bribed someone within the local government to keep the Casino closed.[475] In fact, when Claimants attempted to provide paperwork to demonstrate compliance with the alleged encasing requirement, the local government did not accept it.[476]

196. As demonstrated by this discriminatory and pretextual closure of the Mexico City Casino that spanned over a month, Mexico's unlawful interferences with Claimants' Casino operations—which continued on a sporadic basis since the Claimants' commencement of Casino business in Mexico—intensified over the years. Claimants were at least able to cope

[471] Gordon Burr Statement, **CWS-50**, ¶ 97; Erin Burr Statement, **CWS-51**, ¶ 107.

[472] Gordon Burr Statement, **CWS-50**, ¶ 97; Erin Burr Statement, **CWS-51**, ¶ 107.

[473] Gordon Burr Statement, **CWS-50**, ¶ 97; Erin Burr Statement, **CWS-51**, ¶ 107.

[474] Gordon Burr Statement, **CWS-50**, ¶ 98; Erin Burr Statement, **CWS-51**, ¶ 108.

[475] Gordon Burr Statement, **CWS-50**, ¶ 98; Erin Burr Statement, **CWS-51**, ¶ 108.

[476] Gordon Burr Statement, **CWS-50**, ¶ 98; Erin Burr Statement, **CWS-51**, ¶ 108.

with these injurious actions by pursuing costly legal actions. However, Mexico's unjustified and harassing measures ultimately culminated in the unlawful and permanent closure of all of Claimants' Casinos in April 2014, as set forth in Section IV.X.3.d.

S. The New PRI Administration, Guided by its Political Aims, Mounts a Campaign Against Claimants' Casinos

197. As previously mentioned, on November 16, 2012, SEGOB issued E-Games an independent gaming permit with a distinctive number. However, Claimants could and should have obtained their own permit at least one year earlier, in November 2011, when SEGOB found that E-Games' request for its own permit—which was made upon SEGOB's invitation—complied with all legal requirements under the Gaming Regulation for the issuance of a new gaming permit.[477] Nevertheless, in an apparent attempt to save political face, the Calderón administration, who had promised not to issue any new gaming permits during President Calderón's term, made Claimants wait over a year, until the formal declaration of E-Mex's bankruptcy, so that it could politically justify granting E-Games' permit (as well as Producciones Móviles') by saying that it was merely a replacement for E-Mex's permit that was now revoked.[478] Mr. Obdulio Ávila Mayo, SEGOB's Undersecretary of Government during the Calderón administration, emphasized this point in his press interviews by incorrectly associating E-Games' permit with E-Mex's.[479]

198. Notwithstanding what appears to be a politically-motivated delay, SEGOB did eventually grant Claimants an independent permit on November 16, 2012, confirming yet again that E-Games had satisfied all legal requirements under the Gaming Regulation to become a

[477] Julio Gutiérrez Statement, **CWS-52**, ¶ 33.

[478] Ernestia Álvarez, *Conocía ex funcionario de SEGOB denuncias de presunta corrupción por casinos, Nacionales* (Jan. 15, 2013). Retrieved from https://mvsnoticias.com/noticias/nacionales/conocia-ex-funcionario-de-segob-denuncias-de-presunta-corrupcion-por-casinos-648, **C-258**.

[479] Ernestia Álvarez, *Conocía ex funcionario de SEGOB denuncias de presunta corrupción por casinos, Nacionales* (Jan. 15, 2013). Retrieved from https://mvsnoticias.com/noticias/nacionales/conocia-ex-funcionario-de-segob-denuncias-de-presunta-corrupcion-por-casinos-648, **C-258**.

permit holder. In its November 16, 2012 Resolution, SEGOB also expressly concluded, contrary to the Calderón administration's contention, that E-Games' independent permit was unrelated to and separate from E-Mex's permit.[480] As a result, Claimants' Casino operations were now on firm legal ground for at least a 25-year period.

199. But shortly after, the new PRI administration mounted a relentless attack on E-Games' hard-won permit. The PRI dominated Mexican politics for much of the 20th century. Since 1929, the PRI had governed Mexico for 71 consecutive years until it lost the presidency in 2000 to Vincente Fox representing the PAN Party. In the 2006 presidential vote, the PRI tumbled to third place, as PAN candidate Felipe Calderón succeeded Vincente Fox in the presidency. Thus, Enrique Peña Nieto's victory in the 2012 presidential election was deemed "a remarkable act of political rehabilitation"[481] that brought the PRI back in "from the cold."[482] Enrique Peña Nieto assumed office as the new President of Mexico on December 1, 2012, returning the PRI to power it lost 12 years ago to the PAN after seven decades in charge of the country.

200. Soon after the inauguration of Peña Nieto, the new PRI administration demonstrated openly hostile attitudes towards Claimants and E-Games' permit, mounting initial and unexplainable attacks against them in the media.[483] The attacks came from the highest levels of the government, including from Ms. Marcela González Salas ("**Ms. Salas**"), who President Peña Nieto appointed on January 15, 2013 as the new head of SEGOB's Games

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480 González Expert Report, **CER-3**, ¶¶ 3, 73, 75.

481 Nick Miroff and William Booth, Peña Nieto is Winner of Mexican Election (Jul. 2, 2012). Retrieved from https://www.washingtonpost.com/world/the_americas/mexico-presidential-election-underway/2012/07/01/gJQAyd96FW_story.html, **C-259**.

482 Dave Graham and Anahi Rama, Enrique Pena Nieto, the New Face of Mexico's Old Rulers (Jul. 2, 2012). Retrieved from https://www.reuters.com/article/us-mexico-election-penanieto/enrique-pena-nieto-the-new-face-of-mexicos-old-rulers-idUSBRE8610TT20120702, **C-260**.

483 Gordon Burr Statement, **CWS-50**, ¶ 101; Erin Burr Statement, **CWS-51**, ¶ 95.

and Raffles Division. Prior to her appointment, Ms. Salas had no prior experience in the gaming industry.[484]

201. Notwithstanding the numerous and repeated confirmations by SEGOB of Claimants' legal and valid rights to operate the Casinos, including through the granting of an autonomous permit to E-Games, on January 27, 2013, Ms. Salas—with no more than one working week in office—provided statements to a Mexican newspaper stating that E-Games' November 2012 permit was "illegal".[485] According to Ms. Salas, E-Games' permit was granted at the 11th hour of President Calderón's six-year term without any legal basis.[486] President Enrique Peña Nieto, who assumed office on December 1, 2012, officially designated Ms. Salas head of SEGOB's gaming department on January 15, 2013, a mere 12 calendar days before making this unwarranted accusation against Claimants and their Casinos. Other than this politically-motivated justification, Ms. Salas did not provide any other basis in her public statements for declaring, without equivocation, that E-Games' November 16, 2012 permit was "illegal." Rather, she simply alleged its illegality by linking E-Games' permit to the PAN.[487] Ms. Salas also attacked the original permit granted to E-Mex, which she alleged was granted during the last year of President Vicente Fox's term (another PAN member).[488]

202. As evidenced by Ms. Salas' statements in January 2013, the PRI's subsequent attack on E-Games' permit had as its genesis improper political motivation to call into question

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484 Erin Burr Statement, **CWS-51**, ¶ 95.

485 *Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón* (Jan. 27, 2013). Retrieved from http://www.jornada.unam.mx/2013/01/27/politica/013n1pol, **C-17**; Gordon Burr Statement, **CWS-50**, ¶ 101; Erin Burr Statement, **CWS-51**, ¶ 95.

486 *Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón* (Jan. 27, 2013). Retrieved from http://www.jornada.unam.mx/2013/01/27/politica/013n1pol, **C-17**; Gordon Burr Statement, **CWS-50**, ¶ 101; Erin Burr Statement, **CWS-51**, ¶ 95.

487 *Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón* (Jan. 27, 2013). Retrieved from http://www.jornada.unam.mx/2013/01/27/politica/013n1pol, **C-17**; Gordon Burr Statement, **CWS-50**, ¶ 101; Erin Burr Statement, **CWS-51**, ¶ 95.

488 *Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón* (Jan. 27, 2013). Retrieved from http://www.jornada.unam.mx/2013/01/27/politica/013n1pol, **C-17**; Gordon Burr Statement, **CWS-50**, ¶ 101; Erin Burr Statement, **CWS-51**, ¶ 95.

and subsequently undo the actions of the PAN regime.[489] These statements demonstrate that the subsequent measures taken by the Peña Nieto administration against Claimants and their Casinos were, *inter alia*, politically, and not legally motivated.

203. As can be seen from the interview given by Ms. Salas in January 2013[490] and her later communication to the Ministry of Economy ("**Economía**") stating that E-Games' permit had been granted irregularly,[491] the new PRI administration initiated an attack on E-Games' permit (as well as other permits granted under the PAN administrations) out of political rivalry and vengeance that had nothing to do with the legal validity of E-Games' permit. Furthermore, the PRI administration attempted to revoke E-Games' permit in part to confer economic benefits to the PRI-allied casino operators who were competing against E-Games and, it is believed, because Claimants made clear that they would not participate in any corruption in the gaming industry.

204. Dismayed by the Peña Nieto administration's unjustified and politically-motivated hostility towards Claimants and their Casinos, Claimants attempted to open a communication channel with SEGOB.[492] Their aim was to educate SEGOB—or anyone in the Mexican government willing to listen—about the scope, legality and success of Claimants' investments and of the Casinos, as well as to convince them to stop the unfair treatment they were now receiving by the new administration.[493]

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[489] *Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón* (Jan. 27, 2013). Retrieved from http://www.jornada.unam.mx/2013/01/27/politica/013n1pol, **C-17**.

[490] *Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón* (Jan. 27, 2013). Retrieved from http://www.jornada.unam.mx/2013/01/27/politica/013n1pol, **C-17**.

[491] E-Games Memo. *("La DGJS [Dirección General de Juegos y Sorteos de la SEGOB] nos comunicó que el Permiso Bis fue cancelado debido a que el mismo era un permiso que habia sido otorgado al final de la administración anterior de manera irregular.")*, **C-261**.

[492] Gordon Burr Statement, **CWS-50**, ¶¶ 102-103; Erin Burr Statement, **CWS-51**, ¶¶ 97-98.

[493] Gordon Burr Statement, **CWS-50**, ¶ 103; Erin Burr Statement, **CWS-51**, ¶ 98.

205. Tellingly, Ms. Salas rebuked repeated attempts by Claimants' representatives to meet with her to discuss, *inter alia*, her false statements to the media about the legality of Claimants' permit and the status and future of Claimants' permit and casino business.[494]

206. As part of such efforts to engage the Mexican government in a dialogue, Claimants' then international counsel, White & Case, LLP ("**White & Case**") sent a letter on Claimants' behalf to SEGOB's Secretary, Miguel Ángel Osorio Chong, and to the General Directorate of Foreign Investment of Economía, informing them of the Mexican government's harmful conduct, including the actions taken by the prior PAN administration, against Claimants' investments and seeking their assistance to avoid escalating the dispute.[495]

207. Claimants also hired a public relations firm, Zimat Consultores ("**Zimat**"), to improve its image with the Mexican government.[496] Zimat, and its principal, Martha Mejía ("**Ms. Mejía**"), tried to broker negotiations with the Mexican government, but to no avail.[497]Ms. Mejía also arranged various interviews with various news outlets, including an interview with La Reforma, the premiere newspaper in Mexico.[498] Mr. Burr also interviewed with a U.S.-based news outlet McClatchy in an attempt to explain that tighter regulations would be good for the industry and for Mexico.[499]

208. Moreover, through the assistance of their Mexican counsel, Claimants secured a series of meetings in January and February of 2013 with officials from Economía and SEGOB, including Economía's Director of Consulting and Negotiations, Mr. Carlos Vejar

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494 Gordon Burr Statement, **CWS-50**, ¶ 103; Erin Burr Statement, **CWS-51**, ¶ 98

495 White & Case Letter (Jan. 16, 2013), **R-001**. *See also* Counter-Memorial on Jurisdictional Objections (Jul. 25, 2017), ¶¶ 62-63.

496 Gordon Burr Statement, **CWS-50**, ¶ 102; Erin Burr Statement, **CWS-51**, ¶ 97.

497 Gordon Burr Statement, **CWS-50**, ¶ 102; Erin Burr Statement, **CWS-51**, ¶ 97.

498 Reforma Article, **C-262**.

499 Tim Johnson, U.S. Casino Operator Gordon Burr Persists in Mexico's Chaotic Gaming Industry (Jan. 25, 2013). Retrieved from https://www.mcclatchydc.com/news/nation-world/world/article24743713.html, **C-263**.

("**Mr. Vejar**") and SEGOB's Legal Director, Mr. Hugo Vera ("**Mr. Vera**").[500] Through such meetings, Claimants requested, among others, that SEGOB (1) defend its own validly-issued resolutions granting E-Games an independent permit in ongoing *Amparo* proceedings; (2) discontinue making statements to the media that adversely affect E-Games' public image; and (3) reaffirm E-Games' legal right to operate its Casinos independently of E-Mex.[501] Claimants' recollections of one such meeting are further confirmed by internal correspondence between Economía and SEGOB.[502] All these efforts by Claimants to reach amicable resolution of their issues with the Peña Nieto administration fell on deaf years. Ms. Salas never met with the Claimants despite their repeated attempts at securing meetings with her.[503] Mr. Vera, who attended the meeting with Claimants on February 28, 2013 in Ms. Salas' place, repeated Ms. Salas' conclusion that E-Games' permit was 'illegal", but refused to even explain the basis for that opinion.[504] In that meeting, Mr. Burr told the representatives of SEGOB and Economía, among other things, that they needed to work together to clean up the Mexican gaming industry, including by getting rid of bad players like Mr. Rojas Cardona.[505] Unfortunately, Mr. Burr's pleas fell on deaf ears.

209. Adding insult to injury, SEGOB, immediately following the meeting on February 28, 2013, updated its website to include a new notice falsely stating that E-Games' permit and gaming activities were linked to and dependent on E-Mex's permit, in direct contradiction to SEGOB's prior resolutions recognizing that the two companies operated

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[500] Counter-Memorial on Jurisdictional Objections (Jul. 25, 2017), ¶¶ 64-68.

[501] E-mail from Mr. Vejar to Ms. Salas, dated March 15, 2013, **C-264**; First Witness Statement of Julio Gutiérrez, **CWS-3**, ¶ 11.

[502] E-mail from Mr. Vejar to Ms. Salas, dated March 15, 2013, **C-264**.

[503] Gordon Burr Statement, **CWS-50**, ¶ 103; Erin Burr Statement, **CWS-51**, ¶ 98.

[504] Gordon Burr Statement, **CWS-50**, ¶ 103; First Witness Statement of Julio Gutiérrez, **CWS-3**, ¶ 11.

[505] Gordon Burr Statement, **CWS-50**, ¶ 103. *See also* Erin Burr Statement, **CWS-51**, ¶ 97 (noting that Gordon interviewed with a U.S. based news outlet McClatchy in an attempt to ovice Claimants' opnion that tighter regulations would be good for the industry and of Mexico).

independently of one another.[506] When Mr. Gutiérrez contacted Mr. Vejar from Economía for assistance with SEGOB's obviously retaliatory conduct, Mr. Vejar suggested to Mr. Gutiérrez that E-Games hire a lobbyist to handle its difficulties with the Mexican government.[507] This made clear that the problem was of a political, not legal, nature.[508]

210. As further discussed in detail in Sections IV.X.1 and 2, Mexico, primarily acting through SEGOB and the judiciary, eventually revoked E-Games' November 16, 2012 permit, permanently shut down the Claimants' Casinos, and defeated every effort by Claimants to mitigate the damages caused by Mexico's illegal actions. As further demonstrated below, a series of arbitrary, discriminatory and unlawful measures that eventually led to the total destruction of Claimants' investments in Mexico were politically motivated and part of the well-orchestrated and systematic attack that Mexico initiated against Claimants and their Casino permit at the outset of the PRI administration.

T. Mexico prepares an internal memo confirming its pre-ordained desire to put claimants out of business

211. Mexico's internal correspondence regarding the Claimants and E-Games' permit only further highlights the PRI's desire to retaliate against the previous PAN regime and the government's predetermined, incorrect, and politically inconvenient view that Claimants' permit was somehow illegal. In an internal memorandum regarding the Claimants, as well as E-Games' presentation of a Notice of Intent, Economía confirms that it decided from day one to invalidate Claimants' permit and kick them out of the gaming sector.[509] This

[506] First Witness Statement of Julio Gutiérrez, **CWS-3**, ¶ 12.

[507] First Witness Statement of Julio Gutiérrez, **CWS-3**, ¶ 12.

[508] First Witness Statement of Julio Gutiérrez, **CWS-3**, ¶ 12.

[509] It is important to note that Respondent produced this document to Claimants through document exchange in the jurisdictional phase of these proceedings.The document is not dated, nor does it have an author or an intended recipient. When Claimants asked Respondent about the date of the document, who created the document, and to whom it was sent, Respondent initially told Claimants that the document was dated June 20, 2016. In a subsequent email, Respondent told Claimants that the documnt was likely created before June 15, 2016, when Claimants filed their Request for Arbitration. Then, in another subsequent email, Respondent stated:

memorandum incorrectly states that SEGOB had granted Claimants an independent permit ("Permiso Bis") as early as May 2009.[510] In the May 2009 Resolution, as previously explained, SEGOB granted E-Games *independent operator* status, and SEGOB ultimately granted Claimants their *Permiso Bis* (independent gaming permit) through the November 2012 Resolution, after Claimants had followed all of the required steps to become an independent permit holder.[511] The memorandum also confirms that Claimants had operated their Casinos as an operator under E-Mex's permit, and that once E-Mex formally entered bankruptcy, E-Games solicited and obtained its own intependent permit.[512] The memorandum further confirms that Claimants' Notice of Intent arises from the cancellation by the Management of the General Director of Games and Raffles (DGJS) of the Ministry of the Interior (SEGOB) of Permiso Bis.[513] Importantly, about E-Games' permit, the memorandum states: "The DGJS [Dirección General de Juegos y Sorteos, or the Games and Raffles Division] informed us that the Bis Permit [Claimants' independent permit] was canceled because it was a permit that had

i. "With regards to the document's initial date of creation, the metadata indicates that it was created on 20 June 2016 at 12:52 pm, however, the same metadata indicates that it was "Last Printed" on 10 February 2014 at 7:37 am. We have been unable to determine the exact date of creation.

ii. With regards to the original author, the metadata indicates that it was Ms. Cindy Rayo Zapata, a lawyer from the Consultoría Jurídica. However, she does not recall preparing the note. In all likelihood the note was prepared by Adriana Perez-Gil, a former lawyer from the Consultoría Jurídica, since the note was found in her files. However, we have been unable to confirm that she is in fact the original author.

iii. According to the metadata the note was "Last Modified" on 20 June 2016 at 12:52 pm.

iv. As for the identity of the author of the last edit, the metadata only indicates that it was last modified by "MX". Thus, we cannot confirm the identity of the last person who edited the note. However, in all likelihood it was Ms. Adriana Perez-Gil since the note was found in her files."

As such, Claimants cannot be sure of the date of this document, but believe it was likely prepared sometime in 2014. Relevant correspondence, **C-367**.

[510] Memo E-Games, **C-261** *("La reclamación se desprende principalmente de la cancelación por parte de la Dirección General de Juegos y Sorteos (DGJS) de la Secretaría de Gobernación (SEGOB) de un permiso (denominado "Permiso Bis") que había sido otorgado a Exciting Games en mayo de 2009 para operar casinos, y de una serie de operativos de clausura de varios casinos en distintas entidades federativas.").*

[511] *See* SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16**.

[512] Memo E-Games, **C-261** *("La DGJS nos informó que desde diciembre de 2008 Exciting Games operaba en México por medio de un permiso que explotaba la empresa Entretenimiento de México, S.A. de C.V. desde mayo de 2005 (propiedad de Rafael Rojas Cardona, el zar de los casinos). Y que cuando esta última empresa entró en proceso de concurso mercantil, Exciting Games solicitó su propio permiso, obteniendo así el Permiso Bis.")*

[513] Memo E-Games, **C-261**.

been irregularly granted at the end of the previous administration" (Translation of Spanish original).[514] This statement is not further explained and/or supported in the memorandum or elsewhere. It is nonetheless consistent with the statements that Ms. Salas made out of the gate when she assumed her role as the head of the Games and Raffles Division.[515] It also further proves that SEGOB's rescinding Claimants' independent gaming permit was unrelated to any rulings from the judge in the *Amparo* proceedings and further devoid of any legitimate governmental basis. Instead, the revocation of Claimants' permit was a politically preordained result that Peña Nieto and his underlings required of SEGOB to implement a political agenda to rid Claimants of their Casinos and their substantial investment in the Mexican gaming industry and to benefit political allies of the President, the Hank Rhon family, owners of Claimants' competitors in the gaming sector – Grupo Caliente..

U. Politics and Gaming in Mexico

212. Since gaming was first legalized in Mexico, there has always been a strong link between politics and gaming. Because of gaming's historically uncertain legal footing in Mexico, politicians relied upon political contributions and favors in exchange for granting gaming permits and authorizations. This history can clearly be seen through some of the success of the primary gaming operators in Mexico. The main players with some of the most longstanding political contacts include Grupo Caliente, Televisa, and Grupo CIE.

213. Grupo Caliente received one of the first gaming permits in Mexico and is one of Mexico's largest gaming operators.[516] Grupo Caliente has a history in thoroughbred and greyhound racing and sports book. Today, Grupo Caliente is owned by Jorge Hank, the

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[514] Memo E-Games, **C-261** *("La DGJS nos comunicó que el Permiso Bis fue cancelado debido a que el mismo era un permiso que había sido otorgado al final de la administración anterior de manera irregular.").*

[515] *Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón* (Jan. 27, 2013). Retrieved from http://www.jornada.unam.mx/2013/01/27/politica/013n1pol, **C-17**.

[516] Feliciano Hernández, *Mexico: El Reino de los Casinos* (Aug. 08, 2011). Retrieved from https://www.sinembargo.mx/08-08-2011/20801, **C-368**.

eccentric former mayor of Tijuana and PRI politician.[517] The Hank family's links to the PRI are well known. Tijuana now has more casinos than almost any other city in the world.[518] The Hank family owns hundreds of casinos across Mexico, but their primary location is the Agua Caliente racetrack in Tijuana.[519] Hank and his family are also long associated with drug trafficking and money laundering.[520] Grupo Caliente is a private company which derives its revenues primarily from its sports book business.

214. Given the Hank family's finanicial clout and history in politics, they have always received favorable treatment from the Mexican government. In a recent El Universal article about Jorge Hank, the author writes: "For the rest, Jorge Hank Rhon has been a man who has always known how to be on the side of the Ministry of the Interior so that his casinos can continue with smooth sailing."[521] (English translation of the Spanish original). Despite current Mexican President Andrés Manuel Lopez Obrador's assurances that he was not going to grant any new gaming permits, on March 15, 2019, SEGOB modified the duration of three exisiting permits, which had originally been granted between 1988 and 1993, to Grupo Caliente.[522] These permits will not have an expiration date and will remain effective

[517] Mario Maldonado, *Los Casinos de Hank Rhon Que Autorizo la 4T* (Jan. 24, 2020). Retrieved from https://www.eluniversal.com.mx/opinion/mario-maldonado/los-casinos-de-hank-rhon-que-autorizo-la-4t, **C-265**.

[518] Mario Maldonado, *Los Casinos de Hank Rhon Que Autorizo la 4T* (Jan. 24, 2020). Retrieved from https://www.eluniversal.com.mx/opinion/mario-maldonado/los-casinos-de-hank-rhon-que-autorizo-la-4t, **C-265**.

[519] Lowell Bergaman, The Hanks (2000). Retireved from https://www.pbs.org/wgbh/pages/frontline/shows/mexico/family/bergman.html, **C-266**.

[520] Lowell Bergaman, The Hanks (2000). Retireved from https://www.pbs.org/wgbh/pages/frontline/shows/mexico/family/bergman.html, **C-266**.

[521] Mario Maldonado, *Los Casinos de Hank Rhon Que Autorizo la 4T* (Jan. 24, 2020). Retrieved from https://www.eluniversal.com.mx/opinion/mario-maldonado/los-casinos-de-hank-rhon-que-autorizo-la-4t, **C-265** *("Por lo demás, Jorge Hank Rhon ha side un hombre que simpre ha sabido estar del lado de la Secretaría de Gobernación para que sus casinos sigan más que viento en popa.").*

[522] Mario Maldonado, *Los Casinos de Hank Rhon Que Autorizo la 4T* (Jan. 24, 2020). Retrieved from https://www.eluniversal.com.mx/opinion/mario-maldonado/los-casinos-de-hank-rhon-que-autorizo-la-4t, **C-265**.

indefinitely.[523] These permits inure to the benefit of the Hank family, and expand on their hold over the gaming industry.

215. Televisa is another major player in the industry, which operates casinos under the brand name PlayCity in Mexico. Being the largest media conglomerate in the Spanish-speaking world, Televisa has tremendous influence over Mexican politics. Televisa's links to the PRI are also well known, with the former owner of Televisa Emilio Azcarraga Milmo referring to himself as a "soldado del PRI."[524] Although his son, Emilio Azcarraga Jean promised to cut all ties with the party, this has been widely disputed. The perceived cronyism between Televisa and the PRI was even depicted in a Mexican film entitled *The Perfect Dictatorship* (2014), whose plot directly criticizes both the PRI and Televisa. The plot of the movie centers around a corrupt politician (a fictional depiction of President Enrique Peña Nieto) from a political party (depicting the PRI), and how this politician makes a deal with TV MX (which serves as a stand-in to Televisa) to manipulate news in his favor so as to save his political career.

216. Founded in 1990, Grupo CIE is the largest live event producer in Latin America, organizing concerts, stage productions, trade fairs, amusement parks, and sporting events and betting. Grupo CIE also operates various venues, including the Hipódromo de las Américas, a thoroughbred and quarter-horse racetrack in Mexico City, Mexico and the Yak Entertainment Centers. The company is a public company and headquartered in Mexico, serving both the Spanish and Portuguese speaking markets in Latin America, the United States, and Spain. Grupo CIE owns Administradora Mexicana de Hipódromos S.A. de C.V., which has over 50

[523] Mario Maldonado, *Los Casinos de Hank Rhon Que Autorizo la 4T* (Jan. 24, 2020). Retrieved from https://www.eluniversal.com.mx/opinion/mario-maldonado/los-casinos-de-hank-rhon-que-autorizo-la-4t, **C-265**.

[524] Jenaro Villamil, *Television para Jodidos* (Mar. 19, 2013). Retrieved from https://www.proceso.com.mx/336733/television-para-jodidos, **C-267**.

casinos in Mexico. Grupo CIE's owner, Mr. Alejandro Soberon Kuri is also closely affiliated with Carlos Slim, the richest man in Mexico.

217. All of these highly influential companies highlight the influence that those in the gaming industry have on politics in Mexico. Politicians want money, and those with money and influence in Mexico are able to grease the right palms to get what they want. Unfortunately, while it is difficult to get individuals to speak on the record about the ties between gaming and politics, as will be discussed below, Black Cube, an Israeli intelligence firm, was able to get some key statements from participants in the industry about the role that politics and political favors play in the gaming industry and how that influenced the actions taken by Mexico against the Claimants' gaming permit. Black Cube's findings also shed light on improper political motivations behind some of Mexico's illegal actions against Claimants, including its unlawful revocation of E-Games' permit.

V. Black Cube

218. The Claimants hired Black Cube Inc. ("**Black Cube**"), a London-based intelligence and investigation agency, to investigate Mexico's seemingly inexplicable behavior towards them, particularly the motives behind the Mexican government's revocation of E-Games' permit.[525] Black Cube confirmed through recorded interviews that B-Games' permits were obtained legally, but subsequently revoked illegally by the Mexican government for political reasons as well as to benefit a competitor company allied with the ruling political party.[526]

219. Black Cube is an elite intelligence-gathering enterprise at the forefront of its field.[527] Founded in 2012 by Avi Yanus, Black Cube is comprised largely of former Israeli

[525] Witness Statement of Black Cube ("Black Cube Statement"), **CWS-57**, ¶¶ 26.

[526] Black Cube Statement, **CWS-57**, ¶¶ 32–33.

[527] Black Cube Statement, **CWS-57**, ¶¶ 5–7.

military intelligence professionals.[528] Black Cube develops intelligence for use in litigation proceedings around the world. Black Cube's focus is on developing human intelligence, rather than documentary intelligence—*i.e.*, it focuses on gathering information from individuals who may have knowledge of facts pertinent to its investigation.[529]

220. Black Cube seeks to meet relevant individuals in person; in this case, sources familiar with Claimants' case.[530] These meetings are generally organized so that the information provided to Black Cube agents was done so willingly and freely.[531] Black Cube typically sends one or more agents to any given meeting.[532] The objective of these in-person meetings is to obtain information relevant to the case through conversation with the individuals.

221. Black Cube records its conversations during these meetings if legally permissible. Consequently, Black Cube makes recordings only in jurisdictions where it is lawful to record a conversation with consent from only one of the parties to the conversation ("one-party consent jurisdictions").[533] In this matter, Black Cube met with individuals in the United States (New York), and Mexico.[534] Each of these jurisdictions is a one-party consent jurisdiction (in the U.S., this varies based on State laws, but Black Cube ensures to only conduct its meetings in States that have one-party consent laws).[535]

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528 Black Cube Statement, **CWS-57**, ¶ 5.

529 Black Cube Statement, **CWS-57**, ¶ 6–7.

530 Black Cube Statement, **CWS-57**, ¶ 8.

531 Black Cube Statement, **CWS-57**, ¶ 31.

532 Black Cube Statement, **CWS-57**, ¶ 8.

533 Black Cube Statement, **CWS-57**, ¶ 9.

534 Black Cube Statement, **CWS-57**, ¶ 9.

535 *See Tesis de Jurisprudencia 5/2013* (Supreme Court of México, Mar. 13, 2015), Exhibit **CL-73**; N.Y. Penal Law §§ 250.00(1) and 250.05, Exhibit **CL-74**.

222. Black Cube generally records the conversation from start to finish, without breaks, and generally uses multiple recording devices to ensure it captures all the statements during the meeting.[536]

223. Black Cube is careful to avoid eliciting any information from the individuals that may be protected by attorney-client privilege—if the individual seems to be divulging such information, Black Cube agents will attempt to change the conversation to steer away from these revelations. In the instant investigation, the individuals did not share protected or privileged material to Black Cube's knowledge.[537]

224. Black Cube requires strict compliance with the laws of the jurisdictions in which it operates. Black Cube thus seeks legal advice from attorneys in the jurisdictions where it will meet individuals or make recordings to ensure it is compliant with all aspects of local law.[538]

1. Black Cube's Findings

225. As mentioned above, Black Cube investigated the Mexican government's motivations behind the revocation of E-Games' permit through interviews with individuals with close ties to and first-hand knowledge of Claimants' case. To this end, Black Cube agents met with the following individuals: (1) Mr. Obdulio Ávila Mayo ("**Mr. Ávila Mayo**"), SEGOB's Undersecretary of Government between November 2011 and December 2012; and (2) Mr. Kevin Rosenberg ("**Mr. Rosenberg**"), Director of Business Development at Televisa's PlayCity since 2012, a Mexican company and one of the biggest gambling companies in Mexico.[539]

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536 Black Cube Statement, **CWS-57**, ¶ 10.

537 Black Cube Statement, **CWS-57**, ¶ 12.

538 Black Cube Statement, **CWS-57**, ¶ 8.

539 Black Cube Statement, **CWS-57**, ¶¶ 29 –30; recordings of the meetings were submitted with this Memorial as Annex A to the Black Cube Statement.

226. Black Cube agents met with the interviewees 6 times between July 2018 and December 2018.[540] Black Cube agents confirmed that all meetings had a friendly and amicable tone and that the interviewees were forthcoming with the information provided and had first-hand recollection of many of the events surrounding E-Games' permit.[541]

227. As explained in further detail below, Black Cube agents obtained evidence proving that: (1) E-Games' permit was obtained legally and in fact under similar circumstances to other competitors' permits; (2) the Mexican government revoked E-Games' permits for political reasons and because Claimants could not be "controlled" and would not pay bribes to the the Peña Nieto administration; (3) SEGOB illegally influenced the Supreme Court so that it would decline to exercise jurisdiction and thus remand the case to the appellate court that ruled against E-Games; (4) SEGOB took measures to thwart the potential sale of Claimants' casinos to Televisa's PlayCity; and (5) SEGOB had a longstanding pattern of corruption and favoritism during the Peña Nieto administration, including, among other things, preferential treatment of local companies over foreign ones.

2. A former senior SEGOB official confirmed that E-Games obtained its permit legally

228. Mr. Ávila Mayo, essentially the second highest ranking official at SEGOB in 2011 and 2012 with specific and first-hand knowledge of the facts surrounding this case given his tenure at SEGOB, corroborated that E-Games' permit was issued legally by SEGOB, notwithstanding Ms. Salas' remarks that the E-Games' permit was granted illegally at then end of the Calderón administration.[542]

229. In addition, he confirmed that E-Games obtained its permit under similar circumstances as at least one of its competitors—Televisa PlaCity—who also had its permit

[540] Black Cube Statement, **CWS-57**, ¶¶ 29 –30

[541] Black Cube Statement, **CWS-57**, ¶¶ 29 –30.

[542] Black Cube Statement, **CWS-57**, ¶ 32.

issued legally. Specifically, Mr. Ávila Mayo explained that SEGOB granted E-Games' permit in the exact same manner as Televisa's PlayCity permit, relying at least in part on the legal and adminstrative law theory of "acquired rights."[543] Mr. Ávila Mayo even explained that it had discussions with PlayCity principals about this because Televisa was publicly attacking Mr. Ávila Mayo's support for the legality of E-Games' permit when it should not be doing so given that PlayCity had acquired its permit from SEGOB under substantially identical legal circumstances:

BC Agent 2	Sí, bueno. Oye, y Televisa, en ese-- Cuando tú, tú dijiste que le, le habías dicho a Televisa en aquel momento que no hicieran mucho ruido porque habían conseguido los, los permisos exactamente como los otros. ¿Qué, a qué te referías?	Yes, okay. Listen, and Televisa, in this-- When you, you said that you, you had told Televisa at that time not to make too much noise because they had gotten the, the permits exactly in the same way as the others. What, what were you referring to?
Mr. Ávila Mayo	Televisa acusaba que el otorgamiento de reconocimientos de derechos implicaba juego en vivo. ¿Qué es juego vivo? Dados--.	Televisa made accusations that the granting of recognitions of rights involved live gaming. What is live gaming? Craps--.
BC Agent 2	Umm-hmm.	Umm-hmm.
Mr. Ávila Mayo	-apuesta, y que eso era producto de un acto ilícito e inusual. Después de dos meses de ataques constantes en noticieros, yo fui con José Antonio. Él es vicepresidente de administración, encargado del área de juegos. (…)	-betting, and that this was the product of an illicit or unusual act. After two months of constant attacks in the news, I went to José Antonio. He is the Vice President of Administration responsible for the gaming division. (…) I was surprised, because I had told José Antonio 'Well, the truth, you are

[543] Black Cube Statement, **CWS-57**, ¶¶ 39–40.

	Yo estaba sorprendido, porque le dije yo a José Antonio 'Pues, la verdad, están acusando de algo que, primero, es legal'--.	making accusations regarding something that, firstly, is legal'--.
BC Agent 2	¿Es?	Is?
Mr. Ávila Mayo	Es legal.	Is legal.
BC Agent 2	Legal.	Legal.
Mr. Ávila Mayo	'Y segundo, es algo que ustedes tienen. Y tercero, están acusando el mismo permiso que ustedes tienen. Y si ustedes siguen así'--.	'And secondly, it is something that you have. And thirdly, you are accusing the same permit you have. And if you keep this up'--.

230. Therefore, Mr. Ávila Mayo explained to them that this could backfire on Televisa's PlayCity, because they were making false accusations in media reports about legality of E-Games' permit when it was "the same permit [they—meaning Televisa] have."[544] Mr. Ávila Mayo subsequently reiterated this point in another meeting with Black Cube agents.[545]

231. Mr. Ávila Mayo also confirmed that the revocation of E-Games' permit was for political, not legal, reasons.[546]

BC Agent 1	Pero los, los permisos que recibieron, ¿eran legales o ilegales?	But the, the permits they received, were they legal or illegal?
Mr. Ávila Mayo	Legales.	Legal.

[544] Black Cube Statement, **CWS-57**, ¶ 41.

[545] Black Cube Statement, **CWS-57**, ¶ 41.

[546] Black Cube Statement, **CWS-57**, ¶ 40.

BC Agent 1	¿Legales?	Legal?
Mr. Ávila Mayo	Legales.	Legal.
BC Agent 1	Los recibieron [*los permisos – BC*] es completamente legales--.	They received them [*the permits – BC*] in a completely legal manner--.
Mr. Ávila Mayo	[…]	[…]
BC Agent 1	-entonces, ¿Por qué el gobierno decía que eran, habían sido reconocidos ilegalmente?	-so, why did the government say they were, had been illegally recognized?
Mr. Ávila Mayo	Es lo que siempre señalaron, pero yo nunca recibí ninguna, ningún procedimiento administrativo que me explicara por qué era ilegal. No hay un solo procedimiento en el que--.	It's what they always pointed out, but I never received any, no administrative proceeding that explained why it was illegal. There's not a single proceeding in which--.
Mr. Ávila Mayo	No hay […]	There isn't […]
BC Agent 1	Entonces, yo no soy político, pero en el momento que escucho algo así, es-- Hay, hay, hay acá trampa.	So, I'm not a politician, but the moment I hear something like that, it's -- there's something not right.
Mr. Ávila Mayo	Es tema político, tema político--.	It's a political issue, political issue.
BC Agent 1	¡Por supuesto que es político!	Of course it's a political issue!
Mr. Ávila Mayo	Totalmente político tanto que yo lo invito a que cheque, revise cuantos procedimientos administrativos sobre la emisión de esos no reconocimientos hubo. ¿Sabe usted cuantos hubo?	Absolutely political, so much so that you're invited to check, review how many administrative proceedings there were about the issuance of those non-recognitions. Do you know how many there were?
BC Agent 1	No. Cero.	No. Zero.
Ávila	Cero, don Gabriel. Solamente hay de […], pero don Juan José estaba enojadísimo conmigo y me quería	Zero, Mr. Gabriel. There are only complaints, but Mr. Juan Jose [*Pepe Rojas – BC*] was very angry with me and wanted to put me in

	llevar a la cárcel, y hay denuncias penales, pero no procedimientos--.	jail, and there are criminal complaints, but no procedures--.

3. E-Games' Permit was revoked for political reasons

232. Mr. Ávila Mayo and Mr. Rosenberg both confirmed that the PRI administration revoked E-Games' permit for political reasons. As explained in further detail below, the political motivations identified by the interviewees included: (a) retaliation against B-Mex and E-Games for not being affiliated with the PRI and as a means to favor PRI-affiliated casinos; and (b) means to benefit the Grupo Caliente group and its owners, the Hank Rhon family.

a. The PRI's misguided belief that B-Mex was affiliated with the Calderón administration and the PAN and Its Desire to Remove Claimants Because They Could Not Be "Controlled"

233. These interviewees agreed that E-Games was an innocent victim of the PRI administration's wide scale witch hunt against casino operators not affiliated with the PRI and that could not be "controlled."[547] This is very significant, because it shows that the Peña Nieto administration revoked E-Games' permit because Claimants would not agree to pay bribes to the the Peña Nieto government officials unlike the others in the gaming industry who would do so. Interviewees also uniformly noted that the revocation of E-Games' permit stemmed from the PRI administration's unwarranted belief that Claimants and E-Games were somehow affiliated politically with the Calderón administration, which they were not.

234. For example, Mr. Ávila Mayo explained that E-Games' permit revocation was without a doubt political in nature because the new PRI-government was dead set on hurting any permit holders associated with the previous PAN administration, while paving the way for new market players that they could control.[548] Again, this proves that the Peña Nieto administration, which is widely recognized as one of the most corrupt in Mexico's history,

[547] Black Cube Statement, **CWS-57**, ¶ 47.

[548] Black Cube Statement, **CWS-57**, ¶ 47.

removed Claimants from the gaming industry, because, in part, they would not pay bribes to the PRI-government officials:

Mr. Ávila Mayo	Porque el gobierno nuevo, lo que quería era golpear al gobierno saliente--.	Because the new government, what they wanted was to hurt the outgoing government--.
BC Agent 1	Peña, Peña Nieto.	Peña, Peña Nieto.
Mr. Ávila Mayo	Peña Nieto al gobierno de Felipe Calderón--.	Peña Nieto to the government of Felipe Calderón--.
BC Agent 1	Umm-hmm.	Umm-hmm.
Mr. Ávila Mayo	-y señalaban que estos eran los que habían fondeado, financiado campañas del partido que estaba dejando el poder.	-and they pointed out that they were the ones who had been funding, financing party campaigns for the outgoing party.
BC Agent 1	¿Cierto o no cierto?	True or not true?
Mr. Ávila Mayo	No es cierto.	It's not true.
BC Agent 1	¿No es cierto? Entonces--.	It's not true? Then--.
Mr. Ávila Mayo	Para mi es--.	For me it's--.
BC Agent 1	-es solamente una batalla política para tirar mugre a, a, al gobierno anterior.	-it's only a political battle to throw mud on the, the, the previous government.
Mr. Ávila Mayo	Al presidente Calderón y para, y para que hubieran nuevos empresarios del juego, pudieran controlar.	To president Calderón and so, so that there would be new businessmen in the gambling industry, that they can control
BC Agent 1	O sea, para que el gobierno de Peña Nieto pudiese entrar a sus, a sus amigos.	In other words, so that the Peña Nieto government could bring in its, its friends.
Mr. Ávila Mayo	Para apoderar los que estaban Hank, Hank Rhon con, este, Agua Caliente,	To empower those who were, Hank, Hank Rhon with, with this,

	¿no? Este, varios de los que venían funcionando […]	Agua Caliente, right? This, several of the ones who had been operating […]

b. The Mexican government revoked E-Games' permit to benefit Grupo Caliente and its owners, the Hank Rhon family

235. Mr. Ávila Mayo also explained that the Mexican government revoked E-Games' permit as a political favor to the Hank Rhon family, who at that point was a longstanding political dynasty affiliated with the PRI:[549]

236. Specifically, Mr. Ávila Mayo explained that two members of the Hank Rhon family wanted to run for Governors of different Mexican states, but that the PRI, and in particular President Peña Nieto, forced them to step down as Gubernatorial candidates in favor of other PRI candidates:[550]

BC Agent 2	Pero tú dejaste a entender, la vez pasada, de que uno de los motivos, habían sido favorecer a Aguas Calientes por parte-- por dos cosas. Una, por una cercanía que tenía Peña Nieto con Aguas Calientes, y la otra, el marido de una tal Marcela Salas. ¿Cuál es la historia ahí?	But you had led me to believe, the last time, that one of the motives, had been to favor Aguas Calientes, because of-- because of two things. One, because of a closeness that Peña Nieto had with Aguas Calientes, and the other, the husband of a Marcela Salas. What is the story there?
Mr. Ávila Mayo	Uno de los grupos más favorecidos por la gestión del presidente Peña Nieto es el grupo de Agua Caliente.	One of the most favored groups by the Peña Nieto presidency is the Agua Caliente group.
BC Agent 1	Umm-hmm.	Umm-hmm.
Mr. Ávila Mayo	El grupo Agua Caliente, un grupo ya prácticamente centenario que inicia en	The Agua Caliente group, a group which is already practically

549 Black Cube Statement, **CWS-57**, ¶¶ 44, 45, 48.

550 Black Cube Statement, **CWS-57**, ¶ 45.

	la década de los 20-30 con Abelardo L. Rodríguez, ex presidente de México. Por cierto, tiene un viñedo hermosísimo, ya no es de él, ni de su familia, ya se murió. Viña Frannes allá en la Ensenada. Este, este grupo Agua Caliente es un grupo que opera en el estado de México. Entidad federativa, estable--.	centenarian which started in the 20's-30's with Abelardo L. Rodríguez, the former president of Mexico. By the way, he has a beautiful vineyard, it's not his anymore, nor his family's, he died already. The Frannes Vineyard there in the Ensenada. This, this Agua Caliente group is a group which operates in the State of Mexico. A federal entity, stable--.
BC Agent 1	Umm-hmm.	Umm-hmm.
Mr. Ávila Mayo	De donde es originario el presidente de la república. Y uno de--.	From where the president of the republic is. And one of the--.
BC Agent 1	¿Peña Nieto?	Peña Nieto?
Mr. Ávila Mayo	Así es. El presidente en funciones.	Indeed. The president until the new president takes office.
BC Agent 1	Sí.	Yes.
Mr. Ávila Mayo	Y uno de sus opositores para que fuera gobernador, fue un-- fue Carlos Hank González, hermano de quien maneja Agua Caliente en Tijuana.	And one of his opponents for running for governor, was a-- was Carlos Hank González, the brother of the person who manages Agua Caliente in Tijuana.
BC Agent 1	¿Opositores?	Opponents?
Mr. Ávila Mayo	No eran opositores, pero ellos decidieron cederle el paso.	They were not opponents, but they decided to step aside for him.
BC Agent 1	Umm-hmm.	Umm-hmm.

Mr. Ávila Mayo	Al presidente Peña Nieto.	For president Peña Nieto.
BC Agent 1	Okey.	Okay.
Mr. Ávila Mayo	Allá hay una deuda del presidente Peña Nieto con este grupo. Una deuda política, no deuda económica.	There is a debt of president Peña Nieto with this group. A political debt, not an economic debt.
BC Agent 1	Sí.	Yes.
Mr. Ávila Mayo	Y dos, el hermano de este sujeto, fue candidato en Baja California, un estado norteño--.	And secondly, the brother of this fellow, was a candidate in Baja California, a northern state--.
BC Agent 1	Umm-hmm.	Umm-hmm.
Mr. Ávila Mayo	Pegado a Estados Unidos, a San Diego, a California. Perdió, y lo hicieron ser candidato con todo el apoyo del presidente de la república. Y también, se habló de una compensación por la derrota favoreciendo a Agua Caliente. Un grupo que en los 90 ya había sido favorecido. Ellos son hijos de Carlos Hank González.	Bordering with the United States, with San Diego, with California. He lost, and they made him the candidate with all of the support of the president of the republic. And also, there was talk of a compensation due to the defeat, favoring Agua Caliente. A group which was already favored in the 90's. They are sons of Carlos Hank González.

237. Mr. Ávila Mayo explained that the PRI administration went on to revoke E-Games' permit as compensation for the debt owed by President Peña Nieto to the Hank Rhon family given the PRI's decision to choose other PRI Gubernatorial candidates over Mr. Carlos Hank González.[551] Mr. Ávila Mayo emphasized that by revoking E-Games' permit, the PRI administration eliminated Grupo Caliente's biggest competitor in the gaming industry and as,

[551] Black Cube Statement, **CWS-57**, ¶ 45.

as such, paved the way for Grupo Caliente to strengthen its position as one of the most dominant casino operators in Mexico.[552]

238. Mr. Ávila Mayo also revealed that Ms. Salas' husband, Mario Vásquez Hernández, had very close ties with Grupo Caliente and the Hank Rhon family, and thus removing E-Games to benefit the Hank Rohn family and Grupo Caliente also provided a direct benefit to her family:[553]

Mr. Ávila Mayo	Y dos, el esposo de Marcela González […] que fue la directora general de Juegos y Sorteos los primeros años del presidente Peña Nieto y Diputada Federal 2015 al 2018, era colaborador o empleado del grupo Agua Caliente, muchos años.	And secondly, the husband of Marcela González […] who was the Director General of the Games and Raffles Division the first years of President Peña Nieto and a Federal Deputy between 2015 and 2018, was a collaborator or employee of the Agua Caliente group, for many years.
BC Agent 1	Entonces, la, el, el pago de esa revocación de permisos a una empresa, o en este, en este caso, Exciting Games y favorecer Aguas Caliente, fue un pago político para el gobierno de Peña Nieto.	So, the, the, the payment for this permit revocation to a company, or in this, in this case, Exciting Games and to favor Agua Caliente, was a political payment for the government of Peña Nieto.
Mr. Ávila Mayo	El fortalecimiento de Agua Caliente está alineado a la decisión del presidente de favorecer a ciertos grupos.	The strengthening of Agua Caliente is in alignment with the president's decision to favor certain groups.
BC Agent 1	¿Grupos?	Groups?
Mr. Ávila Mayo	Históricamente--.	Historically--.

552 Black Cube Statement, **CWS-57**, ¶ 45.

553 Black Cube Statement, **CWS-57**, ¶ 46.

BC Agent 1	¿Qué, pero son grupos que son simpatizantes al, al PRI?	But those are groups that are sympathetic to, to the PRI?
Mr. Ávila Mayo	Al PRI. Grupos que históricamente--.	To the PRI. Groups that are historically--.
BC Agent 1	Cuando lo dicen me vuelve loco.	When they say that it drives me crazy.
Mr. Ávila Mayo	Grupos que históricamente han estado ligados al PRI.	Groups which historically have been linked to the PRI.

4. SEGOB interfered with the Supreme Court Proceedings so that it would decline jurisdiction and remand the case to the appellate court

239. Mr. Rosenberg revealed over the course of several meetings that while Claimants' appeal challenging the revocation of E-Games' November 16, 2012 permit was pending before the Mexican Supreme Court, the Peña Nieto administration, including through SEGOB, inappropriately lobbied the Mexican Supreme Court to decline jurisdiction over the case and to remand it to the appellate court that had already ruled against Claimants.[554]

240. As to who may have intervened on SEGOB's behalf, Mr. Rosenberg contends that it may have been 'the lady' within SEGOB (i.e. Ms. Salas, the Director of Games & Raffles), who would have lobbied against E-Games.[555]

241. Mr. Rosenberg also explained how the Supreme Court refused to rule on E-Games' appeal because E-Games did not have anyone within the court to lobby the judges, while SEGOB did, and revealed that it may have been 'the lady' within SEGOB (i.e. Ms. González Salas), who lobbied against E-Games.

BC Agent 3	I remember that you told me that the supreme court, it took them a while to make any decision. And at the end, they decided not to discuss the case at all, and they gave it back to the appealing court.

554 Black Cube Statement, **CWS-57**, ¶ 49.

555 Black Cube Statement, **CWS-57**, ¶ 49.

Mr. Rosenberg	Right.
BC Agent 3	Correct?
Mr. Rosenberg	Yeah.
BC Agent 3	What happened there? Why did it take them so long to make any decision, and if I remember what you told me, that SEGOB actually had some influence there, or they tried to make the supreme court-- what was the story there?
Mr. Rosenberg	The story is that the judges inside the supreme court, it's been one of our-- in the […], because gaming is not well-seen by the supreme court. So, they don't understand what's gaming.
BC Agent 3	They don't understand what's gaming?
Mr. Rosenberg	No, they feel that maybe it's probably some sort of money laundering, it's also, you know, guns, drugs, everything that it's not--.
BC Agent 3	This is the court or SEGOB?
Mr. Rosenberg	The court.
BC Agent 3	The court, okay.
Mr. Rosenberg	So, into the thing that go to the court about gaming, they usually stay there for very long, and they usually lose, or-- most of the cases are lost there. Because they really don't understand the gaming.
BC Agent 3	Okay.
Mr. Rosenberg	Maybe that is what happened there. The guy from Exciting Games, he didn't have someone inside the court to leverage or to help him lobby, or do some lobby to-- with the judges. So--.
BC Agent 3	And SEGOB did?
Mr. Rosenberg	SEGOB did.

BC Agent 3	Who--?
Mr. Rosenberg	SEGOB never liked Pepe Rojas. Never.
BC Agent 3	So, you're say--.
Mr. Rosenberg	So, I think it's probably someone inside SEGOB--.
BC Agent 3	That influenced the--.
Mr. Rosenberg	-that influenced the court.
BC Agent 3	The Supreme Court?
Mr. Rosenberg	Umm-hmm.
BC Agent 3	Who can that be? The head of SEGOB? It was the lady--.
Mr. Rosenberg	I think so. The lady.
BC Agent 3	-back then--.
Mr. Rosenberg	At that time.
BC Agent 3	I don't remember her name.
Mr. Rosenberg	I think it's Margarita. They used to-- they didn't like at all.

5. SEGOB blocked Claimants' efforts to sell the Casinos

242. Following the closure of the Casinos, Claimants tried to mitigate damages by exploring the sale of its Casinos to Televisa, yet, as Mr. Rosenberg confirmed, SEGOB single-handedly thwarted these efforts:

Mr. Rosenberg	They never, they never. Yeah, they tried to sell the property, but you need to go through a long legal process--.
BC Agent 4	Right.
Mr. Rosenberg	-to remove all the, let's say the illegal operations that they have, they had, they want-- they need to show a lot of things to the government that those casinos were not illegal, there were no drugs, it was a long, long process to defend everything to just get a, able to go inside.
BC Agent 4	Right.

Mr. Rosenberg	So, they tried for two or four years, we even tried to buy them. Televisa--.
BC Agent 4	PlayCity?
Mr. Rosenberg	Yeah, PlayCity, yeah. I went like, to—maybe four or five meetings with them, we went to the government, talked to the authorities, and they said, 'We are not going to, they were, they cheated us with this permit we—'.
BC Agent 4	Oh, the government said?
Mr. Rosenberg	The government said, 'We are not going to give any new permits we are not to go through the legal process to, to free those casinos so that you can buy them. That's not going to happen. Those guys cheated us, they got a permit, then we take them back, so we are not going to, to, to' The government was like a little spoiled child, spoiled child, sorry.

243. Mr. Rosenberg explained that he participated in several meetings with Claimants, some with the Mexican government, who in turn told PlayCity that the Mexican State would not "free" the Casinos to allow Claimants to sell them to PlayCity or anyone else.[556]

6. The Mexican government has a consistent pattern of corruption and of favoritism towards local gaming companies

244. Mr. Rosenberg elaborated on his experience with the widespread corruption within SEGOB under the Peña Nieto administration. Mr. Rosenberg noted that corruption within SEGOB puts foreign companies at a disadvantage while local competitors, who presumably participate in the corruption, consistently thrive in the gaming industry.[557] Mr. Rosenberg explained that government lobbying is essential in the gaming sector if one wants to succeed and that foreign companies who are extremely compliant with the law do not survive in the Mexican gaming sector, because "Mexico is not like that":[558]

[556] Black Cube Statement, **CWS-57**, ¶ 50.

[557] Black Cube Statement, **CWS-57**, ¶ 51.

[558] Black Cube Statement, **CWS-57**, ¶ 52.

Mr. Rosenberg	I think that the only foreign companies that have succeeded are the ones that partnered with a local operator. All the foreigners that came-- the foreign companies that came and tried to operate by their own, they tried to do everything extremely compliant and Mexico is not like that.
BC Agent 4	Okay.
Mr. Rosenberg	You need a lot of political friends to make things happen in the Secretaría de Gobernación, the main—the Ministry of Gaming, basically.
BC Agent 4	Gaming and Raffles and, yeah.
Mr. Rosenberg	You need friends in that area to make it work.

245. As a prime example, Mr. Rosenberg admitted that Televisa benefitted from a close relationship with government officials and, as such, have instant access to top level SEGOB officials who immediately grant any permits to Televisa.[559]

Mr. Rosenberg	No experience in the last, yeah So, every time they change, and that something that also happens, every one or two years they change the authorities. So, you need to be doing constant lobbying to, to make sure--.
BC Agent 3	To meet people all the time and to--.
Mr. Rosenberg	Yes. I don't know what kind of lobbying, I don't know how much, I don't know what they do, but they do a lot.
BC Agent 3	Umm-hmm.
Mr. Rosenberg	Constantly. Televisa don't need to do that because we go directly to the main guy inside--.
BC Agent 3	To the top minister or to--.
Mr. Rosenberg	To the top minister. But if you had-- If you have control of the middle minister or ministry, it's kind of easy to get--.
BC Agent 3	Yeah.

[559] Black Cube Statement, **CWS-57**, ¶ 52.

Mr. Rosenberg	-all the authorizations to open new properties, to get a permit for expansion.
BC Agent 3	Right.
Mr. Rosenberg	To use table games. That's a huge thing because we don't have table games in PlayCity.
BC Agent 3	At all?
Mr. Rosenberg	At all. Because we haven't asked for the permit. Because basically it's asking for a favor, and they probably will need-- ask for something in exchange. All those companies, they already asked for the favor, and they probably pay something in some way, I don't know if, if money, I don't know if--.
BC Agent 3	Under the table or above the table.
Mr. Rosenberg	Under the table, I have no idea if they get a receipt or not, I don't know [*chuckles*].
BC Agent 3	[*chuckles*] Yeah but it's, that's done in many countries, I mean, in many places it's--.
Mr. Rosenberg	But if you have the right guy in Mexico, doing that for you, your investment is probably--.
BC Agent 3	Safe.
Mr. Rosenberg	-safe.
BC Agent 3	Right.
Mr. Rosenberg	And I'm sure it's safe.

246. As evidenced above, Messrs. Ávila Mayo and Rosenberg confirmed that the Mexico, through the actions of the Peña Nieto administration, SEGOB, and the Mexican judiciary, revoked Claimants' gaming permit and closed their Casinos to punish them for political reasons, because they could not "be controlled" and would not participate in corruption, and to benefit the Hank Rohn family and their gaming business. The Peña Nieto

administration illegally influenced the Supreme Court so that, after a gross miscarriage of justice in the lower courts, the Supreme Court would not rule in favor of Claimants, declined to exercise jurisdiction over E-Games' case and remanded it to the very same appellate court who had illegally ruled against E-Games. Mr. Rosenberg also confirmed that SEGOB thwarted the potential sale of Claimants' casinos to Televisa's PlayCity, denying them any effort to salvage some value from their investments. Lastly, both men confirmed that SEGOB had a longstanding pattern of corruption and favoritism during the Peña Nieto administration in favor of Mexican gaming companies.

247. In the following sections, Claimants detail the politically-motivated, discriminatory, and unlawful measures taken by Mexican authorities and instrumentalities, including the Mexican judiciary, SEGOB, the SAT and the Attorney General's office, to undermine and eventually annihilate Claimants' highly profitable businesses in Mexico.

248. These various actions of the Peña Nieto administration, the Mexican judiciary, SEGOB, and the Mexican tax and prosecutorial authorities shed light on Mexico's illegal destruction of Claimants' successful Casinos and investments in the country in egregious violation of the NAFTA.

W. E-Mex Files an *Amparo* Lawsuit Against the SEGOB Resolution that Allowed E-Games to Operate the Casinos Independently

249. In 2011, E-Mex was involved in litigation with its financier, BlueCrest, in the middle of an arbitration with E-Games, and on the brink of losing its gaming permit due to its imminent insolvency after it absconded with $75 million of BlueCrest's capital. Faced with its imminent downfall, E-Mex turned to the Mexican courts where it could peddle its influence against its foes.

250. On December 30, 2011, E-Mex filed an *Amparo* proceeding[560] launching constitutional attacks against various SEGOB actions in relation to its permit ("***Amparo* 1668/2011**" or "**First *Amparo***").[561] The case was assigned to the Sixteenth District Judge on Administrative Matters for the Federal District (*Juez Decimo Sexto de Distrito en Materia Administrativa en el Distrito Federal*) ("**Sixteenth District Judge**").[562]

251. In its initial request for *Amparo* filed on December 30, 2011, E-Mex did not claim the unconstitutionality of the May 27, 2009 Resolution.[563] After scoring some victories against SEGOB, E-Mex set it sights on Claimants by amending its pleadings and launching an attack on SEGOB's May 27, 2009 Resolution, which had granted Claimants the ability to operate its Casinos under E-Mex's permit but independent of it.[564] In E-Mex's third amendment to its request for *Amparo*, filed on June 5, 2012, it sought to declare unconstitutional the May 27, 2009 Resolution (the "**Third Amendment**").[565] Importantly, at this time, Claimants, through E-Games, remained an independent operator under E-Mex's permit, as SEGOB had not yet decided their request for an independent, autonomous permit.[566] E-Mex was seeking to challenge that independent operator status and thus render illegal Claimants' permission to operate independently.

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560 The request for *Amparo* is a remedy for the protection of constitutional rights that every individual/entity has against virtually every exercise of governmental authority in Mexico. It serves a dual purpose: it protects the citizen and his basic rights, and safeguards the constitution itself by ensuring that its principles are not contravened by statutes or actions of the state; E-Mex Request for *Amparo* (Dec. 30, 2011), **C-268**.

561 Guerrero Report, **CER-2**, ¶ 41.

562 Guerrero Report, **CER-2**, ¶ 41.

563 E-Mex Request for *Amparo* (Dec. 30, 2011), **C-268**; Guerrero Report, **CER-2,** ¶41.

564 Guerrero Report, **CER-2**, ¶ 12; E-Mex Third Amendment to Request for *Amparo* (Jun. 5, 2012), **C-269**.

565 Guerrero Report, **CER-2**, ¶ 41; E-Mex Third Amendment to Request for *Amparo* (Jun. 5, 2012), **C-269**; E-Mex's First Amendment to its Writ of *Amparo* was filed on January 18, 2012, and E-Mex's Second Amendment to its Writ of *Amparo* was filed on March 29, 2012.

566 González Report, **CER-3**, ¶ 12-25; Guerrero Report, **CER-2**, ¶ 12.

252. Importantly, E-Mex never directly challenged SEGOB's November 16, 2012 Resolution, granting E-Games its independent gaming permit, in the First *Amparo* Proceeding.[567]

253. Only one day later, on June 6, 2012, the Sixteenth District Judge admitted the (*admitir*) Third Amendment (the "**June 6, 2012 Order**").[568] As explained below, the Sixteenth District Judge's determination to admit E-Mex's Third Amendment was improper under Mexican law, because there was a "manifest and unquestionable" ground for inadmissibility of the Third Amendment, as E-Mex filed it too late.[569] Despite the evident inadmissibility of the Third Amendment, which should have resulted in its immediate dismissal (*desechamiento de plano*), the Sixteenth District Judge admitted it and then only six months later ruled that the May 27, 2009 Resolution was unconstitutional (the "**January 31, 2013 Order**").[570]

254. The Sixteenth District Judge's January 31, 2013 Order concluded that the May 27, 2009 Resolution was unconstitutional, because the Gaming Regulation did not expressly recognize the figure of an "independent operator" and that an operator could not acquire that legal status, whether by the legal principle of "acquired rights" or otherwise, because the Mexican gaming laws and regulations did not recognize it. Importantly, as the Sixteenth District Judge later clarified, he did not declare the principle of "acquired rights" unconstitutional. Instead, he only ruled that the Mexican gaming laws and regulations do not allow for the existence of an independent operator of a permit.[571] As a result, in its January 31, 2013 Order, the judge ordered SEGOB to rescind the May 27, 2009 Resolution and to review

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567 Guerrero Report, **CER-2**, ¶ 167.

568 Order of the *Juez Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (June 6, 2012), **C-270**; Guerrero Report, **CER-2**, ¶¶ 42.

569 Guerrero Report, **CER-2**, ¶¶ 44-47; Julio Gutiérrez Statement, **CWS-52**, ¶ 55.

570 *See* Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Jan. 31, 2013), **C-18**.

571 *See* Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Jan. 31, 2013), p. 94, **C-18**.

again E-Games' request that led SEGOB to issue that resolution so as to issue a new resolution consistent with the January 31, 2013 Order.[572]

255. While this ruling is incorrect and likely was the product of corruption, the January 31, 2013 Order, standing alone, did not jeopardize Claimants' operations in Mexico. This is because by January 2013 Claimants already were operating under an autonomous Casino permit given the November 16, 2012 Resolution. Claimants no longer depended on their status as an "operator" under E-Mex's permit. As developed below, following the January 31, 2013 Order, the Mexican judiciary adopted a series of measures that were highly irregular, violated Claimants' due process and other fundamental rights, lacked transparency, and ultimately rubber-stamped the illegal and unjustified *volte face* by SEGOB when it rescinded the November 16, 2012 Resolution granting Claimants their gaming permit.

256. SEGOB, while under the PAN administration, defended the legality and constitutionality of the May 27, 2009 Resolution during the First *Amparo*.[573] However, as discussed further below, SEGOB in August of 2013, under the influence of the PRI administration, did an "about face" and rescinded the November 16, 2012 Resolution and maintained that this resolution should remain without effect even after the First *Amparo* judge told SEGOB that its unconstitutionality ruling did not affect that resolution. SEGOB maintained this argument on appeal, even after being told by the First *Amparo* judge that its actions were excessive and not in compliance with his orders. Ultimately, the Mexican judiciary and SEGOB, pressured and guided by the highest levels of the Pena Nieto administration, implemented a further series of unlawful, discriminatory and arbitrary measures that ultimately resulted in the unlawful taking of E-Games' November 2012 permit and the total destruction of Claimants' investments in Mexico.

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[572] *See* Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Jan. 31, 2013), **C-18**.

[573] *See* SEGOB Memorials in *Amparo* proceedings, **C-19**.

X. Judicial Irregularities, Unlawful Executive Intromissions and an Arbitrary and Discriminatory Reversal of SEGOB's Legal Stance Result in the Illegal Taking of Claimants' Investments

257. The *Amparo* 1668/2011 proceedings culminated in SEGOB's declaring invalid its own November 16, 2012 Resolution, efforts by the lower court to have SEGOB reinstate that resolution then followed by the appellate court later insisting that the lower court declared that resolution unconstitutional when the lower court made clear that it did not do so. This resultedin the Mexican judiciary's rubber-stamping of the agency's invalidation of E-Games' permit under highly irregular and suspect circumstances. All of these measures were plagued with innumerable irregularities, egregious violations of Mexican law and Claimants' due process rights, and repeated acts by the executive branch of Mexico that influenced and completely undermined the judicial branch's independence. If the *Amparo* 1668/2011 proceedings had not been plagued with the judicial irregularities and unlawful executive intromissions explained below, Claimants and E-Games would not have been deprived of the rights that, as an independent permit holder, they acquired through the November 16, 2012 Resolution.[574] Mexico invalidated E-Games' independent permit without even affording Claimants an opportunity to argue in favor of the constitutionality or legality of the November 16, 2012 Resolution.[575]

258. Mexico, acting through SEGOB, also subjected Claimants and E-Games to a series of illegal measures that ultimately led to the complete destruction of Claimants' investments in Mexico, all in flagrant violations of Mexico's substantive obligations to Claimants under the NAFTA. SEGOB's illegal actions, both in the context of the *Amparo* 1668/2011 proceedings and beyond, will be discussed later in further details in Section IV.X.3.

[574] Guerrero Report, **CER-2**, ¶ 24(f).

[575] *See* generally Guerrero Report, **CER-2**.

259. All of these actions by Mexico were coordinated at the highest levels of the Peña Nieto administration to punish Claimants and remove them from the gaming industry because (i) they were perceived to be aligned with the previous PAN administration; (ii) they could not be "controlled" and thus would not agree to pay bribes to officials within the the Peña Nieto administration; and, (iii) offcials at the highest levels of the Peña Nieto administration agreed to remove Claimants from the gaming industry as a political favor and pay-back to the Hank Rohn family, who benefitted from this in their gaming business.

260. The following two sections discuss the judicial irregularities and undue political influences that permeated the *Amparo* 1668/2011 proceedings. In a chronological order, the *Amparo* 1668/2011 proceedings before the Sixteenth District Judge and the Seventh Collegiate Tribunal on Administrative Matters in the First District (*Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito*) ("**Collegiate Tribunal**" or "***Tribunal Colegiado***")—the appellate court assigned to these proceedings—will be discussed first, followed by the discussion of the *Amparo* 1668/2011 proceedings before the Mexican Supreme Court.

1. Judicial Irregularities in the *Amparo* 1668/2011 Proceedings Before the Sixteenth District Judge and the Collegiate Tribunal

261. As discussed above, E-Mex filed the Third Amendment in a untimely manner, which alone should have resulted in the immediate dismissal of the *Amparo* 1668/2011 proceedings in respect to the May 27, 2009 Resolution. Additionally, while E-Mex's Third Amendment, as well as the Sixteenth District Judge's January 31, 2013 Order, concerned the May 27, 2009 Resolution only, the Sixteenth District Judge and the Collegiate Tribunal unlawfully expanded the scope of the *amparo* judgment to include the November 16, 2012 Resolution and eventually rubber-stamped SEGOB's invalidation of the same. In doing so, the Sixteenth District Judge and Collegiate Tribunal acted in violation of Mexican law and Claimants' due process rights:

(i) E-Mex's Third Amendment was filed extemporaneously (and was thus untimely under Mexican law) and therefore the Sixteenth District Judge should have immediately dismissed it upon its filing (*desechamiento de plano*) instead of admitting (*admitir*) the Third Amendment; and the Collegiate Tribunal should not have declared SEGOB's appeal of the Sixteenth District Judge's June 6, 2012 determination to admit the Third Amendment unsubstantiated (*infundado*);[576]

(ii) After reviewing the *Amparo* 1668/2011 proceeding case file and examining the evidence, the Sixteenth District Judge should have concluded, and the Collegiate Tribunal should have confirmed that—even if they both initially incorrectly and unlawfully admitted the Third Amendment—the Third Amendment was in fact inadmissible (*improcedente*) because it was extemporaneous (and therefore untimely), and both the Sixteenth District Judge and the Collegiate Tribunal should therefore have dismissed (*sobreseer*) the *amparo* proceeding with respect to the May 27, 2009 Resolution.[577]

(iii) The Sixteenth District Judge failed to notify E-Games of SEGOB's July 19, 2013 Resolution confirming its compliance with the January 31, 2013 Order, thereby unlawfully depriving E-Games of an opportunity to be heard;[578]

(iv) The Collegiate Tribunal's determination to revoke SEGOB's November 16, 2012 Resolution as a result of the January 31, 2013 Order constituted an excess in the fulfilment (*exceso en el cumplimiento*) of the January 31, 2013 Order;[579] and, moreover, the Collegiate Tribunal's determination that the November 16, 2012 Resolution derived from the May 27, 2009 Resolution was irregular and inaccurate under Mexican law; and

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[576] Guerrero Report, **CER-2**, ¶ 41-87.

[577] In an *Amparo* proceeding, there can be a single challenged act or several challenged acts. As explained above, in the *Amparo* 1668/2011 proceeding, E-Mex launched constitutional attacks against various different actions taken by SEGOB. In *Amparo* proceedings in which there are several challenged acts (such as in the case at hand), the *Amparo* judge must analyze the constitutionality of each of the challenged acts; and, with respect to each act, the *Amparo* judge has three options: to dismiss the *amparo* (in respect to such act), to grant the *amparo* (in respect to such act), or to deny the *amparo* (in respect to such act); Guerrero Report, **CER-2**, ¶ 88-157.

[578] Guerrero Report, **CER-2**, ¶ 158-164.

[579] Guerrero Report, **CER-2**, ¶ 165-250.

(v) Notwithstanding the foregoing irregularities, the November 16, 2012 Resolution should have never been revoked in the *Amparo* 1668/2011 proceeding, because this resolution was not even challenged in the proceeding and because E-Mex was in fact prohibited under Mexican law from challenging the November 16, 2012 Resolution in the *Amparo* 1668/2011 proceeding as a result of a binding judgment against it in another *Amparo* proceeding filed by E-Mex on December 18, 2012 launching constitutional attacks against, *inter alia*, the November 16, 2012 Resolution ("***Amparo* 1151/2012**" or "**Second *Amparo***").[580]

262. Each of these instances is described below in turn.

a. The Sixteenth District Judge and the Collegiate Tribunal Improperly Admitted E-Mex's Third Amendment Despite That It Was Filed Late

i. The Sixteenth District Judge Improperly Accepted the Third Amendment And Was Bound to Dismiss It

263. By virtue of the June 6, 2012 Order, the Sixteenth District Judge accepted E-Mex's Third Amendment.[581] However, this was incorrect and improper under Mexican law, because there was a "manifest and unquestionable" ground for inadmissibility (*motivo manifiesto e indudable de improcedencia*) that required the immediate dismissal (*desechamiento de plano*) of the amendment, as it was extemporaneous.[582]

264. Under Mexican law, a request for *amparo* or amendment to an *amparo*, must be filed within 15 business days from the date following the day in which the person filing the request for *amparo* was notified of, became aware of, or claimed to have knowledge of the act it wishes to challenge (*acto reclamado*).[583] In this instance, the challenged act is the May 17,

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580 E-Mex Request for *Amparo* (Dec. 18, 2012), **C-273**; Guerrero Report, **CER-2**, ¶ 251-342.

581 Order of the *Juez Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (June 6, 2012), **C-270**.

582 Guerrero Report, **CER-2**, ¶¶ 44.

583 Guerrero Report, **CER-2**, ¶ 50, 74.

2009 Resolution, which E-Mex included in its Third Amendment.[584] If a request for *amparo* or its amendment is filed outside of the aforementioned 15 day period, the *amparo* or amendment is considered extemporaneous.[585] Under Mexican law, filing a request for *amparo* or its amendment in an extemporaneous manner should result in the *amparo* or the amendment being declared inadmissible (*improcedente*).[586] If the *amparo* or the amendment is declared inadmissible, under Mexican law, the same must be immediately dismissed (*desechamiento de plano*)—in other words, the court must dismiss it and not allow it be part of the *amparo* proceedings.[587]

265. Even if the judge accepts an amendment improperly, the amendment must eventually be dismissed (*sobreseído*).[588] The standards of review for dismisisng an untimely *amparo* request (*desechamiento de plano*), or later dismissing an improperly-admitted untimely request—are different.[589] In the first case, the grounds for inadmissibility (*causal de improcedencia*) must be "manifest and unquestionable" (*manifiesta e indudable*), while in the second case the inadmissibility becomes part of the legal action (*litis*) and, therefore, the parties are allowed to present evidence and allegations with respect to such inadmissibility.[590] Mexican jurisprudence has interpreted "manifest" to mean "clear, evident" and "unquestionable" to mean "true, certain, proven."[591]

266. Importantly, Mexican law provides that the analysis of the admissibility (*procedencia*) of an *amparo* proceeding—in other words, the review of the grounds for

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584 Guerrero Report, **CER-2**, ¶ 41.

585 Guerrero Report, **CER-2**, ¶¶ 52; Julio Gutiérrez Statement, **CWS-52**, ¶ 51.

586 Guerrero Report, **CER-2**, ¶ 52

587 Guerrero Report, **CER-2**, ¶ 52.

588 Guerrero Report, **CER-2**, ¶ 52.

589 Guerrero Report, **CER-2**, ¶ 52, 101.

590 Guerrero Report, **CER-2**, ¶ 52, 101.

591 Guerrero Report, **CER-2**, ¶ 58.

inadmissibility—must be performed by the judge *ex officio*.[592] Therefore, upon receipt of a request for *amparo* or its amendment, the judge must examine their admissibility *ex officio* and if the judge observes a "manifest and unquestionable" ground for inadmissibility, he or she must immediately dismiss the same, and not accept it (*desechamiento de plano*).[593] In the event that an *amparo* court improperly admits an untimely request for *amparo* or its amendment, the judge must eventually dismiss the *amparo* proceeding given its untimeliness.[594] There is no need for the parties to allege that there is a ground for inadmissibility (*causal de improcedencia*) of the *amparo* request or its amendment.[595] The judge must perform the analysis and execute the dismissal *ex officio*.[596]

267. In this case, it is clear—and should have been clear to the Sixteenth District Judge—that there was a "manifest and unquestionable" ground for inadmissibility as to E-Mex's Third Amendment.[597] E-Mex filed the Third Amendment extemporaneously, and, as will be explained in further detail below, this was evident—"manifestly and unquestionably"—from the legal proceedings and documents within the *Amparo* 1668/2011 case file.[598] The central question for purposes of determining whether the Third Amendment was in fact untimely is to ascertain the date on which E-Mex was notified of, became aware of, or claimed to have knowledge of SEGOB's May 27, 2009 Resolution.[599] If it was clear, evident, and readily apparent that E-Mex's Third Amendment was filed more than 15 business days from

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[592] Guerrero Report, **CER-2**, ¶ 52, 55, 101, 151, 152.

[593] Article 145 of the Law of *Amparo*, Regulatory of Articles 103 and 107 of the Constitution, published in the Official Gazette of the Federation on January 10, 1936 and abrogated on April 2, 2013 ("**Abrogated *Amparo* Law**"), **CL-75**; Guerrero Expert Report, **CER-2**, ¶ 52, 55.

[594] Article 145 of the Law of *Amparo*, Regulatory of Articles 103 and 107 of the Constitution, published in the Official Gazette of the Federation on January 10, 1936 and abrogated on April 2, 2013 ("**Abrogated *Amparo* Law**"), **CL-75**; Guerrero Report, **CER-2**, ¶ 44, 55, 59.

[595] Guerrero Report, **CER-2**, ¶ 55; Abrogated *Amparo* Law, Art. 145, **CL-75**.

[596] Guerrero Report, **CER-2**, ¶ 55.

[597] Guerrero Report, **CER-2**, ¶ 73.

[598] Guerrero Report, **CER-2**, ¶¶ 57.

[599] Guerrero Report, **CER-2**, ¶ 74-75.

the date following the day in which E-Mex was put on notice of the May 27, 2009 Resolution, this should have constituted a "manifest and unquestionable" ground for inadmissibility, leading to its immediate dismissal.

268. In the Third Amendment, E-Mex argued that it became aware of the May 27, 2009 Resolution on May 15, 2012 when it participated in a hearing that took place in another *amparo* proceeding initiated by E-Games on February 10, 2012 to challenge various actions taken by SEGOB ("***Amparo* 356/2012**").[600] However, E-Mex's assertion as to when it became aware of the May 27, 2009 Resolution was false, and the Sixteenth District Judge should have detected this. There are verifiable and reliable records in the *Amparo* 1668/2011 case file proving that E-Mex learned of the May 27, 2009 Resolution at least on three separate occasions, all of which were considerably before May 15, 2012.[601] However, the Sixteenth District Judge incorrectly either failed to identify and consider any of these instances, which will be described below, or he knew of them and ignored them, despite their being part of the record in the *Amparo* 1668/2011 case file at the time the Third Amendment was filed.[602]

269. There are at least three instances prior to May 15, 2012 in which E-Mex was notified of, became aware of, or claimed to have knowledge of SEGOB's May 27, 2009 Resolution.[603] Specifically, this occurred on: (i) March 27, 2012; (ii) April 9, 2012; and (iii) April 12, 2012. Again, E-Mex's Third Amendment was filed on June 5, 2012.

> (i) On March 27, 2012 E-Mex was notified of its status as an interested third party in the *Amparo* 356/2012 proceeding (another related *amparo* proceeding not directly at issue in this case) and, importantly, was notified of the *Amparo* 356/2012 judge's February 14, 2012 order.[604] This order was issued by the

[600] Guerrero Report, **CER-2**, ¶ 46; E-Mex Third Amendment to Request for *Amparo* (Jun. 5, 2012), **C-269**.

[601] Guerrero Report, **CER-2**, ¶ 75.

[602] Guerrero Report, **CER-2**, ¶ 76.

[603] Guerrero Report, **CER-2**, ¶ 75.

[604] Guerrero Report, **CER-2**, ¶¶ 67, 71(c), 75(a); E-Mex *Razón Actuarial* (Mar. 27, 2012), **C-274**.

Amparo 356/2012 judge in response to E-Games' request for *amparo* in the *Amparo* 356/2012 proceeding which, included the May 27, 2009 Resolution.[605] Under Mexican law, when a party is called to a judicial proceeding, it is assumed for various purposes, including the computation of deadlines and terms, that the party has had access to the entirety of the legal proceedings (*actuaciones judiciales/actuaciones*) that comprise the case file.[606] Therefore, since the moment in time when E-Mex was notified of the *Amparo* 356/2012 proceeding, it had, or is presumed under the law to have had, knowledge of all of the documents (*actuaciones*) comprising the *Amparo* 356/2012 case file (which included the May 27, 2009 Resolution).[607]

(ii) On April 9, 2012, E-Mex first appeared in the *Amparo* 356/2012 proceeding by filing a brief.[608] Under Mexican law, when E-Mex formally appeared in the *Amparo* 356/2012 proceeding, there can be absolutely no doubt that E-Mex had access to the entirety of the legal proceedings (*actuaciones*) that comprised the case file, which included the May 27, 2009 Resolution.[609] Furthermore, in its brief entering an appearance in the *Amparo* 356/2012 case, E-Mex accused E-Games of having concealed information from the *Amparo* 356/2012 judge.[610] In order to reach this conclusion that E-Games concealed information, E-Mex necessarily had to have reviewed all of the information and documentation exhibited by E-Games in the case, which included the May 27, 2009 Resolution.[611]

(iii) On April 12, 2012 E-Mex filed a brief in the *Amparo* 1668/2011 proceeding confirming to the Sixteenth District Judge, among other things, that it had access to the entire *Amparo* 356/2012 case file.[612] Indeed, E-Mex stated that it had

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605 Guerrero Report, **CER-2**, ¶ 67, 71(c).

606 Guerrero Report, **CER-2**, ¶ 75(a)(i).

607 Guerrero Report, **CER-2**, ¶ 75(a)(ii).

608 Guerrero Report, **CER-2**, ¶ 68, 71(d), 75(b); E-Mex Brief in the *Amparo* 356/2012 proceeding (Apr. 9, 2012), **C-275**.

609 Guerrero Report, **CER-2**, ¶ 75(b).

610 Guerrero Report, **CER-2**, ¶ 75(b)(ii).

611 Guerrero Report, **CER-2**, ¶ 75(b)(ii).

612 Guerrero Report, **CER-2**, ¶¶ 68, 71(d), 75(c)(i); E-Mex Brief in the *Amparo* 356/2012 proceeding (Apr. 12, 2012), **C-276**.

performed a "comprehensive reading" of E-Games' request for *amparo* in the *Amparo* 356/2012 proceeding.[613] Importantly, in item (*antecedente*) number 4 of the procedural history section of E-Games' request for *amparo*, E-Games expressly referred to the May 27, 2009 Resolution, and confirmed that it accompanied a copy of the same with its request.[614] That E-Games had filed a copy of the May 27, 2009 Resolution with its request for *amparo* was confirmed by the court itself.[615] A tick symbol can be observed in the certified copies of E-Games' *amparo* request next to the statement describing that E-Games attached a certified copy of the May 27, 2009 Resolution.[616] The use of a tick symbol is customary in Mexican courts to confirm that the "ticked" statement has been reviewed and confirmed by the court.[617] Therefore, following E-Mex's "comprehensive reading" of E-Games' request for *amparo*, it must necessarily have gained knowledge of, and reviewed, the May 27, 2009 Resolution, which was annexed to E-Games' request as an exhibit.[618] Therefore, there can be no doubt that on April 12, 2012 E-Mex became aware of the May 27, 2009 Resolution, and it even admitted to this to the Sixteenth District Judge when it confirmed having received an entire copy of the file in *Amparo* 356/2012 and performing a "comprehensive reading" of E-Games' request for *amparo*; as explained below said file included the May 27, 2009 Resolution.[619]

270. All of the above evidence is verifiable and cannot be a matter of debate, since all three instances in which E-Mex was made aware of the May 27, 2009 Resolution can ascertained through certified copies of public documents, certified copies of judicial

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[613] Guerrero Report, **CER-2**, ¶¶ 75(c)(1); E-Mex Brief in the *Amparo* 356/2012 proceeding (Apr. 12, 2012), **C-276**.

[614] Guerrero Report, **CER-2**, ¶¶ 75(c)(i); E-Games' Request for *amparo* in the *Amparo* 356/2012 proceeding (Feb. 10, 2012), **C-277**.

[615] Guerrero Report, **CER-2**, ¶ 62.

[616] Guerrero Report, **CER-2**, ¶ 63.

[617] Guerrero Report, **CER-2**, ¶ 63.

[618] Guerrero Report, **CER-2**, ¶ 70, 75(c)(i).

[619] Guerrero Report, **CER-2**, ¶ 75(c)(ii).

proceedings (*actuaciones judiciales*), and writs filed by E-Mex itself.[620] Moreover, the authenticity of the records (*constancias*) and judicial proceedings (*actuaciones judiciales*) has never been challenged.[621] Importantly, as stated above, all of the three aforementioned instances were part of the record in the *Amparo* 1668/2011 case file at the moment the Third Amendment was filed.[622] In fact, on April 16, 2012, the Sixteenth District Judge himself sent the *Amparo* 356/2012 judge a court order requesting that the *Amparo* 356/2012 judge send him certified and legible copies of the entire *Amparo* 356/2012 case file.[623] On April 19, 2012 the *Amparo* 356/2012 judge complied with such order.[624] Therefore, the Sixteenth District Judge was well aware of all of the aforementioned instances in which E-Mex was notified of, became aware of, or claimed to have knowledge of the May 27, 2009 Resolution as a result of its participation as an interested third party in the *Amparo* 356/2012 proceeding.[625] Furthermore, in reviewing the *Amparo* 356/2012 file, the Sixteenth District Judge would himself have seen that a copy of the May 27, 2009 Resolution was part of that file. E-Mex also admitted to the Sixteenth District Judge in a brief it filed in the *Amparo* 1668/2011 proceeding that it had performed a "comprehensive reading" of E-Games' request for *amparo* in the *Amparo* 356/2012 proceeding, which the *Amparo* 356/2012 court itself confirmed included a certified copy of the May 27, 2009 Resolution.[626] Therefore, E-Mex was informed of the May 27, 2009 Resolution much more than 15 days prior to filing the Third Amendment on June 5, 2012. As such, it was manifest that the filing of the Third Amendment was untimely, and the judge

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620 Guerrero Report, **CER-2**, ¶ 72.

621 Guerrero Report, **CER-2**, ¶ 72.

622 Guerrero Report, **CER-2**, ¶ 79.

623 Guerrero Report, **CER-2**, ¶ 69; Order of the *Juez Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Apr. 16, 2012), **C-278**.

624 Guerrero Report, **CER-2**, ¶ 69; Order in the *amparo* 356/2012 proceeding (Apr. 19, 2012), **C-369**.

625 Guerrero Report, **CER-2**, ¶ 73, 76, 79.

626 Guerrero Report, **CER-2**, ¶ 78; E-Mex Brief in the *Amparo* 356/2012 proceeding (Apr. 12, 2012), **C-276**.

should have immediately dismissed it, as there existed a "manifest and unquestionable" ground for its inadmissibility.[627]

271. However, the Sixteenth District Judge failed to do what Mexican law says he should have done and improperly admitted E-Mex's Third Amendment. In failing to abide by Mexican law, the Sixteenth District Judge's actions constituted a gross miscarriage of justice.

ii. The Collegiate Tribunal Improperly Declared SEGOB's Appeal of the Sixteenth District Judge's Acceptance of E-Mex's Third Amendment Unsubstantiated

272. SEGOB's Games and Raffles Division appealed the Sixteenth District Judge's June 6, 2012 Order through *Recurso de Queja* 68/2012.[628] *Recurso de Queja* 68/2012 was assigned to the Collegiate Tribunal.[629] In resolving *Recurso de Queja* 68/2012, the Collegiate Tribunal failed to correctly apply the *Amparo* Law and to follow key principles of Mexican law, all of which ultimately resulted in an improper resolution confirming the Sixteenth District Judge's June 6, 2012 Order accepting the untimely filing of E-Mex's Third Amendment. The Collegiate Tribunal incorrectly determined that *Recurso de Queja* 68/2012 was unsubstantiated (*infundado*), and therefore incorrectly agreed with the Sixteenth District Judge's acceptance of the filing of E-Mex's Third Amendment.[630] The Collegiate Tribunal's actions in failing to adhere to Mexican *Amparo* law, key principles of Mexican law, and to detect that there was a "manifest and unquestionable" ground for inadmissibility with respect to the filing of E-Mex's Third Amendment, violated basic principles of due process and natural justice, and constituted a gross miscarriage of justice.

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627 Guerrero Report, **CER-2**, ¶ 80.

628 Guerrero Report, **CER-2**, ¶ 42, 81; SEGOB *Recurso de Queja* 68/2012 (June 13, 2012), **C-280**.

629 Guerrero Report, **CER-2**, ¶ 42.

630 Guerrero Report, **CER-2**, ¶ 81; Order of the *Séptimo Tribunal Colegiado en Materia Administrativa* (Aug. 8, 2012), **C-271.**

273. In *Recurso de Queja* 68/2012, SEGOB explained the instances (all of which have been described above) that proved that E-Mex had been notified of, became aware of, or claimed to have knowledge of the May 27, 2009 Resolution much in advance of May 15, 2012, demonstrating its manifest untimeliness.[631] Further, SEGOB accompanied *Recurso de Queja* 68/2012 with copies of all of the legal proceedings (*actuaciones*), which included the May 27, 2009 Resolution.[632] However, on June 22, 2012, the Collegiate Tribunal—in a complete misapplication of the *Amparo* Law—incorrectly rejected and failed to consider (*no admitió*) the evidence offered by SEGOB.[633] The Collegiate Tribunal based its rejection of this evidence on Article 91 of the *Amparo* Law.[634] However, Article 91 of the *Amparo* Law was inapplicable to the case at issue because it only applied to *recursos de revisión* (a distinct type of appeal under Mexican law), and not to *recursos de queja*.[635] In this case, SEGOB filed a *recurso de queja*, not a *recurso de revisión*.[636]

274. The one exception contained in Article 91 of the *Amparo* Law, which the Collegiate Tribunal itself pointed to and which dictated that the Collegiate Tribunal consider the evidence offered by SEGOB, is applicable to the case at issue.[637] Article 91 of the *Amparo* Law states that "…in accordance with article 91, section II, of the *Amparo* Law, with respect to petitions for constitutional relief (*asuntos en revisión*), only the evidence submitted to the Judge hearing the case will be considered, *except for such evidence presented for the purposes of proving the existence of grounds for inadmissibility*."[638] The evidence offered by SEGOB

631 Guerrero Report, **CER-2**, ¶ 82; SEGOB *Recurso de Queja* 68/2012 (June 13, 2012), **C-280**.

632 Guerrero Report, **CER-2**, ¶ 83; SEGOB *Recurso de Queja* 68/2012 (June 13, 2012), **C-280**.

633 Guerrero Report, **CER-2**, ¶ 83; Order of the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (June 22, 2012), **C-281**.

634 Guerrero Report, **CER-2**, ¶ 83; Article 91 of the Abrogated *Amparo* Law, **CL-75**.

635 Guerrero Report, **CER-2**, ¶ 84(a); Article 91 of the Abrogated *Amparo* Law, **CL-75**.

636 Guerrero Report, **CER-2**, ¶ 84(a); Article 91 of the Abrogated *Amparo* Law, **CL-75**.

637 Guerrero Report, **CER-2**, ¶ 84(b); Article 91 of the Abrogated *Amparo* Law, **CL-75**.

638 Guerrero Report, **CER-2**, ¶ 84(b); Article 91 of the Abrogated *Amparo* Law (emphasis added), **CL-75** .

was precisely aimed at proving the inadmissibility of the Third Amendment.[639] Therefore, the Collegiate Tribunal was required to consider the evidence offered by SEGOB in support of its appeal but improperly failed to do so.[640]

275. Notwithstanding this, such evidence was already part of the record in the *Amparo* 1668/2011 case file on June 22, 2012.[641] As described above, on April 16, 2012, the Sixteenth District Judge himself sent the *Amparo* 356/2012 judge a court order requesting that the *Amparo* 356/2012 judge send him certified and legible copies of the entire *Amparo* 356/2012 case file, and the *Amparo* 356/2012 judge complied with such request on April 19, 2012.[642] Thus, the Collegiate Tribunal was required to consider the evidence offered by SEGOB in support of its appeal because "only the evidence submitted to the Judge hearing the case will be considered, except for such evidence presented for the purposes of proving the existence of grounds for inadmissibility."[643] But it did not do so.

276. On August 8, 2012, the Collegiate Tribunal improperly determined that *Recurso de Queja* 68/2012 was unsubstantiated (*infundado*) (the "**August 8, 2012 Order**").[644] In reaching this conclusion, the Collegiate Tribunal—in addition to improperly failing to consider the evidence offered by SEGOB, which would have led it to find that SEGOB's *Recurso de Queja* 68/2012 was substantiated—also failed to apply, among others, the following key principles established in Mexican law and recognized by the Mexican Supreme Court, respectively: (1) the principle of completeness (*principio de exhaustividad*) and (2) the judge's

639 Guerrero Report, **CER-2**, ¶ 84(b).

640 Guerrero Report, **CER-2**, ¶ 84(b).

641 Guerrero Report, **CER-2**, ¶ 84(c).

642 Guerrero Report, **CER-2**, ¶ 69, 84(c); Order of the *Juez Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Apr. 16, 2012), **C-278**; Order in the *amparo* 356/2012 proceeding (Apr. 19, 2012), **C-369**.

643 Guerrero Report, **CER-2**, ¶ 84(c); Article 91 of the Abrogated Amparo Law, **CL-75**.

644 Guerrero Report, **CER-2**, ¶ 85; Order of the *Séptimo Tribunal Colegiado en Materia Administrativa* (Aug. 8, 2012), **C-271.**

duty to perform an *ex officio* review of the admissibility of an *amparo* proceeding or, in other words, the lack of existence of grounds for inadmissibility of the same.[645]

277. As explained above, in *Recurso de Queja* 68/2012, SEGOB described the three very specific instances that proved that E-Mex had been notified of, became aware of, or claimed to have knowledge of the May 27, 2009 Resolution long before May 15, 2012.[646] Despite SEGOB's arguments to this effect, in its August 8, 2012 Order, the Collegiate Tribunal failed to address any of the instances in which E-Mex was considered to have been on notice of the May 27, 2009 Resolution.[647] This constitutes a clear violation of the principle of completeness that applies to *amparo* judgments.[648] According to this principle, the judge must "examine"[649] and "respond"[650] to "the issues that are subject to debate, derived from the request for *amparo* or the writing expressing grievances" [651] However, the Collegiate Tribunal never provided a response with respect to SEGOB's claims that the record was clear as to E-Mex having learned of the May 27, 2009 Resolution on April 9, 2012 and April 12, 2012. If the Collegiate Tribunal had studied and considered the aforementioned dates—as it should have done in accordance with the principle of completeness—it would have had to conclude that E-Mex became aware of the May 27, 2009 Resolution, at the latest, on those dates.[652] Consequently, the Collegiate Tribunal also should have found that there was a "manifest and unquestionable" ground for inadmissibility of the Third Amendment, and immediately dismissed (*desechamiento de plano*) the same.

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645 Guerrero Report, **CER-2**, ¶¶ 86.

646 Guerrero Report, **CER-2**, ¶ 86(a); SEGOB *Recurso de Queja* 68/2012 (June 13, 2012), **C-280**.

647 Guerrero Report, **CER-2**, ¶ 86(a).

648 Guerrero Report, **CER-2**, ¶ 86(a).

649 Guerrero Report, **CER-2**, ¶ 86(a).

650 Guerrero Report, **CER-2**, ¶ 86(a).

651 Guerrero Report, **CER-2**, ¶ 86(a).

652 Guerrero Report, **CER-2**, ¶ 86(a).

278. The Collegiate Tribunal also failed to perform an *ex officio* review of the admissibility of the *amparo* proceeding.[653] The Mexican Supreme Court has recognized that the appellate court is fully qualified to examine the existence of grounds for inadmissibility (*causales de improcedencia*) in addition to those identified by the district judge.[654] Moreover, as stated above, judges are required to perform an *ex officio* analysis of the admissibility (*procedencia*) of an *amparo* proceeding.[655] As such, the Collegiate Tribunal was required to analyze *ex officio* whether there were any grounds for inadmissibility of the Third Amendment.[656] This was particularly true given that the existence of possible grounds for inadmissibility (*causales de improcedencia*) was directly at issue. Importantly, the Collegiate Tribunal already had access to certified copies of the entirety of the legal proceedings (*constancias*) that comprised the *Amparo* 356/2012 case file.[657] The various instances in which E-Mex became aware of the May 27, 2009 Resolution were all provided to the Sixteenth District Judge, and, most importantly, were available for the Collegiate Tribunal to review. However, the Collegiate Tribunal failed to review, or if it reviewed them failed to properly consider and appply, the legal proceedings (*constancias*) that comprised the *Amparo* 1668/2011 case file at the time E-Mex filed the Third Amendment, and to analyze *ex officio* the admissibility of the *amparo* proceeding.[658]

279. If the Collegiate Tribunal had—as it was required to do under Mexican law—reviewed *ex officio* the admissibility of the *Amparo* 1668/2011 proceeding, considered the evidence offered by SEGOB, and in accordance with the principle of completeness, examined,

653 Guerrero Report, **CER-2**, ¶ 86(c).

654 Guerrero Report, **CER-2**, ¶ 86(c).

655 Guerrero Report, **CER-2**, ¶ 86(c).

656 Guerrero Report, **CER-2**, ¶ 86(c).

657 Guerrero Report, **CER-2**, ¶ 86(c).

658 Guerrero Report, **CER-2**, ¶ 86(c).

considered, and provided a response with respect to SEGOB's claims that the record was clear as to E-Mex having learned of the May 27, 2009 Resolution on April 9, 2012 and April 12, 2012, the Collegiate Tribunal would have—and was required to—find that SEGOB's appeal was substantiated and ordered the dimsmissal of E-Mex's Third Amendment as it related to the May 27, 2009 Resolution.[659] In failing to abide by Mexican law and to detect the aforementioned issues, the Collegiate Tribunal's actions in declaring SEGOB's *Recurso de Queja* 68/2012 unsubstantiated (i*nfundado*) constituted a gross miscarriage of justice.

b. The Sixteenth District Judge and the Collegiate Tribunal Should Have Concluded that the Third Amendment Was Inadmissible and Dismissed the Amparo with Respect to SEGOB's May 27, 2009 Resolution

280. Under Mexican law, the Sixteenth District Judge and the Collegiate Tribunal's admission and failure to dismiss E-Mex's Third Amendment did not render the amendment timely and did not conclude the issue.[660] The timeliness of the Third Amendment itself would still have to be examined and resolved at a later stage, even after being improperly accepted.[661] What this means in practice is that both courts had the obligation to examine de novo and ex officio whether the Third Amendment shoud proceed to be decided on the merits or should be dismissed for having been filed late.[662]

281. On August 30, 2012, following the Collegiate Tribunal's improper August 8, 2012 Order finding SEGOB's *Recurso de Queja* 68/2012 unsubstantiated (*infundado*), E-Games sought dismissal of the Third Amendment before the Sixteenth District Judge, arguing that it was inadmissible because it had been filed late and seeking the dismissal of the *amparo* with respect to SEGOB's May 27, 2009 Resolution.[663]

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659 Guerrero Report, **CER-2**, ¶ 81-87.

660 Guerrero Report, **CER-2**, ¶ 94, 106, 109.

661 Guerrero Report, **CER-2**, ¶ 94, 109.

662 Guerrero Report, **CER-2**, ¶ 54, 55.

663 Guerrero Report, **CER-2**, ¶ 89; E-Games Brief (Aug. 30, 2012), **C-282**.

282. In its January 31, 2013 Order, the Sixteenth District Judge ruled incorrectly that the Third Amendment had been timely filed and declined to dismiss the *amparo* with respect to SEGOB's May 27, 2009 Resolution.[664] The Sixteenth District Judge's determination to this effect in its January 31, 2013 Order was incorrect and improper under Mexican law, and its actions with respect to such determination constituted a gross miscarriage of justice.[665]

283. Furthermore, on February 19, 2013, E-Games filed *Recurso de Revisión* 107/2013 against the Sixteenth District Judge's January 31, 2013 Order.[666] The *Recurso de Revisión* 107/2013 was assigned to the Collegiate Tribunal.[667] E-Mex and SEGOB also appealed the January 31, 2013 Order.[668] On July 10, 2013 the Collegiate Tribunal issued a decision regarding E-Games' *Recurso de Revisión*, in which it confirmed the Sixteenth District Judge's January 31, 2013 Order that the Third Amendment had not been filed extemporaneously and that consequently there were no grounds for dismissal of the *amparo* with respect to SEGOB's May 27, 2009 Resolution (the "**July 10, 2013 Order**").[669] For the reasons provided below, the Collegiate Tribunal's determination to this effect was—as was the Sixteenth District Judge's finding—incorrect and improper under Mexican law, and constituted a gross miscarriage of justice.[670]

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664 The January 31, 2013 Order also determined that SEGOB's May 27, 2009 Resolution was unconstitutional; Guerrero Report, **CER-2**, ¶ 90; Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Jan. 31, 2013), **C-18**.

665 Guerrero Report, **CER-2**, ¶ 90.

666 Guerrero Report, **CER-2**, ¶ 91; E-Games *Recurso de Revisión* 107/2013 (Feb. 19, 2013), **C-283**.

667 Guerrero Report, **CER-2**, ¶ 91.

668 Guerrero Report, **CER-2**, ¶ 91.

669 Guerrero Report, **CER-2**, ¶ 92; Order of the *Séptimo Tribunal Colegiado en Materia Administrativa* (July 10, 2013), **C-20.**

670 Guerrero Report, **CER-2**, ¶ 93.

i. The Sixteenth District Judge Incorrectly Failed to Dismiss the *Amparo* with Respect to SEGOB's May 27, 2009 Resolution

284. As already explained above,[671] there was undeniable evidence in the *Amparo* 1668/2011 case file that E-Mex knew about the May 27, 2009 Resolution long before May 15, 2012and thus that the Third Amendment seeking to overturn that resolution was untimely and that it should have been dismissed.[672] Ignoring clear evidence to this effect, in its January 31, 2013 Order, the Sixteenth District Judge stated that even though there was proof that E-Mex received a copy of all of the legal proceedings (*todo lo actuado*) in the *Amparo* 356/2012 case file, there was no record (*constancia*) showing that E-Mex had actually received a copy of the May 27, 2009 Resolution.[673] This was manifestly incorrect.

285. There were multiple instances in the *Amparo* 356/2012 proceeding in which E-Mex received and/or acknowledged receipt of certified copies of the May 27, 2009 Resolution, including its receipt, through its certified representative (Ms. María del Rocío Leal Arriaga), of certified copies of all legal proceedings (*todo lo actuado*) in the *Amparo* 356/2012 case file containing that resolution.[674] E-Mex's receipt of this case file is a part of the record in the *Amparo* 1668/2011 proceeding, and therefore there was in fact a record (*constancia*) of E-Mex having actually received a copy of the May 27, 2009 Resolution.[675] The Sixteenth District Judge had ample evidence before it to reach this conclusion and unexplainably ignored or conveniently explained it away.

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[671] *See supra* Section IV.X.1.a.

[672] Guerrero Report, **CER-2**, ¶ 94.

[673] Guerrero Report, **CER-2**, ¶ 95; *See* Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Jan. 31, 2013), **C-18**.

[674] Guerrero Report, **CER-2**, ¶ 96, 109, 113; E-Mex Request in the *Amparo* 356/2012 (Apr. 18, 2012), **C-279**; Receipt of Certified copies in the *Amparo* 356/2012 proceeding (Apr. 25, 2012), **C-284**.

[675] Guerrero Report, **CER-2**, ¶ 106.

286. On July 3, 2012, E-Games asked the Sixteenth District Judge to request from the *Amparo* 356/2012 judge certified copies of the *Amparo* 356/2012 case file to evidence that, the Third Amendment was untimely.[676] On July 5, 2012, the Sixteenth District Judge requested from the *Amparo* 356/2012 judge the copies of the case file.[677] On July 9, 2012, the *Amparo* 356/2012 judge requested that the entirety of the *Amparo* 356/2012 case file be sent to the Sixteenth District Judge, which he received on July 10, 2012.[678] The receipt of these copies is formally recorded in the certification issued by the Secretary of the Sixteenth District Court.[679]

287. Second, and very importantly, the Sixteenth District Judge confirmed in its January 31, 2013 Order that Ms. María del Rocío Leal Arriaga received the certified copies of the *Amparo* 356/2012 case file.[680] Therefore, there can be no doubt as to the fact that (i) the May 27, 2009 Resolution was part of the *Amparo* 356/2012 case file, (ii) on April 25, 2012, E-Mex requested and received certified copies of *all* legal proceedings (*todo lo actuado*) in the *Amparo* 356/2012 case file, including the May 27, 2009 Resolution, and (iii) that this was part of the record (*constaba*) in the *Amparo* 1668/2011 proceeding.[681]

288. Despite all of this evidence, the Sixteenth District Judge unexplainably concluded that this did not suffice to prove that E-Mex had in fact learned of the May 27, 2009 Resolution at the time of the receipt of the certified copies by Ms. María del Rocío Leal, because:

> … of said receipt of certified copies signed by María del Rocío Leal Arriaga, authorized for that purpose by [E-Mex], which displays her signature and that of the court clerk who recorded the delivery of the totality of the records

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676 Guerrero Report, **CER-2**, ¶ 110; E-Games Request to Sixteenth District Judge (Jul. 5, 2012), **C-285**.

677 Guerrero Report, **CER-2**, ¶ 110 ; E-Games Request to Sixteenth District Judge (Jul. 5, 2012), **C-285**.

678 Guerrero Report, **CER-2**, ¶ 110; Judge's Request in the *Amparo* 356/2012 proceeding (Jul. 9, 2012), **C-286**; Sixteenth District Judge receipt (Jul. 10, 2012), **C-287**.

679 Guerrero Report, **CER-2**, ¶ 110; Sixteenth District Judge receipt (Jul. 10, 2012), **C-287**.

680 Guerrero Report, **CER-2**, ¶ 113; *See* Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Jan. 31, 2013), **C-18**.

681 Guerrero Report, **CER-2**, ¶ 112.

> (*constancias*) that comprise the case file, it cannot be reliably established that [E-Mex] also received a copy of the annexes that are included separately (*que obran por separado*), in which the [May 27, 2009 Resolution] can be found, which is why this judge considers that the date of delivery of the copies of the case file cannot be considered as a starting point for the computation of the fifteen day period to file the *amparo* if there was no specification as to the pages of the record (*fojas de las constancias*) that were delivered, or if copies of the annexes that comprise a separate evidentiary file (*copias de los anexos que constan en cuaderno por separado*), because as previously stated, there is no certainty that [E-Mex] had direct, accurate and complete knowledge of the [May 27, 2009 Resolution].[682] (Translation of the Spanish original).

289. The Sixteenth District Judge's determination is incorrect under Mexican law because: (i) the totality of the legal proceedings (*constancias*) that comprise the case file include, precisely, *all* legal proceedings (*constancias*), including the resolution in question; and (ii) the court clerk possesses authority of attestation (*fe pública*), so its certification recording the delivery of the totality of the case file constitutes conclusive evidence (*prueba plena*) that the totality of the case file was delivered to Ms. María del Rocío Leal.[683] Under Mexican law, when a party to an *amparo* proceeding requests certified copies of the totality of the legal proceedings (*constancias*) that comprise the case file, it receives copies of the *entire* case file: attached documents, resolutions, *oficios*, judicial proceedings, etc.[684] That is, all legal proceedings (*constancias*) within the case file and the party is presumed under the law to have knowledge of its entire contents.[685] Consequently, there can be no doubt that the May 27, 2009 Resolution was included in the copies received by E-Mex on April 25, 2012 and that E-Mex therefore had knowledge of it as of that date.[686]

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682 Guerrero Report, **CER-2**, ¶ 111; *See* Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Jan. 31, 2013), p. 62, **C-18**.

683 Guerrero Report, **CER-2**, ¶ 114.

684 Guerrero Report, **CER-2**, ¶ 115.

685 Guerrero Report, **CER-2**, ¶ 115-117.

686 Guerrero Report, **CER-2**, ¶ 118.

290. Furthermore, in Mexico, the court clerk is considered to possess authority of attestation (*fe pública*). This certification constitutes conclusive evidence (*prueba plena*) of acts that have been attested to by the clerk.[687] The Sixteenth District Judge stated that the court clerk "recorded the delivery of the totality of the records (*constancias*) that comprise the case file,"[688] and also concluded that "it cannot be reliably established ("*no se advierte de manera fehaciente*") that [E-Mex] also received a copy of the annexes that are included separately, in which the [May 27, 2009 Resolution] can be found."[689] These statements of the Sixteenth District Judge are incorrect and contradictory because there *was* in fact conclusive evidence (*prueba fehaciente*), in the form of the court clerk's certification, that E-Mex had received the entirety of the case file, including the May 27, 2009 Resolution.[690]

291. Authority of attestation (*fe pública*) can only be contested by irrefutably demonstrating that the facts that the clerk attested to are incorrect by demonstrating the contrary.[691] In this case, to contest the court clerk's certification that E-Mex received a copy of the May 27, 2009 Resolution, E-Mex had to irrefutably prove (*demostrar fehacientemente*) that it did not receive certified copies of the entirety of the *Amparo* 356/2012 proceeding case file, and instead only received certain portion of the file, which did not include the May 27, 2009 Resolution.[692] In Mexico, it is relatively easy to prove whether or not particular documents are part of the record because certified copies are provided as part of the case file (*legajo*).[693] Therefore, it would have been very simple for E-Mex to prove that, as it argued, it

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687 Guerrero Report, **CER-2**, ¶ 119.

688 Guerrero Report, **CER-2**, ¶ 119; *Order of the Juzgado Decimosexto de Distrito en Materia Administrativa el Distrito Federal* (Jan. 31, 2013), p.62, **C-18**.

689 Guerrero Report, **CER-2**, ¶ 120; *Order of the Juzgado Decimosexto de Distrito en Materia Administrativa el Distrito Federal* (Jan. 31, 2013), p.62, **C-18**.

690 Guerrero Report, **CER-2**, ¶ 121.

691 Guerrero Report, **CER-2**, ¶ 121.

692 Guerrero Report, **CER-2**, ¶ 122.

693 Guerrero Report, **CER-2**, ¶ 123.

did not receive copies of the May 27, 2009 Resolution when it received the entirety of the *Amparo* 356/2012 proceeding case file.[694] It would have sufficed for E-Mex to have exhibited before the Sixteenth District Judge the certified copies it received so that the Judge could have verified whether or not the May 27, 2009 Resolution was part of the same.[695] However, E-Mex never did this and, hence, it failed to contest the court clerk's authority of attestation (*fe pública*).[696] As a result, it was conclusively proven (*plenamente probado*) that E-Mex received a certified copy of the entirety of the *Amparo* 356/2012 case file, including the May 27, 2009 Resolution.[697]

292. For the reasons described above, the Sixteenth District Judge comitted a gross and flagrant legal error in concluding that E-Mex's receipt of a copy of the May 27, 2009 Resolution had not been reliably established.[698] If the Sixteenth District Judge had acted in accordance with the law, it would have found that the Third Amendment had been filed extemporaneously, and that consequently, the *amparo* had to be dismissed with respect to SEGOB's May 27, 2009 Resolution.[699] The Sixteenth District Judge's actions constituted a gross miscarriage of justice.

ii. The Collegiate Tribunal Also Incorrectly Failed to Dismiss the *Amparo* with Respect to SEGOB's May 27, 2009 Resolution

293. On February 19, 2013, E-Games, among others,[700] filed an appeal, or *recurso de revisión*, against the January 31, 2013 Order, which was assigned to the Collegiate

694 Guerrero Report, **CER-2**, ¶ 123.

695 Guerrero Report, **CER-2**, ¶ 123.

696 Guerrero Report, **CER-2**, ¶ 123.

697 Guerrero Report, **CER-2**, ¶ 123.

698 Guerrero Report, **CER-2**, ¶ 125.

699 Guerrero Report, **CER-2**, ¶ 106.

700 Producciones Móviles, SEGOB and E-Mex also filed *recursos de revisión* against the January 31, 2013 Order because they considered that it was incorrect and that they suffered an injury as a result of the same.

Tribunal—*Recurso de Revisión* 107/2013.[701] The Collegiate Tribunal's July 10, 2013 Order—which resolved *Recurso de Revisión* 107/2013—improperly confirmed the Sixteenth District Judge's January 31, 2013 Order finding that the Third Amendment had not been filed extemporaneously and that, consequently, the *amparo* was not to be dismissed with respect to SEGOB's May 27, 2009 Resolution.[702] The Collegiate Tribunal's determination was grossly incorrect and failed to follow key principles of Mexican law.[703]

294. Notably, the reasons expressed in the analysis of SEGOB's *Recurso de Queja* 68/2012[704]—which will not be repeated again here—were sufficient for the Collegiate Tribunal to have detected that there was a "manifest and unquestionable" ground for inadmissibility regarding E-Mex's Third Amendment, which required the immediate dismissal (*desechamiento de plano*) of the same.[705] The Collegiate Tribunal should have reviewed *ex officio* the issues presented by SEGOB's *Recurso de Queja* 68/2012 and come to this obvious conclusion.[706] Its failure to do so constitutes the first manifest and unexplainably odd irregularity of the July 10, 2013 Order resolving *Recurso de Revisión* 107/2013.[707]

295. Furthermore, the Collegiate Tribunal's determination declaring the *Recurso de Revisión* 107/2013 unsubstantiated (*infundado*) is based on an incorrect premise, and its conclusion is flawed.[708] The Collegiate Tribunal found that *Recurso de Revisión* 107/2013 was unsubstantiated because, in its view, the May 27, 2009 Resolution was not part (*no obraba*) of the *Amparo* 356/2012 case file as of April 25, 2012, the date that E-Mex received certified

701 Guerrero Report, **CER-2**, ¶ 129; E-Games *Recurso de Revisión* 107/2013 (Feb. 19, 2013), **C-283**.

702 Guerrero Report, **CER-2**, ¶ 131; Order of the *Séptimo Tribunal Colegiado en Materia Administrativa* (July 10, 2013), **C-20**.

703 Guerrero Report, **CER-2**, ¶ 132.

704 *See supra* Section IV.X.1.a.

705 Guerrero Report, **CER-2**, ¶ 134.

706 Guerrero Report, **CER-2**, ¶ 135.

707 Guerrero Report, **CER-2**, ¶ 136.

708 Guerrero Report, **CER-2**, ¶ 137.

copies of *all* legal proceedings (*todo lo actuado*) in the *Amparo* 356/2012 case file.[709] According to the Collegiate Tribunal, the May 27, 2009 Resolution was not part of the *Amparo* 356/2012 case file until May 10, 2012.[710] As explained in detail above,[711] this is incorrect because the May 27, 2009 Resolution was annexed to E-Games' February 10, 2012 request for *amparo* in the *Amparo* 356/2012 proceeding.[712] In item (*antecedente*) number 4 of the procedural history section of E-Games' request for *amparo*, E-Games expressly referred to the May 27, 2009 Resolution, and accompanied the request with a copy of the May 27, 2009 Resolution.[713] E-Games' filing of a copy of the May 27, 2009 Resolution with its request for *amparo* was confirmed by the court itself.[714] Therefore, the Collegiate Tribunal's statement that the May 27, 2009 Resolution was not added to the *Amparo* 356/2012 until May 10, 2012 is demonstrably incorrect and difficult to rationalize.[715]

296. The Collegiate Tribunal also failed to address E-Games' argument that the totality of the legal proceedings that comprise the case file (*todo lo actuado*) includes the annexes, in which the May 27, 2009 Resolution could be found, and that the court clerk's certification recording the delivery of the totality of the case file constitutes conclusive

[709] Guerrero Report, **CER-2**, ¶ 137; ; Order of the *Séptimo Tribunal Colegiado en Materia Administrativa* (July 10, 2013), **C-20**; Receipt of Certified copies in the *Amparo* 356/2012 proceeding (Apr. 25, 2012), **C-284**.

[710] Guerrero Report, **CER-2**, ¶ 138; ; Order of the *Séptimo Tribunal Colegiado en Materia Administrativa* (July 10, 2013), **C-20**.

[711] *See supra* Section IV.X.1.a.

[712] Guerrero Report, **CER-2**, ¶ 140; E-Games' Request for *amparo* in the *Amparo* 356/2012 proceeding (Feb. 10, 2012), **C-277**

[713] Guerrero Report, **CER-2**, ¶ 140; E-Games' Request for *amparo* in the *Amparo* 356/2012 proceeding (Feb. 10, 2012), **C-277**

[714] Guerrero Report, **CER-2**, ¶ 140; E-Games' Request for *amparo* in the *Amparo* 356/2012 proceeding (Feb. 10, 2012), **C-277**.

[715] Guerrero Report, **CER-2**, ¶ 141.

evidence (*prueba fehaciente*) to this effect.[716] In failing to address these important points, the Collegiate Court violated the principle of completeness.[717]

297. Based on the foregoing, the Collegiate Tribunal manifestly erred in concluding that the Third Amendment had been filed in a timely manner, and that consequently, the *amparo* was not to be dismissed with respect to SEGOB's May 27, 2009 Resolution. If the Collegiate Tribunal had acted in accordance with the law, reviewed *ex officio* the issues that arose before the Sixteenth District Judge in *Recurso de Queja* 68/2012, and properly considered the undeniable evidence, it would have found that the Third Amendment had been filed extemporaneously, and that consequently, the *amparo* had to be dismissed with respect to SEGOB's May 27, 2009 Resolution.[718] Its failure to do so is yet another gross miscarriage of justice.

298. Furthermore, in *Recurso de Revisión* 107/2013, E-Games raised another ground for dismissal of E-Mex's Third Amendment, which the Collegiate Tribunal failed to address. E-Games argued that the effects of the May 27, 2009 Resolution had ceased by virtue of SEGOB's November 16, 2012 Resolution, which granted E-Games an independent permit and that the *amparo*, as it related to the May 27, 2009 Resolution, must accordingly be dismissed as moot.[719] Mexican *Amparo* law provides that a ground for inadmissibility (*causal de improcedencia*) of an act that is challenged in an *amparo* proceeding arises when "the effects of the challenged act have ceased".[720] In other words, if the challenged act no longer has effects, then an *amparo* in relation to it is inaddmissible. The challenged act in this case was the May 27, 2009 Resolution. E-Games argued that since SEGOB's November 16, 2012

[716]Guerrero Report, **CER-2**, ¶ 143; Order of the *Séptimo Tribunal Colegiado en Materia Administrativa* (July 10, 2013), **C-20**.

[717] Guerrero Report, **CER-2**, ¶¶ 143.

[718] Guerrero Report, **CER-2**, ¶ 55.

[719] Guerrero Reporteport, **CER-2**, ¶ 144; E-Games Recurso de Revisión 107/2013 (Feb. 19, 2013), **C-283**.

[720] Abrogated *Amparo* Law, Art. 73, Section XVI, **CL-75**.

Resolution recognized E-Games as a permit holder, E-Games no longer had an "independent operator" status, and therefore, the effects of the May 27, 2009 Resolution had ceased.[721] E-Mex's *amparo* directed at the resoltion was thus inadmissible.

299. However, in its July 10, 2013 Order, the Collegiate Tribunal stated that it would not analyze E-Games' argument (E-Games' argument's was *inatendible*), because E-Games had not offered sufficient proof that the effects of the May 27, 2009 Resolution had ceased by virtue of the November 16, 2012 Resolution, reasoning thatE-Games had not offered sufficient proof because it had not exhibited the November 16, 2012 Resolution as evidence.[722] The Collegiate Tribunal's determination was incorrect.[723] E-Games' argument constituted a potential ground for dismissal (*causal de improcedencia*), and therefore the Collegiate Tribunal had a duty to (i) examine the issue *ex officio*, and (ii) obtain the evidence necessary to perform such analysis.[724]

300. The *Amparo* Law clearly establishes that grounds for inadmissibility of an *amparo* proceeding must be examined *ex officio*, which the tribunal recognized it must do.[725] That E-Games failed to exhibit the November 16, 2012 Resolution did not constitute a valid reason for the Collegiate Tribunal to fail to examine the issue *ex officio*.[726] Courts have the ability to gather *ex officio* any evidence they may need to resolve the issue at hand.[727] Importantly, the Mexican Supreme Court has established that if a judge has any indication that

[721] Guerrero Report, **CER-2**, ¶ 144; E-Games *Recurso de Revisión* 107/2013 (Feb. 19, 2013), **C-283**.

[722] Guerrero Report, **CER-2**, ¶ 145; Order of the *Séptimo Tribunal Colegiado en Materia Administrativa* (July 10, 2013), **C-20**.

[723]Guerrero Report, **CER-2**, ¶¶ 146.

[724]Guerrero Report, **CER-2**, ¶¶ 146.

[725]Guerrero Report, **CER-2**, ¶¶ 151; Order of the *Séptimo Tribunal Colegiado en Materia Administrativa* (July 10, 2013), **C-20**.

[726]Guerrero Report, **CER-2**, ¶ 153.

[727]Guerrero Report, **CER-2**, ¶ 153.

there may be grounds for inadmissibility, it must analyze the issue *ex officio*, gathering the evidence needed to make such a determination.[728]

301. The Collegiate Tribunal should thus have requested that SEGOB provide the court with the November 16, 2012 Resolution in order to be in a position, as required by law, to analyze and resolve *ex officio* whether or not there were grounds for inadmissibility, as alleged by E-Games.[729] If the Collegiate Tribunal had done so, it would have determined that there were grounds for inadmissibility of the Third Amendment given that the November 16, 2012 Resolution recognized E-Games as a permit holder, and therefore, the effects of SEGOB's May 27, 2009 Resolution recognizing E-Games' status as an independent operator had ceased.[730]

c. The Sixteenth District Judge Failed to Notify E-Games of SEGOB's July 19, 2013 Resolution, Thereby Effectively Depriving E-Games of the Opportunity to be Heard

302. Once the Collegiate Tribunal confirmed the January 31, 2013 Order, the Sixteenth District Judge ordered SEGOB to comply with the same, which SEGOB did on July 19, 2013.[731] SEGOB's July 19, 2013 Resolution rescinded the May 27, 2009 Resolution, and simultaneously resolved against E-Games' request to become an "independent operator" under E-Mex's permit.[732] Following the Sixteenth District Judge's receipt of SEGOB's resolution confirming compliance with the January 31, 2013 Order, the Sixteenth District Judge was required by law[733] to notify the complainant (which in this case was E-Mex, since it filed the request for *amparo*) and any interested third party (in this case, E-Games) of SEGOB's

[728] Guerrero Report, **CER-2**, ¶¶ 154.

[729] Guerrero Report, **CER-2**, ¶ 156.

[730] Guerrero Report, **CER-2**, ¶ 157.

[731] Guerrero Report, **CER-2**, ¶ 245; SEGOB Resolution (Jul. 19, 2013), **C-272**.

[732] SEGOB Resolution (Jul. 19, 2013), **C-272**.

[733] Guerrero Report, **CER-2**, ¶ 246; Abrogated *Amparo* Law, Art. 196, **CL-75**.

resolution.[734] Mexican law requires such notification in order to afford the claimant and the interested third party an opportunity to state whatever may be in their best interest.[735]

303. However, in contravention to Article 196 of the *Amparo* Law, the Sixteenth District Judge failed to serve notice on E-Games regarding SEGOB's July 19, 2013 Resolution even though it notified E-Mex, *thereby effectively depriving E-Games of the opportunity to be heard*.[736] This constitutes a clear violation of E-Games' due process rights, including its right of defense under Mexican law and of Article 196 of the *Amparo* Law.[737] It is hard to understand why the judge would notify one party, but not the other.

d. SEGOB'S Astonishing Volte Face, Further Due Process Violations by the Sixteenth District Judge and The Collegiate Tribunal's Determination to Revoke SEGOB's November 16, 2012 Resolution Were Contrary to Mexican Law and Constituted an Excess in the Fulfillment of the Sixteenth District Judge's January 31, 2013 Order

304. With the matter before the Sixteenth District Judge for execution, E-Mex, on August 22, 2013, argued that SEGOB had failed to comply with the court's January 31, 2013 Order when it only rescinded the May 27, 2009 Resolution, and it moved the judge to rescind not only the May 27, 2009 Resolution—that originally was the *only* one directly involving E-Games in the *Amparo* 1668/2011 proceeding—but also all other orders/resolutions that flowed from the May 27, 2009 Resolution.[738] E-Mex did not specifically mention any other resolutions that flowed from the May 27 2009 Resolution, and E-Mex did not mention the November 16, 2012 Resolution in its request to the Sixteenth District Judge.[739] The Sixteenth District Judge's consideration of E-Mex's motion, and the Collegiate Tribunal's considerations

734 Guerrero Report, **CER-2**, ¶¶ 247.

735 Guerrero Report, **CER-2**, ¶¶ 247; Abrogated *Amparo* Law, Art. 196, **CL-75**.

736 Guerrero Report, **CER-2**, ¶ 248; Abrogated *Amparo* Law, Art. 196, **CL-75**; Order of the *Juez Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Aug. 12, 2013), **C-288**.

737 Abrogated *Amparo* Law, Art. 196, **CL-75**; Guerrero Report, **CER-2**, ¶ 250.

738 *See* E-Mex Motion to Rescind, **C-21**; Julio Gutiérrez Statement, **CWS-52**, ¶ 85.

739 *See* E-Mex Motion to Rescind, **C-21**

in the enforcement stage of the *Amparo* judgment with respect to the November 16, 2012 Resolution, were highly irregular and further seriously violated E-Games' due process rights, as E-Games was (i) not afforded an adequate opportunity to object to or raise arguments against E-Mex's motion to include other, as of yet not at issue, SEGOB resolutions within the ambit of the Sixteenth District Judge's ruling; and (ii) deprived of the rights afforded to it in the November 16, 2012 Resolution without the essential formalities of a judicial proceeding.[740] These various, serious irregularities in the proceedings befroe the Sixtteenth District Judge not only raise eyebrows, but were indicators that something very wrong was afoot. This was shortly confirmed.

305. A few days after the motion was filed, one of E-Mex's principals—Mr. Francisco Salazar, Mr. Rojas Cardona's lawyer—approached Mr. Burr through E-Games' management team in Mexico, and informed Mr. Burr that "they controlled" the Sixteenth District Judge and that, unless E-Games settled their claims at issue in the ongoing arbitration between E-Mex and E-Games relating to royalties supposedly owed to E-Mex under the Operating Agreement, E-Mex would instruct the Sixteenth District Judge to issue an order requiring SEGOB to rescind all other administrative resolutions issued in favor of E-Games, including the November 16, 2012 one granting E-Games its permit, even though these resolutions were not at issue in or challenged during the *Amparo* 1668/2011 proceeding.[741] E-Mex assured that the judge would issue an order to this effect.[742] In addition, E-Mex also stated that they had sufficient influence within SEGOB to achieve the revocation of E-Games' permit.[743]

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740 Guerrero Report, **CER-2**, ¶ 204-220, 242-243.

741 Julio Gutiérrez Statement, **CWS-52**, ¶ 85; Gordon Burr Statement, **CWS-50**, ¶ 118; Erin Burr Statement, **CWS-51**, ¶ 126.

742 Julio Gutiérrez Statement, **CWS-52**, ¶ 56.

743 Julio Gutiérrez Statement, **CWS-52**, ¶ 56; Gordon Burr Statement, **CWS-50**, ¶ 118; Erin Burr Statement, **CWS-51**, ¶ 126.

306. In apparent support for E-Mex's threat to Claimants, on August 26, 2013, the Sixteenth District Judge issued a judgment stating that SEGOB had not complied with the January 31, 2013 Order and ordered SEGOB to rescind all resolutions based on or derived from the May 27, 2009 Resolution (DGAJS/SCEV/0260/2009-BIS), without specifying which resolutions were to be rescinded (the "**August 26, 2013 Order**").[744] The Sixteenth District Judge simply stated that "having revoked the [May 27, 2009 Resolution], [SEGOB] is also obligated to revoke any other action or actions issued as a result of [the May 27, 2009 Resolution]."[745] Unlike the initial January 31, 2013 Order, in which the Sixteenth District Judge ordered SEGOB to rescind the May 27, 2009 Resolution and issue a new resolution consistent with the *Amparo* judgment, this time, the Sixteenth District Judge only ordered SEGOB to rescind all subsequent resolutions that were legally dependent upon the May 27, 2009 Resolution without also ordering it to issue new resolutions resolving the corresponding requests made by E-Games that led to the resolutions.

307. The effect of this aspect of the Sixteenth District Judge's Order is that it did not allow or require SEGOB to issue new resolutions answering the initial requests made by E-Games and thus improperly limited E-Games' rights to challenge the resulting administrative action. In addition to being arbitrary and unlawful, the Sixteenth District Judge's August 26, 2013 Order thus had the effect of depriving E-Games and Claimants of any appellate recourse against SEGOB's rescission of all subsequent resolutions involving E-Games. It also provided E-Mex with the ammunition to continue exerting its extortionist threat against Claimants. Eventually, as a result of E-Mex' persistent and clear extortionist threats regarding its use of the Mexican judiciary and SEGOB to achieve the revocation of E-Games' permit, Claimants

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[744] *See* Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Aug. 26, 2013), **C-23**; Guerrero Report, **CER-2**, ¶ 190; Julio Gutiérrez Statement, **CWS-52**, ¶ 58; Gordon Burr Statement, **CWS-50**, ¶ 119; Erin Burr Statement, **CWS-51**, ¶ 127.

[745] Guerrero Report, **CER-2**, ¶ 190; Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Aug. 26, 2013), **C-23**.

reluctantly, and under coercion, entered into an agreement with E-Mex to settle all outstanding disputes and other claims by E-Mex towards the end of 2013.[746]

308. Less than 24 hours after it was notified of the Sixteenth District Judge's order, on August 28, 2013, SEGOB issued a 12-page resolution rescinding seven additional resolutions, including, among others, the November 16, 2012 Resolution (DGJS/SCEV/1426/2012), which granted E-Games and Claimants the independent Casino permit allowing Claimants to operate their Casino businesses in Mexico through 2037.[747] In it, SEGOB curiously and wrongly reasoned that the Sixteenth District Judge had held unconstitutional the doctrine of acquired rights, and used this hook to rescind the November 2012 resoluton. The timing of SEGOB's rapid response to the Sixteenth District Judge's judgment also is astonishing, suspicious and unusual. In order to comply with the Sixteenth District Judge's judgment, SEGOB would have needed to review every resolution that SEGOB had issued in favor or E-Games to discern whether they were legally flowing from it. It then had to prepare the 12-page esolution that rescinded the additional resolutions. It is frankly not believable that SEGOG could have done all of this in less than 24 hours. This further evidences corruption and foul play in these proceedings. In response to SEGOB's filing, E-Games filed a motion arguing that SEGOB exceeded its authority in fulfilling the Sixteenth District Judge's August 26, 2013 Order.[748]

309. On October 14, 2013, the Sixteenth District Judge ruled that SEGOB exceeded its authority in fulfilling its January 31, 2013 Order (the "**October 14, 2013 Order**").[749] This was significant, because the judge was in essence telling SEGOB that it had failed to comply

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[746] Gordon Burr Statement, **CWS-50**, ¶ 120; Erin Burr Statement, **CWS-51**, ¶ 93.

[747] Julio Gutiérrez Statement, **CWS-52**, ¶ 59; Guerrero Report, **CER-2**, ¶¶ 162, 191, 312; SEGOB Resolution (Aug. 28, 2013), **C-289**.

[748] Guerrero Report, **CER-2**, ¶ 163; Order of the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (Feb. 19, 2014), **C-290**.

[749] *See* Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), **C-24**; Guerrero Expert Report, **CER-2**, ¶ 164: Julio Gutiérrez Statement, **CWS-52**, ¶ 62.

with his order, having gone too far in overtuning the most recent resolution relating to E-Games—the one granting it its own permit.[750] The consequences for SEGOB for doing this could be severe, as its officials could be held personally liable for failing to comply with the judge's January and subsequent rulings.[751] Specifically, the Sixteenth District Judge determined that, in addition to E-Games' authorization to act as an independent operator, E-Games also had a permit that allowed it to operate as an autonomous permit holder, referencing the November 16, 2012 permit.[752] The Sixteenth District Judge concluded that E-Games had been operating under its own permit as of November 16, 2012 as a result of SEGOB's Resolution DGAJS/SCEVF/P-06/2005-BIS, which the Sixteenth District Judge considered "totally independent and autonomous and is not related in any way to the resolution declared unconstitutional" and that SEGOB had exceeded its compliance with his ruling by overturing this November 2012 resoultion that was not implicated by his ruling.[753] The judge also specifically referenced SEGOB's argument that he had rendered unconstitutional the doctrine of "acquired rights" in his January order, and made clear that he had not done so:

> "Indeed, in the *Amparo* judgment, Resolution DGAJS/SCEV/0260/2009-BIS dated May twenty-seven of two thousand and nine was declared unconstitutional, **and not the legal principle of acquired rights**, thus revoking administrative acts based on the above, and not as specifically stated in the judgment, is without a doubt excess compliance."[754] (eemphasis added) (English translation of Spanish original).

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750 Guerrero Report, **CER-2**, ¶ 192.

751 Guerrero Report, **CER-2**, ¶ 262.

752 Guerrero Report, **CER-2**, ¶ 191; *See* Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), **C-24**.

753 Guerrero Report, **CER-2**, ¶ 191; *Order of the Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), **C-24**.

754 Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), p. 23, **C-24**. *(*
"En efecto, en la sentencia de amparo, se declaró inconstitucional el oficio DGAJS/SCEV/0260/2009-BIS, de veintisiete de mayo de dos mil nueve ***y no la figura de los derechos adquiridos****, por lo que al declararse insubsistentes actos administrativos con base en ésta, y no como se precisó en la sentencia, resulta indudable la existencia de un exceso en el cumplimiento".).*

310. One would think that in the face of this reaction by the Sixteenth District Judge, SEGOB would have quickly issued a *mea culpa* and reinstated the November 16, 2012 Resolution. That is what basically any agency anywhere in the world would do in response to such a judicial response to its actions. Anywhere except for Mexico where unfortunately corruption and foul play were afoot. After all, most executive agencies defend the legality of their own resolutions, rather than insist on their illegatlity. But here, as noted, there were other considerations in play. The November 2012 Resolution had been issued in the prior PAN administration, and the company who benefitted from it—E-Games—was perceived by the new Peña Nieto administration as a PAN loyalist who could not be "controlled." So, rather than comply with the judge's response and issue a *mea culpa* reinstating the November resolution, SEGOB doubled-down and continued to insist that the judge's ruling required it to overturn the November resolution even though the judge made pellucid that it did not and that doing so was an excess in SEGOB's authority.

311. Having considered that SEGOB exceeded its authority in fulfilling the January 31, 2013 Order, the Sixteenth District Judge initiated another type of enforcement proceedings (known in Mexico as an *incidente de inejecución*) against SEGOB (*Incidente de Inejecución* 82/2013) and sent the proceedings to the Collegiate Tribunal, where *Incidente de Inejecución* 82/2013 was registered.[755]

312. In essence, an *incidente de inejecución* is a judicial enforcement mechanism available to a district judge to ensure compliance with his/her judgments.[756] If a district judge determines that a government party has not complied with his/her orders judgment or has exceeded the scope of the judgment within three days following the notification of such judgment, the district judge will remit the case to the Collegiate Tribunal so that they can

[755] Guerrero Report, **CER-2**, ¶ 164, 191.

[756] Guerrero Report, **CER-2**, ¶ 262.

oversee the correct enforcement of the district judge's order. In an *incidente de inejecución*, should the Collegiate Tribunal find that the government did not comply with the district judge's order, such non-compliance could entail serious consequences for the government party.[757] Specifically, the person in charge of the non-coompliant government party could face monetary penalties and even be removed from his/her position within the government agency (including facing civil liability after being removed).[758]

313. Claimants' growing concerns about the irregularities in the *Amparo* 1168/2011 proceeding were further solidified when Ms. Adela Domínguez—who served as the judge responsible for delivering the combined opinion of the Collegiate Tribunal for the *Incidente de Inejecución* 82/2013—told Mr. José Miguel Ramírez Rodríguez ("**Mr. Ramírez**"), the Mexican Enterprises' Legal Director, that they would under no circumstances allow operators to become permit holders because that would cause instability in the gaming industry in Mexico.[759] This unfortunately foreshadowed another political consideration influencing the outcome of the judicial proceedings.

314. On February 19, 2014, despite the Sixteenth District Judge's October 14, 2013 Order—finding that SEGOB exceeded its authority in fulfilling the January 31, 2013 Order—the Collegiate Tribunal irregularly, unlawfully, and against the Sixteenth District Judge's interpretation of its own ruling, determined that *Incidente de Inejecución* 82/2013 was unsubstantiated (*infundado*) and that SEGOB had not exceeded its authority in fulfilling the Sixteenth District Judge's January 31, 2013 Order by rescinding the November 16, 2012 Resolution (the "**February 19, 2014 Order**").[760] The Collegiate Tribunal determined that

[757] Guerrero Report, **CER-2**, ¶ 262.

[758] Guerrero Report, **CER-2**, ¶ 262.

[759] Julio Gutiérrez Statement, **CWS-52**, ¶ 65.

[760] Guerrero Report, **CER-2**, ¶¶ 165, 253, 334-335; Julio Gutiérrez Statement, **CWS-52**, ¶ 65; Order of the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (Feb. 19, 2014), **C-290**.

SEGOB's compliance with the January 31, 2013 Order was not excessive and in fact strangely agreed with SEGOB's new argument that the January 31, 2013 Order struck down the principle of "acquired rights," an issue which the Sixteenth District Judge made clear he did not find unconstitutional in hisJanuary 31, 2013 Order or in its August 26, 2013 Order.[761] It ruled this way even though the very Sixteenth District Judge that issued the January 31, 2013 Order stated that this was not his ruling:

> "Indeed, in the *Amparo* judgment, Resolution DGAJS/SCEV/0260/2009-BIS dated May twenty-seven of two thousand and nine was declared unconstitutional, and not the legal principle of acquired rights, thus revoking administrative acts based on the above, and not as specifically stated in the judgment, is without a doubt excess compliance."[762] (English translation of Spanish original).

315. On March 10, 2014, on remand, the Sixteenth District Judge complied with the Collegiate Tribunal's February 19, 2014 Order, thus accepting SEGOB's fulfillment of the January 31, 2013 Order (the "**March 10, 2014 Order**").[763] This was a complete reversal of fortunes for Claimants. In one fell swoop, the Collegiate Tribunal irregularly and unlawfully altered the terms and scope of the January 31, 2013 Order, without giving Claimants the opportunity to address such claims, thereby depriving them completely of their due process rights under applicable law.

316. For the reasons explained below, the Collegiate Tribunal should have confirmed the Sixteenth District Judge's October 14, 2013 finding that SEGOB exceeded its authority in fulfilling the January 31, 2013 Order by rescinding the November 16, 2012 Resolution.[764] The

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[761] Julio Gutiérrez Statement, **CWS-52**, ¶ 65; Order of the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (Feb. 19, 2014), **C-290**.

[762] Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), p. 23, **C-24**. *("En efecto, en la sentencia de amparo, se declaró inconstitucional el oficio DGAJS/SCEV/0260/2009-BIS, de veintisiete de mayo de dos mil nueve* ***y no la figura de los derechos adquiridos****, por lo que al declararse insubsistentes actos administrativos con base en ésta, y no como se precisó en la sentencia, resulta indudable la existencia de un exceso en el cumplimiento".).*

[763] Guerrero Report, **CER-2**, ¶ 255; Order of the *Juez Decimosexto en Materia Administrativa del Primer Circuito* (Mar. 10, 2014), **C-291**.

[764] Guerrero Report, **CER-2**, ¶ 180.

Collegiate Tribunal's actions in failing to confirm the Sixteenth District Judge's October 14, 2013 Order violated basic principles of due process and natural justice, and constituted a gross miscarriage of justice.

i. The January 31, 2013 Order Was Clear and Precise, and Therefore, the Collegiate Tribunal Should Not Have Required Compliance Deviating from its Terms, as This Constituted an Excess in the Fulfilment of the Order

317. Mexican law establishes a number of fundamental principles regarding *amparo* proceedings. First, *amparo* judgments only provide protections regarding the constitutional rights or guarantees of natural or juridical persons requesting it.[765] Second, *amparo* judgments must "clearly and precisely"[766] establish the acts that are granted *amparo* protection, and compliance with an *amparo* judgment must be precise (*puntual*), in other words, without excesses or defects.[767] Third, an *amparo* judgment is only fulfilled (*cumplida*) when this is done in its entirely, without excesses or defects."[768] When there are excesses or defects in the compliance with the *amparo* judgment, the judgment is not fulfilled.[769] Fourth, any considerations made in the enforcement stage of an *amparo* judgment must be limited exclusively to determining whether or not the competent authority complied in a precise manner, without excesses or defects, with the *amparo* judgment.[770]

318. The January 31, 2013 Order was "clear and precise."[771] The Sixteenth District Judge granted E-Mex's *amparo* with respect to the May 27, 2009 Resolution only.[772] The

765 Guerrero Report, **CER-2**, ¶ 182.

766 Guerrero Report, **CER-2**, ¶ 183.

767 Guerrero Report, **CER-2**, ¶ 184.

768 Guerrero Report, **CER-2**, ¶ 185.

769 Guerrero Report, **CER-2**, ¶ 185.

770 Guerrero Report, **CER-2**, ¶ 182.

771 Guerrero Report, **CER-2**, ¶ 187.

772 Guerrero Report, **CER-2**, ¶ 188

judge did not mention in its January 31, 2013 Order that SEGOB had to rescind all resolutions based on or derived from the May 27, 2009 Resolution.[773] Therefore, to comply with the *amparo* judgment and fulfill the same, SEGOB only had to revoke the May 27, 2009 Resolution and review again E-Games' request that led SEGOB to issue that resolution so as to issue a new resolution consistent with the January 31, 2013 Order.[774] Therefore, rescinding any resolution other than the one from May 27, 2009 constituted an excess in the fulfilment of the January 31, 2013 Order (the "***Amparo* judgment**")—as the Sixteenth District Judge himself established in its October 14, 2013 Order.[775]

ii. The Collegiate Tribunal Deprived E-Games of the Rights Conferred to It in the November 16, 2012 Resolution Without Affording E-Games the Right to a Separate Judicial Proceeding, and Improperly Determined in the Enforcement Stage of the *Amparo* Proceeding that the November 16, 2012 Resolution Derived from the May 27, 2009 Resolution

319. As stated above, any considerations made in the enforcement stage of an *amparo* judgment must be limited exclusively to determining whether or not the competent authority complied in a precise manner, without excesses or defects, with the *amparo* judgment.[776] The enforcement stage of an *amparo* judgment is not a separate judicial proceeding and, as such, the essential formalities of a judicial proceeding are not met.[777] The Mexican Constitution states that no one can be deprived of their rights, except through a judicial proceeding in which the essential formalities of the proceeding are complied.[778] The Plenary of the Mexican Supreme Court, in interpreting Article 14 of the Mexican Constitution,

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[773] Guerrero Report, **CER-2**, ¶ 189; Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Jan. 31, 2013), **C-18**.

[774] Guerrero Report, **CER-2**, ¶ 192.

[775] Guerrero Report, **CER-2**, ¶ 192.

[776] Guerrero Report, **CER-2**, ¶ 215.

[777] Guerrero Report, **CER-2**, ¶ 216.

[778] Guerrero Report, **CER-2**, ¶ 210; Constitution of Mexico, Art. 14, **CL-77**.

determined that the essential formalities of the proceeding are those necessary to guarantee an adequate defense before the act of deprivation; specifically: (i) notification of the initiation of the proceeding and its consequences; (ii) the opportunity to introduce and present before the court any necessary evidence for the defense; (iii) the opportunity to formulate allegations; and (iv) a resolution resolving the issues argued in the judicial proceeding.[779] Importantly, the enforcement stage of an *amparo* judgment does not allow for the parties to offer evidence or formulate allegations.[780]

320. For the reasons explained above, the enforcement stage of the *Amparo* judgment—the January 31, 2013 Order—could only involve considerations as to whether SEGOB had propery complied with the Sixteenth District Judge's order to rescind the May 27, 2009 Resolution and all adminitrative resolutions that legally derived from it and that were clearly specified by the *amparo* judge. To rescind any further acts (whether or not such acts were derived from one another), the rescission of such acts would have had to be stated in the *Amparo* judgment in a "clear and precise" manner.[781] Thus, in order for SEGOB's compliance with the January 31, 2013 Order to have been precise, without excesses or defects, SEGOB would have had to rescind the May 27, 2009 Resolution only and nothing more, as the Sixteenth Judicial District Judge did not "clearly and precisely" identify any other SEGOB resolutions that needed to be rescinded.[782] And it certainly would not be proper compliance to rescind a SEGOB resolution that the the Sixteenth Judicial District Judge stated clearly and precisely did

[779] Guerrero Report, **CER-2**, ¶ 212.

[780] Guerrero Report, **CER-2**, ¶ 216.

[781] Guerrero Report, **CER-2**, ¶ 218; Julio Gutiérrez Statement, **CWS-52**, ¶ 55.

[782] Guerrero Report, **CER-2**, ¶ 219.

not come within the ambit of his ruling.[783] But that is exactly what SEGOB did when it rescinded the November 16, 2012 Resolution.[784]

321. As explained above,[785] the November 16, 2012 Resolution was not a part of the January 31, 2013 Order.[786] In other words, the *Amparo* judgment did not order the rescission of the November 16, 2012 Resolution in a "clear and precise" manner; it only ordered the rescission of the May 27, 2009 Resolution.[787] Therefore, Mexican law dictates that in order to rescind the November 16, 2012 Resolution and to deprive E-Games of the rights originating from the November 16, 2012 Resolution, it would have been necessary to follow a separate and independent judicial proceeding in which the essential legal formalities of such a proceeding were complied.[788] However, in contravention of Mexican law the Collegiate Tribunal deprived E-Games of the rights conferred to it in the November 16, 2012 Resolution without affording E-Games the right to a separate and independent judicial proceeding.[789]

322. In finding that the November 16, 2012 Resolution needed to be rescinded as a result of the January 31, 2013 Order, the Collegiate Tribunal performed an analysis characteristic of a judicial proceeding, without there ever having been an actual separate and independent judicial proceeding to resolve the matter.[790] In other words, notwithstanding that the *Amparo* judgment was in the enforcement stage, the Collegiate Tribunal still analyzed the merits of the November 16, 2012 Resolution,[791] and found that the November 16, 2012

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783 Guerrero Report, **CER-2**, ¶ 192.

784 Guerrero Report, **CER-2**, ¶ 192.

785 *See supra* Section IV.W.

786 Guerrero Report, **CER-2**, ¶ 192; *See* Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Jan. 31, 2013), **C-18**.

787 Guerrero Report, **CER-2**, ¶ 192.

788 Guerrero Report, **CER-2**, ¶ 243.

789 Guerrero Report, **CER-2**, ¶ 243.

790 Guerrero Report, **CER-2**, ¶ 242.

791 Guerrero Report, **CER-2**, ¶ 242(a).

exhibited inconsistencies, was contradictory, and was based on arguments that had been declared unconstitutional.[792] This was all done to justify its determination that the November 16, 2012 had to be rescinded.

323. Under Mexican law, a judge's review of the legality and constitutionality of an administrative act (such as the November 16, 2012 Resolution) cannot be performed in the enforcement stage of an *amparo* judgment.[793] The legality and constitutionality of an administrative act must be reviewed in a separate and independent judicial proceeding.[794] Therefore, the Collegiate Tribunal simply could not have legally concluded that the November 16, 2012 Resolution contained inconsistencies, was contradictory, and was based on arguments that had been declared unconstitutional, as it was deciding issues in the enforcement stage of the *Amparo* proceeding where only SEGOB's compliance was at issue.[795]

324. In addition to the above, it was improper for the Collegiate Tribunal to determine at the enforcement stage of the *Amparo* 1668/2011 proceeding that the November 16, 2012 Resolution derived from the May 27, 2009 Resolution and the August 15, 2012 Resolution.[796] As previously explained, the November 16, 2012 Resolution itself stated that it was not based on or derived from the May 27, 2009 Resolution or the August 15, 2012 Resolution.[797] SEGOB's determination to that effect within the body of the November resolution constitutes an administrative act, and therefore, it is presumed valid and to have been issued in accordance with the law, unless proven otherwise by means of an administrative or judicial proceeding.[798] Given the inexistence of any administrative or judicial proceeding

[792] Guerrero Report, **CER-2**, ¶ 216.

[793] Guerrero Report, **CER-2**, ¶ 216.

[794] Guerrero Report, **CER-2**, ¶ 216.

[795] Guerrero Report, **CER-2**, ¶ 219.

[796] Guerrero Report, **CER-2**, ¶¶ 221-243.

[797] Guerrero Report, **CER-2**, ¶ 228, 237.

[798] Guerrero Report, **CER-2**, ¶ 229.

declaring SEGOB's determination on that point as invalid, illegal or unconstitutional,[799] such determination was valid and binding at the time the Collegiate Tribunal concluded to the contrary.

325. Perhaps more importantly, the Collegiate Tribunal's determination to the contrary was directly contradictory to the express findings of the Sixteenth District Judge who stated very clearly that his January 31 Order did not extend to the November 16, 2012 Resolution. The judge stated: "Indeed, in the *Amparo* judgment, Resolution DGAJS/SCEV/0260/2009-BIS dated May twenty-seven of two thousand and nine was declared unconstitutional, and not the legal principle of acquired rights […]"[800] There was no room for the Collegiate Tribunal to determine otherwise in the enforcement stage of the *Amparo* proceedings.[801]

326. In fact, the findings of the Collegiate Tribunal that the November 16 Resolution had been ruled unconstitutional by the *Amparo* judge was based on a finding by the Collegiate Tribunal that the Sixteenth District Judge ruled as unconstitutional the doctrine of "acquired rights."[802] The Collegiate Tribunal found as follows: "the fact is that both [permit] designations were based on the legal principle of acquired rights, a legal principle declared unconstitutional by the district judge."[803]

327. But this finding is direclty contrary to the findings of the Sixteenth District Judge, who stated that he did not find this established doctrine unconstitutional: " Indeed, in the *Amparo* judgment, Resolution DGAJS/SCEV/0260/2009-BIS dated May twenty-seven of

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799 Guerrero Report, **CER-2**, ¶ 230.

800 Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), p.23, **C-24** (emphases added).

801 Guerrero Report, **CER-2**, ¶ 201.

802 Guerrero Report, **CER-2**, ¶ 200.

803 Order of the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (Feb. 19, 2014), p. 98-99, **C-290**.

two thousand and nine was declared unconstitutional, and not the legal principle of acquired rights [….]"[804] It was incorrect and illegal for the Collegiate Tribunal to issue a finding like this that was direclty contrary to what the Sixteenth District judge ruled during the *Amparo* enforcement proceeding.[805] What is more, this illegal finding by the Collegiate Tribunal was the lynchpin for its holding that SEGOB's compliance with the *Amparo* judgment was proper. This shows the gross errrors and miscarriage of justice in the Collegiate Tribunal's holding. Only by mischaracterizing and attributing a ruling to the *Amparo* judge that directly contradicts his express findings could it arrive at the erred conclusion that SEGOB properly complied with the *Amparo* judgment.[806]

328. The actions by the Collegiate Tribunal in reviewing the constitutionality of an administrative act in the enforcement stage of the proceedings resulted in the irregular and unlawful alteration of the terms and scope of the January 31, 2013 Order.[807] This was an irregular and unlawful action which deprived Claimants of their independent permit which had been lawfully and carefully procured, and was adopted without affording Claimants the opportunity to address the Collegiate Tribunal's findings in any substantive way.[808] This constituted yet another gross miscarriage of justice and a further violation of Claimants' due process rights.

329. And while this gross miscarriage of justice could have been remedied by the Mexican Supreme Court, the Supreme Court, under improper influence from the executive branch of Mexico, declined jurisdiction over E-Games' appeal of the Collegiate Tribunal's

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804 Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), p.23, **C-24**.

805 Guerrero Report, **CER-2**, ¶ 206.

806 Guerrero Report, **CER-2**, ¶ 203.

807 Guerrero Report, **CER-2**, ¶ 208.

808 Guerrero Report, **CER-2**, ¶ 205-207.

February 19, 2014 Order, thereby allowing the incorrect and unlawful conclusion of the Collegiate Tribunal to stand to date.

e. The Incidente de Inejecución 82/2013

330. On October 14, 2013, the Sixteenth District Judge ruled that SEGOB exceeded its authority in fulfilling its January 31, 2013 Order.[809] This ruling by the Sixteenth District Judge ultimately was a curate's egg of sorts because of what the Sixteenth District Judge chose to do next. Specifically, as will be explained below, there were two more appropriate and straightforward ways for the Sixteenth District Judge to have resolved his finding that SEGOB had improperly executed his *Amparo* judgment.[810] Instead, the *Amparo* judge curiously took the circuitous, unnecessary and less efficient route of initiating another type of enforcement proceedings (known in Mexico as an *incidente de inejecución*) against SEGOB. By initiating an *incidente de inejecución,* the Sixteenth District Judge sent the matter directly to the appellate court for it to decide whether to sanction SEGOB for having exceeded its mandate in complying with the initial *Amparo* judgment.[811] The Sixteenth District Judge thus washed his hands of this politically-charged case.

331. The two options available to the Sixteenth District Judge instead of initiating the *incidente de inejecución*, which would have not only been more efficient, but which would also have resulted in a better administration of justice, were (i) to issue an order specifying the scope of the *amparo* and require SEGOB to comply with the *amparo* judgment; and (ii) to initiate what is known in Mexico as an *incidente de aclaración oficiosa*, a motion directed at specifying, defining or clarifying the terms of fulfillment of a judgment.[812]

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809 *See* Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), **C-24**; Guerrero Expert Report, **CER-2**, ¶ 261: Julio Gutiérrez Statement, **CWS-52**, ¶ 51.

810 Guerrero Report, **CER-2**, ¶ 263-284.

811 Guerrero Report, **CER-2**, ¶ 261.

812 Guerrero Report, **CER-2**, ¶ 264.

332. As explained above,[813] the January 31, 2013 Order was "clear and precise."[814] However, the Sixteenth District Judge, in its August 26, 2013 and October 14, 2013 Orders, determined that the *Amparo* judgment had not been duly fulfilled (*debidamente cumplida*) and imparted a different interpretation from the one adopted in the January 31, 2013 Order.[815] Specifically, in its August 2013 Order, the Sixteenth District Judge stated that "having revoked the [May 27, 2009 Resolution], [SEGOB] is also obligated to revoke any other action or actions issued as a result of [the May 27, 2009 Resolution]."[816] However, the Sixteenth District Judge did not precisely identify which administrative acts would be deemed in his view to be an "act issued as a result of the [May 27, 2009 Resolution]".[817] Mexican *Amparo* Law provides that in instances where there is ambiguity or a possibility of reaching different results when interpreting an *amparo* judgment, the *amparo* judge must issue a new order specifying the scope of the constitutional protection (*amparo*) afforded and requiring the responsible authority to comply with such "new" judgment.[818] Therefore, the Sixteenth District Judge, instead of initiating the *incidente de inejecución*, should have issued an order requiring SEGOB to confirm that the November 16, 2012 Resolution—and any others that were outside of the scope of his *Amparo* judgment—should not have been rescinded by SEGOB and ordering SEGOB to reinstate those resolutions, including the November 16, 2012 Resolution.[819]

333. The second option would have been for the Sixteenth District Judge to have initiated an *incidente de aclaración oficiosa*, an *ex officio* motion directed at specifying,

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[813] *See supra* Section X.1.d.i.

[814] Guerrero Report, **CER-2**, ¶ 192.

[815] Guerrero Report, **CER-2**, ¶ 190.

[816] Guerrero Report, **CER-2**, ¶¶ 190; Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Aug. 26, 2013), **C-23**;

[817] Guerrero Report, **CER-2**, ¶ 161, 190, 272; Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Aug. 26, 2013), **C-23**;

[818] Guerrero Report, **CER-2**, ¶ 279.

[819] Guerrero Report, **CER-2**, ¶ 280.

defining or clarifying the terms of fulfillment of a judgment.[820] Through an *incidente de aclaración oficiosa*, the Sixteenth District Judge would have clarified the scope of his prior order. [821] In fact, there is Mexican jurisprudence stating that the initiation of an *incidente de inejecución* is improper when the conditions for enforceability (*condiciones de exigibilidad*) of the *amparo* judgment are ambiguous; such as is arguably the case here.[822] Therefore, the Sixteenth District Judge should have initiated *ex officio* an *incidente de aclaración oficiosa* to specify, define or clarify the manner or terms of compliance with the *amparo* judgment.[823]

334. However, once the Collegiate Tribunal became involved, the ruling PRI inserted itself directly into the judicial process. Recall that the judge in charge of the proceeding told one of E-Games' lawyers that it would never let stand a ruling that allowed a gaming operator to become a pemit holder.[824] What resulted was a highly unusual and improper decision by the Collegiate Tribunal finding that *Incidente de Inejecución* 82/2013 was unsubstantiated, confirming SEGOB's rescission of E-Games' November 16, 2012 permit and rejecting the Sixteenth District Judge's interpretation of his own *Amparo* judgment.[825] Furthermore, as described below,[826] the executive branch then interfered further to ensure that this improper appellate decision would stand, thereby limiting and effectively denying Claimants a meaningful opportunity for further appellate review of that improper decision.

f. The Revocation of the November 16, 2012 Resolution in the *Amparo* 1668/2011 Proceeding Was Unlawful Because It Was Contrary to E-Mex's Procedural Conduct and the Second

820 Guerrero Report, **CER-2**, ¶ 281.

821 Guerrero Report, **CER-2**, ¶ 283.

822 Guerrero Report, **CER-2**, ¶ 281.

823 Guerrero Report, **CER-2**, ¶ 283.

824 Julio Gutiérrez Statement, **CWS-52**, ¶ 65.

825 Order of the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (Feb. 19, 2014), **C-290**.

826 *See infra* Section IV.X.2.

District Judge's Determination in the *Amparo* 1151/2012 Proceeding

335. On December 18, 2012, E-Mex initiated the *Amparo* 1151/2012 proceeding, or the Second *Amparo* proceeding, to challenge various actions taken by SEGOB in relation to its permit.[827] The *Amparo* 1151/2012 proceeding was assigned to the Second District Judge on Administrative Matters for the State of Nuevo León (*Juez Segundo de Distrito en Materia Administrativa en el Estado de Nuevo León*) ("**Second District Judge**" or "***Juez Segundo***").[828] On March 19, 2013 E-Mex sought to amend its request for *amparo* in the *Amparo* 1151/2012 proceeding to include, among others, SEGOB's November 16, 2012 Resolution, seeking to have the Second District Judge find this resolution unconstitutional (the "**Amendment**").[829] As will be explained below, due to the Second District Judge's determination in the *Amparo* 1151/2012 proceeding that E-Mex's Amendment was inadmissible (*improcedente*) and due to E-Mex's procedural conduct (*conducta procesal*) in the *Amparo* 1151/2012 proceeding, the Sixteenth District Judge and the Collegiate Tribunal's resolutions ordering the rescission of the November 16, 2012 Resolution in the *Amparo* 1668/2011 proceeding were improper, irregular and unlawful.

336. Specifically, the Sixteenth District Judge and Collegiate Tribunal's actions in ordering the rescission of the November 16, 2012 Resolution despite the events that transpired in the *Amparo* 1151/2012 proceeding violated Mexican law, basic principles of due process and natural justice, and constituted a gross miscarriage of justice.

i. The November 16, 2012 Resolution was Implicitly Consented to by E-Mex in the *Amparo* 1151/2012 Proceeding and Therefore its Rescission in the

827 E-Mex Request for *Amparo* (Dec. 18, 2012), **C-273**; Guerrero Report, **CER-2**, ¶ 300.

828 Guerrero Report, **CER-2**, ¶ 300.

829 Guerrero Report, **CER-2**, ¶ 302; Julio Gutiérrez Statement, **CWS-52**, ¶ 51; E-Mex Amendment (Mar. 19, 2013), **C-292**.

Amparo 1668/2011 Proceeding Violated Basic Principles of Mexican Law

337. On March 19, 2013 E-Mex sought to amend its request for *amparo* in the *Amparo* 1151/2012 proceeding to include the November 16, 2012 Resolution.[830] On March 20, 2013, the Second District Judge admitted (*admitir*) the Amendment (the "**March 20, 2013 Order**").[831] On March 5, 2013 E-Games appealed the Second District Judge's March 20, 2013 Order through a *Recurso de Queja* 30/2013.[832] *Recurso de Queja* 30/2013 was assigned to the First Collegiate Tribunal on Administrative Matters in the Fourth District (*Primer Tribunal Colegiado en Materia Administrativa del Cuarto Circuito*) ("**First Collegiate Tribunal**" or "***Primer Tribunal Colegiado***").[833] In *Recurso de Queja* 30/2013, E-Games argued that E-Mex had learned of the November 16, 2012 Resolution in advance of March 1, 2013, contrary to what E-Mex stated in the Amendment, and as a result, E-Mex's extemporaneous filing of the Amendment was inadmissible (*improcedente*) and therefore, should have been dismissed by the Second District Judge.[834]

338. On October 17, 2013, the First Collegiate Tribunal agreed with E-Games, finding that the Amendment was inadmissible, because it was filed extemporaneously and therefore, under Mexican law, the November 16, 2012 Resolution constituted an implicitly consented act (*acto consentido tácitamente*) by E-Mex which could not be afforded *amparo* protection (the "**October 17, 2013 Order**").[835] The First Collegiate Tribunal determined that

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[830] Guerrero Report, **CER-2**, ¶¶ 302, 316; Julio Gutiérrez Statement, **CWS-52**, ¶ 51; E-Mex Amendment (Mar. 19, 2013), **C-292**.

[831] Guerrero Report, **CER-2**, ¶ 302; Order of the Second District Judge accepting to process the filing of E-Mex's Amendment (Mar. 20, 2013), **C-293**.

[832] Guerrero Report, **CER-2**, ¶ 303; Julio Gutiérrez Statement, **CWS-52**, ¶ 51; E-Games brief in *Recurso de Queja* 30/2013 (Mar. 5, 2013), **C-294**.

[833] Guerrero Report, **CER-2**, ¶ 303.

[834] Julio Gutiérrez Statement, **CWS-52**, ¶ 51.

[835] Guerrero Report, **CER-2**, ¶¶ 303; Julio Gutiérrez Statement, **CWS-52**, ¶ 51; Order of the *Primer Tribunal Colegiado en Materia Administrativa del Cuarto Circuito* (Oct. 17, 2013), **C-295**.

E-Mex became aware of the November 16, 2012 Resolution on February 8, 2013.[836] The First Collegiate Tribunal's resolution was in accordance with the law because, as explained above, Mexican *Amparo* Law provides that "implicitly consented acts" are those against which an *amparo* proceeding is not filed in a timely manner.[837] E-Mex filed the Amendment extemporaneously, and therefore, the November 16, 2012 Resolution was an implicitly consented act which could not be afforded *amparo* protection.[838]

339. For the reasons explained below, the fact that the *Amparo* 1151/2012 proceeding resolved that the November 16, 2012 Resolution constituted an implicitly consented act (*acto consentido tácitamente*) by E-Mex should have resulted in the Sixteenth District Judge and the Collegiate Tribunal resolving in the *Amparo* 1668/2011 proceeding that there was an excess in SEGOB's compliance with the January 31, 2013 Order.[839] Instead, the Sixteenth District Judge and the Collegiate Tribunal issued improper resolutions ordering the rescission of the November 16, 2012 Resolution in the *Amparo* 1668/2011 proceeding, thereby acting in contravention of Mexican law, violating basic principles of due process and natural justice, and committing a gross miscarriage of justice.[840]

340. Importantly, the First Collegiate Tribunal's October 17, 2013 Order was not subject to appeal.[841] It constituted a final ruling with res judicata effects in the *Amparo* 1151/2012 proceeding.[842] Accordingly, under Mexican law, as a result of the October 17, 2013 Order, E-Mex exhausted its means to challenge the November 16, 2012 Resolution via an

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836 Guerrero Report, **CER-2**, ¶ 316; Order of the *Primer Tribunal Colegiado en Materia Administrativa del Cuarto Circuito* (Oct. 17, 2013), **C-295.**

837 Guerrero Report, **CER-2**, ¶ 316; Abrogated *Amparo* Law, Art. 73, Section XII, **CL-75**.

838 Guerrero Report, **CER-2**, ¶ 316; Julio Gutiérrez Statement, **CWS-52**, ¶ 52.

839 Guerrero Report, **CER-2**, ¶ 318.

840 Guerrero Report, **CER-2**, ¶ 315.

841 Guerrero Report, **CER-2**, ¶¶ 305-307, 318.

842 Guerrero Report, **CER-2**, ¶ 321.

amparo.[843] Therefore, it was unlawful to afford E-Mex another opportunity to challenge the November 16, 2012 Resolution by means of an *amparo* in the *Amparo* 1668/2011 proceeding.[844] It had already been resolved in the *Amparo* 1151/2012 proceeding that E-Mex was not entitled to *amparo* protection in regards to the November 16, 2012 Resolution, and therefore, under Mexican law, the effect of the *Amparo* 1668/2011 could not be the rescission of the November 16, 2012 Resolution.[845] Under the *Amparo* Law, it is improper to rescind an act that has been previously been implicitly consented, especially where that implied consent is res judicata for the party seeking to invalidate the administrative act.[846]

341. Moreover, Mexican law states that *amparo* judges are obligated under the law to examine compliance with *amparo* judgments *ex officio*.[847] Therefore, both the Sixteenth District Judge and the Collegiate Tribunal were obligated to examine *ex officio* due fulfillment (*debido cumplimiento*) of the *Amparo* 1668/2011 judgment (the January 31, 2013 Order).[848] To that end, both the Sixteenth District Judge and the Collegiate Tribunal should have taken into account—in the *Amparo* 1668/2011 proceeding—E-Mex's implicit consent (*consentimiento tácito*) in the *Amparo* 1151/2012 proceeding to the November 16, 2012 Resolution and the res judicata effect of the rulings in that parallel *Amparo* proceeding.[849]

342. Remarkably, both the Sixteenth District Judge and the Collegiate Tribunal were aware of the *Amparo* 1151/2012 proceeding, and more importantly, knew that the November 16, 2012 Resolution had been unsuccessfully challenged by E-Mex in the *Amparo* 1151/2012

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843 Guerrero Report, **CER-2**, ¶ 323.

844 Guerrero Report, **CER-2**, ¶ 320; Abrogated *Amparo* Law, Art. 193, **CL-75**.

845 Guerrero Report, **CER-2**, ¶ 318-319.

846 Guerrero Report, **CER-2**, ¶ 324.

847 Guerrero Report, **CER-2**, ¶ 324; Abrogated *Amparo* Law, Art. 214, **CL-75**.

848 Guerrero Report, **CER-2**, ¶ 327.

849 Guerrero Report, **CER-2**, ¶ 327.

proceeding.[850] The Sixteenth District Judge confirmed as much in its October 14, 2013 Order ruling that SEGOB exceeded its authority in fulfilling the January 31, 2013 Order:

> […]
>
> The foregoing, without this District Court recognizing, in any way, the legality of the DGAJS/SCEVF/P-06/2005-BIS permit, granted in the DGAJS/SCEV/1426/2012 resolution of November sixteen, two thousand and twelve, or ignoring that [the November 16, 2012 Resolution] was challenged in the *amparo* 1151/2012 proceeding before the Second District Judge on Administrative Matters for the State of Nuevo León.[851] (English translation of Spanish original).

343. As stated above, *amparo* judges are required by law to *ex officio* examine compliance with *amparo* judgments.[852] Even though the First Collegiate Tribunal's October 17, 2013 Order was not part of the *Amparo* 1668/2011 case file, it could be found in the Integrated System for Case Files (*Sistema Integral de Seguimiento de Expedientes*, "**SISE**").[853] The SISE is an online database that provides access to resolutions issued by judges in the entire United Mexican States.[854] Judges in Mexico are required to upload electronic versions of their resolutions to the SISE.[855] In fact, the electronic versions of the judgments stored and captured in the SISE are considered facts in the public domain or of common knowledge (*hechos notorios*) for Mexican judges.[856] The concept of *hechos notorios* refers to any event in the public domain or known to all or almost all members of a certain social circle at the time a

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850 Guerrero Report, **CER-2**, ¶ 328.

851 Guerrero Report, **CER-2**, ¶ 328; Order of the *Juez Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Oct. 14, 2013), **C-24** (empasis added).

852 Guerrero Report, **CER--2**, ¶ 324; Abrogated *Amparo* Law, Art. 214, **CL-75**.

853 Guerrero Report, **CER-2**, ¶ 331.

854 GENERAL AGREEMENT 28/2001, OF THE PLENARY SESSION OF THE FEDERAL JUDICIAL COUNCIL, WHICH ESTABLISHES THE COMPULSORY USE OF THE COMPREHENSIVE FOLLOW-UP SYSTEM, https://sjf.scjn.gob.mx/sjfsist/paginas/Reportes/ReporteDE.aspx?idius=729&Tipo=4&Tema=0.

855 GENERAL AGREEMENT 28/2001, OF THE PLENARY SESSION OF THE FEDERAL JUDICIAL COUNCIL, WHICH ESTABLISHES THE COMPULSORY USE OF THE COMPREHENSIVE FOLLOW-UP SYSTEM, https://sjf.scjn.gob.mx/sjfsist/paginas/Reportes/ReporteDE.aspx?idius=729&Tipo=4&Tema=0.

856 Guerrero Report, **CER-2**, ¶ 330.

judgment is going to be issued, and with respect to which there is no doubt or discussion.[857] Therefore, if a specific judgement is in the SISE at the time a judge issues a resolution, the judge is considered to have knowledge of such resolution.[858] Importantly, the First Collegiate Tribunal's October 17, 2013 Order—which found that the Amendment was inadmissible (*improcedente*) because it was filed extemporaneously and that therefore, under Mexican law, the November 16, 2012 Resolution constituted an implicitly consented act by E-Mex which could not be afforded *amparo* protection—was uploaded to SISE on October 24, 2013.[859] Therefore, as of October 24, 2013, the First Collegiate Tribunal's October 17, 2013 Order was considered part of the public domain or of common knowledge to Mexican judges. E-Mex's implicit consent to the November 16, 2012 Resolution took place before the Sixteenth District Judge declared that the *amparo* judgment in the *Amparo* 1668/2011 proceeding had been complied with—in other words, before the Sixteenth District Judge confirmed in its March 10, 2014 Order that its January 31, 2013 Order had been fulfilled by SEGOB—and therefore, the Sixteenth District Judge and the Collegiate Tribunal should have taken E-Mex's implicit consent to the November 16, 2012 Resolution into account, which would have led it to find that E-Mex could not attack the validity of the November 16, 2012 resoluton a second time.[860]

344. Furthermore, the Collegiate Tribunal, in examining *ex officio* due fulfillment of the *Amparo* 1168/2011 judgment, should have taken into account of the October 17, 2013 Order in the *Amparo* 1151/2012 proceeding—prior to its February 19, 2014 Order in the *Amparo* 1168/2011 resolving *Incidente de Inejecución* 82/2013.[861] If the Collegiate Tribunal

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[857] Notorious Facts: Electronic versions of the sentences stored and captured in the comprehensive file tracking system (SISE) have this character. Thesis: P./J. 16/2018 (10a), https://sjf.scjn.gob.mx/SJFSem/Paginas/Reportes/ReporteDE.aspx?idius=2017123&Tipo=1.

[858] Guerrero Report, **CER-2**, ¶ 330.

[859] Guerrero Report, **CER-2**, ¶ 331.

[860] Guerrero Report, **CER-2**, ¶ 332. As stated above, the First Collegiate Tribunal determined that E-Mex became aware of the November 16, 2012 Resolution on February 8, 2013.

[861] Guerrero Report, **CER-2**, ¶ 333.

had acted in accordance with the law and taken into consideration the October 17, 2013 Order in the *Amparo* 1151/2012 proceeding, it would have found that enforcement of the January 31, 2013 Order in the *Amparo* 1668/2011 proceeding could not result in the rescission of the November 16, 2012 Resolution.[862]

ii. The November 16, 2012 Resolution's Revocation Violated the Principle of Estoppel

345. As stated above, the Sixteenth District Judge and the Collegiate Tribunal were aware of the *Amparo* 1151/2012 proceeding, and more importantly, that the November 16, 2012 Resolution had been challenged by E-Mex in the *Amparo* 1151/2012 proceeding.[863] That the November 16, 2012 Resolution constituted an implicitly consented act by E-Mex which could not be afforded *amparo* protection was thus known to the Sixteenth District Judge and the Collegiate Tribunal.[864] As a consecuence, the Sixteenth District Judge and the Collegiate Tribunal should have resolved that, by virtue of the principle of estoppel, it was not possible to leave without effects the November 16, 2012 Resolution as a result of the *Amparo* 1668/2011 proceeding—given that E-Mex took blatantly contradictory positions with respect to the November 16, 2012 Resolution in the *Amparo* 1151/2012 and in the *Amparo* 1668/2011 proceedings.[865] The Sixteenth District Judge and the Collegiate Tribunal's failure to detect that the November 16, 2012 Resolution could not be revoked by virtue of the principle of estoppel constituted a gross miscarriage of justice.

346. It is clear from the *Amparo* 1151/2012 and *Amparo* 1668/2011 case files that E-Mex adopted contradictory positions. As described above, in the *Amparo* 1151/2012 proceeding, E-Mex sought to amend its request for *amparo* specifically to include the

862 Guerrero Report, **CER-2**, ¶ 334.

863 Guerrero Report, **CER-2**, ¶ 342.

864 Guerrero Report, **CER-2**, ¶ 343.

865 Guerrero Report, **CER-2**, ¶ 336.

November 16, 2012 Resolution.[866] E-Mex's conduct in challenging the constitutionality of the November 16, 2012 Resolution in the *Amparo* 1151/2012 proceeding proves that E-Mex was aware that the effect of the *Amparo* 1668/2011 proceeding could not be the rescission of the November 16, 2012 Resolution.[867] Otherwise, E-Mex would not have amended its request for *amparo* in the *Amparo* 1151/2012 proceeding to include the November 16, 2012 Resolution, since, in any case, the *Amparo* 1668/2011 proceeding would have sufficed for E-Mex's purposes—the revocation of the November 16, 2012 Resolution.[868] But, the reality is that E-Mex knew that the *Amparo* 1668/2011 proceeding could not result in the rescission of the November 16, 2012 Resolution (since E-Mex had not challenged it), and so it sought to amend its request for *amparo* in the *Amparo* 1151/2012 proceeding to include the November 16, 2012 Resolution.

347. Furthermore, on August 22, 2013, E-Mex argued in the *Amparo* 1668/2011 proceeding that SEGOB had failed to comply with the Sixteenth District Judge's January 31, 2013 Order when it only rescinded the May 27, 2009 Resolution, and it moved the judge to rescind not only the May 27, 2009 Resolution, but also all other subsequent resolutions that flowed from it.[869] E-Mex's conduct in this respect is also self-contradictory, because while it knew that the *Amparo* 1668/2011 proceeding could not result in the rescission of the November 16, 2012 Resolution, it nevertheless moved the Sixteenth District Judge to do precisely this—rescind the November 16, 2012 Resolution. [870]

348. In light of the above, and considering that the Sixteenth District Judge and the Collegiate Tribunal were aware of the *Amparo* 1151/2012 proceeding, and more importantly,

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866 Guerrero Report, **CER-2**, ¶ 358; E-Mex Amendment (Mar. 19, 2013), **C-292**.

867 Guerrero Report, **CER-2**, ¶ 358.

868 Guerrero Report, **CER-2**, ¶ 160.

869 Guerrero Report, **CER-2**, ¶ 310, 339; *See* E-Mex Motion to Rescind, **C-21**.

870 Guerrero Report, **CER-2**, ¶ 341.

that E-Mex had unsuccessfully challenged the November 16, 2012 Resolution in the *Amparo* 1151/2012 proceeding, the Sixteenth District Judge and the Collegiate Tribunal should have resolved that, by virtue of the principle of estoppel, the *Amparo* 1668/2011 proceeding could not result in the rescission of the November 16, 2012 Resolution.[871]

2. Judicial Irregularities in the *Amparo* 1668/2011 Proceedings Before the Mexican Supreme Court

349. E-Games filed a writ to the Mexican Supreme Court (the "**Supreme Court**") on March 31, 2014 known as a *recurso de inconformidad*, attacking: (1) the Collegiate Tribunal's February 19, 2014 Order resolving *Incidente de Inejecución* 82/2013; and (2) the Sixteenth District Judge's March 10, 2014 acceptance of SEGOB's rescission of all resolutions issued in favor of E-Games subsequent to the May 27, 2009 Resolution.[872] The *recurso de inconformidad* thus was meant to challenge the appellate court's rulings and reasoning as well as the actual judgment that revoked Claimants' November 16, 2012 permit.[873]

350. On May 6, 2014, the Supreme Court admitted and agreed to hear E-Games' *recurso de inconformidad*.[874] The case was assigned to Justice Alberto Pérez Dayán ("**Justice Pérez Dayán**"), who would serve as the judge responsible for delivering the combined opinion of the Supreme Court in respect to the *recurso de inconformidad*.[875] Justice Pérez Dayán had previously served on the Collegiate Tribunal that resolved *Incidente de Inejecución* 82/2013 and had been recently appointed Justice of the Supreme Court at the proposal of the Peña Nieto

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871 Guerrero Report, **CER-2**, ¶ 336.

872 Guerrero Report, **CER-2**, ¶¶ 286; Julio Gutiérrez Statement, **CWS-52**, ¶ 65; E-Games *Recurso de Inconformidad* (Mar. 31, 2014), **C-296**.

873 Guerrero Report, **CER-2**, ¶ 286.

874 *See* Order of the *Suprema Corte de Justicia de la Nación* (May 6, 2014), **C-25**; Julio Gutiérrez Statement, **CWS-52**, ¶ 96.

875 Julio Gutiérrez Statement, **CWS-52**, ¶ 97; Order of the *Suprema Corte de Justicia de la Nación* (May 6, 2014), **C-25**.

administration and the Peña Nieto administration's Legal Counsel (*Consejero Jurídico*) Humberto Castillejos ("**Mr. Castillejos**").[876]

351. Upon admission of the request, Justice Pérez Dayán assigned the *recurso de inconformidad* to a clerk (in Mexico known as a *proyectista* or *secretario de estudio y cuenta*, depending on the court) in charge of analyzing the matter and preparing a draft of the judgment which would be ultimately decided by the plenary session of the Supreme Court.[877] Over the course of four months, Claimants' Mexican counsel, Mr. Gutiérrez, met frequently with the *proyectista*, Ms. Irma Gómez, to go over questions and to submit memoranda on various issues, mainly regarding the substance and merits of the issues raised by Claimants on their appeal.[878] From the time invested in the matter, the nature of the questions asked by the *proyectista*, and the *proyectista*'s remarks to Claimants' Mexican counsel, it was clear that the Supreme Court was considering the merits of the matter and that the *proyectista* was preparing a draft judgment to that effect.[879] It was also clear that the central issue in the draft judgment would be whether SEGOB's November 16, 2012 Resolution was based on or derived from the May 27, 2009 Resolution.[880]

352. One week before the plenary session that would have led to a decision on the merits of the *recurso*, however, Claimants' Mexican counsel (Mr. Julio Gutiérrez and Mr. Ricardo Ríos Ferrer) met with Justice Pérez Dayán, the judge in charge of the *recurso de inconformidad*.[881] In the waiting room of Justice Pérez Dayán's chambers, they crossed paths with President Peña Nieto's head lawyer, Mr. Castillejos, who was there waiting to meet with

[876] Julio Gutiérrez Statement, **CWS-52**, ¶ 97.

[877] Julio Gutiérrez Statement, **CWS-52**, ¶ 98.

[878] Julio Gutiérrez Statement, **CWS-52**, ¶ 98.

[879] Julio Gutiérrez Statement, **CWS-52**, ¶ 98.

[880] Julio Gutiérrez Statement, **CWS-52**, ¶ 98.

[881] Julio Gutiérrez Statement, **CWS-52**, ¶ 99.

Justice Pérez Dayán.[882] While in the waiting room, Mr. Gutiérrez and his partner, Ricardo Ríos Ferrer, oveheard Mr. Castillejos ask another lawyer who was there with him for E-Games' *recurso de inconformidad* case file.[883] This happened right before Mr. Castillejos walked into Justice Pérez Dayán's chambers.[884] Oddly, during the meeting with Mr. Gutiérrez and Mr. Ríos Ferrer, Justice Pérez Dayán appeared unusually nervous and barely discussed the *recurso de inconformidad* with them, which was very different than the various prior interactions that Claimants' counsel had had with Justice Pérez Dayán in relation to the case.[885]

353. Just one week after that meeting, on September 3, 2014, the Second Chamber of the Supreme Court very surprisingly reversed course after having considered it for months and dismissed the *recurso de inconformidad* on procedural grounds, denying to hear the matter on the merits.[886] This was extremely odd, as the Court did an initial review of whether to accept or dismiss the *recurso de inconformidad* when it first came in, and decided to hear it on the merits.[887] That is not the normal procedure for the Supreme Court; to decide to hear it and then after months of considering it on the merits to dismiss it on procedural grounds.[888] It seemingly was no coincidence that the Supreme Court reversed course and dismissed the case on procedural grounds rather than ruling on its merits just after the President's personal lawyer visited Justice Pérez Dayán to discuss Claimants' case.

354. It also bears noting that the son of Justice Pérez Dayán, who was the principal judge working on Claimant's appeal to the Supreme Court, was working for Mr. Castillejos at

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882 Julio Gutiérrez Statement, **CWS-52**, ¶ 99.

883 Julio Gutiérrez Statement, **CWS-52**, ¶ 100.

884 Julio Gutiérrez Statement, **CWS-52** ¶ 100.

885 Julio Gutiérrez Statement, **CWS-52**, ¶ 100; Gordon Burr Statement, **CWS-50**, ¶ 122; Erin Burr Statement, **CWS-51**, ¶ 132.

886 Julio Gutiérrez Statement, **CWS-52**, ¶ 101; Guerrero Expert Report, **CER-2**, ¶ 288; Mexican Supreme Court Order (Sept. 3, 2014), **C-26**.

887 Julio Gutiérrez Statement, **CWS-52** ¶ 101.

888 Julio Gutiérrez Statement, **CWS-52** ¶ 101.

the very time that the judge was deciding Claimant's case, including when he decided to reverse course after meeting with Mr. Castillejos and dismiss the case on procedural grounds.[889] Again, this is more evidence of the new PRI administration's interference to influence the fate of Claimant's gaming permit and gaming business.

355. In dismissing the *recurso de inconformidad* after consdiering it on the merits for months and being almost ready to issue a ruling, the Second Chamber of the Supreme Court remanded the case to the very same appellate court that had issued the decision that was the subject of E-Games' appeal to the Supreme Court.[890] In other words, the Collegiate Tribunal was responsible for reviewing its own February 19, 2014 Order, in which it had determined that *Incidente de Inejecución* 82/2013 was unsubstantiated and that SEGOB had not exceeded its authority in fulfilling the Sixteenth District Judge's January 31, 2013 Order by rescinding the November 16, 2012 Resolution. The unavailability of any other legal recourse against a judgment resolving an *incidente de inejecución*, combined with the Supreme Court's decision to remand the case to the same Collegiate Tribunal, effectively and practically denied E-Games an appeal of this ruling, as the same appellate court that issued the decision on appeal then reviewed the merits of the appeal of its own decision.[891] This not only is a denial of justice under principles of public international law as will be discussed later, it is a clear violation of Mexican law, and of basic principles of justice, including the American Convention on Human Rights, which, in essence, establishes the right to an effective recourse before the competent judicial authorities.[892]

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889 Julio Gutiérrez Statement, **CWS-52** ¶ 101; *Presumen Conflicto de Interés en Ministerio* (Feb. 8, 2017). Retrieved from https://www.heraldo.mx/presumen-conflicto-de-interes-en-ministro/, **C-365**.

890 Julio Gutiérrez Statement, **CWS-52**, ¶ 101; Guerrero Report, **CER-2**, ¶ 288; Mexican Supreme Court Order (Sept. 3, 2014), **C-26**.

891 *See* Mexican Supreme Court Order (Sep. 3, 2014), **C-26**; Julio Gutiérrez Statement, **CWS-52**, ¶ 101.

892 Guerrero Report, **CER-2**, ¶¶ 292-299; Article 25 of the American Convention on Human Rights, **CL-76**.

356. If the previous judicial irregularities were not enough, the appellate court's handling of this issue on remand was also rife with politically-motivated irregularities. For example, when Claimants' Mexican counsel discussed the appeal with one of the judges in charge of this matter, Hon. José Luis Caballero, he informed Claimants' counsel that he feared for the safety of his job within the appellate court given the politically-charged nature of the case involving E-Games' permit.[893] A few days later, Judge Caballero was transferred to a different court, rendering him unable to participate in the decision of Claimant's case. Judge Caballero was soon replaced by an interim clerk.[894]

357. Unsurprisingly, on January 29, 2015, the Collegiate Tribunal upheld its prior decision and thus upheld the Sixteenth District Judge's March 10, 2014 Order affirming SEGOB's resolution rescinding *all* administrative resolutions issued to E-Games, including the November 16, 2012 Resolution that granted E-Games its independent permit.[895] The Collegiate Tribunal determined, as it itself had decided when it initially reviewed the Sixteenth District Judge's *recurso de inejecución*, that the November 16, 2012 Resolution granting E-Games an independent permit was derived from and was a direct consequence of the May 27, 2009 Resolution, which the Sixteenth District Judge had ruled unconstitutional. So it ruled a second time in direct contravention of the ruling of Sixteenth District Judge, attributing to him rulings that he very clearly stated he did not make. E-Games' permit thus stood revoked, and Claimants having no other avenue for appeal saw their sizeable investments and profitable Casino businesses effectively destroyed.

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893 Julio Gutiérrez Statement, **CWS-52**, ¶ 102.

894 Julio Gutiérrez Statement, **CWS-52**, ¶ 102.

895 Julio Gutiérrez Statement, **CWS-52**, ¶ 103; Guerrero Expert Report, **CER-2**, ¶ 290, 314; Order of the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (Jan. 29, 2015), **C-297**.

3. SEGOB Quarterbacksthe Unlawful, Arbitrary and Discriminatory Revocation of E-Games' Permit and Illegally and Arbitrarily Closes Down All of Claimants' Casinos

a. SEGOB's Repudiation of its Prior Resolutions and Criteria Granting Claimants Their Autonomous Permit, and Unlawful Introduction of the November 16, 2012 Resolution in the Enforcement Stage of the *Amparo* 1668/2011 Proceeding Was Fueled By Its Desire to Revoke Claimants' Permit for Political and Other Improper Reasons

358. As described above, the Sixteenth District Judge issued a judgment ordering SEGOB to rescind all resolutions based on or derived from the May 27, 2009 Resolution, without specifying which resolutions were to be rescinded.[896]

359. On August 28, 2013, SEGOB, seizing on this "gift horse" opportunity, rescinded several resolutions, including, among others, the November 16, 2012 Resolution that granted E-Games and Claimants the autonomous Casino permit, allowing Claimants to operate their Casino businesses in Mexico through 2037.[897] In so doing, SEGOB employed a reasoning that departs from the order it received from the Sixteenth District Judge in his August 26, 2013 Order, and, importantly, that squarely contradicts the language and reasoning employed by SEGOB when it issued the November 16, 2012 Resolution.

360. This seemingly unexplainable behavior is actually only understandable when one views in context what was going on. SEGOB, under the new PRI adminsitration, made clear from the onset of the Peña Nieto administration that Claimants were no longer welcomed in Mexico's gaming sector. From the initial public statements made by Ms. Marcela Salas declaring Claimant's permit as "illegal" to the internal memorandum in SEGOB clarifying that SEGOB "canceled" E-Games' permit because it was supposedly issued in an "irregular" manner, to the political and illicit motivations of the Peña Nieto administration to oust

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[896] *See* Order of the Juzgado Decimosexto de Distrito en Materia Administrativa (Aug. 26, 2013), **C-23**; Guerrero Report, **CER-2**, ¶ 311.

[897] González Report, **CER-3**, ¶ 163 (f); SEGOB Resolution (Aug. 28, 2013), **C-289**.

Claimants because they would not pay bribes and hence could not be "controlled", the underlying motivations and plan of the new administration were clear, and there was no way Claimants were going to survive and remain in Mexico.[898] This is what in fact happened and the only real way to explain the highly irregular actions of SEGOB in rescinding/revoking the resolution that granted Claimants' permit and then the irreconcilable positions taken by the Mexican judiciary all aimed at "rubber-stamping" SEGOB's actions notwithstanding their evident illegal nature.

361. In its August 28, 2013 Resolution, SEGOB reasoned that (i) all of the resolutions that it issued after the May 27, 2009 Resolution were subsidiary to and based upon the May 27, 2009 Resolution and thus had to be rescinded; and (ii) that each of the subsequent resolutions were based on the principle of "acquired rights", which SEGOB argued had been ruled unconstitutional by the *Amparo* judge.[899]

362. This, however, was not what the Sixteenth District Judge concluded in his January 31, 2013 Order, nor what he ordered SEGOB to do in his August 26, 2013 Order.[900] Importantly, this action by SEGOB, and all those that followed, which destroyed Claimants' investments in Mexico, were taken by a SEGOB controlled by the PRI administration, which as noted now sat in political judgment of actions taken by the prior administration controlled by the PAN and wanted to kick out Claimants as payback and to benefit the powerful PRI allies—the Hank Rhon family. This is significant and explains how it is that SEGOB, now in August 2013, could employ reasoning that is nowhere to be found in the January 31, 2013 Order and that squarely contradicts what SEGOB said less than a year earlier in its November 16, 2012 Resolution granting E-Games its autonomous permit.

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[898] *Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón* (Jan. 27, 2013). Retrieved from http://www.jornada.unam.mx/2013/01/27/politica/013n1pol, **C-17**; E-Games Memo, **C-261**; Black Cube Statement, **CWS-57**, ¶ 47; Gordon Burr Statement, **CWS-50**, ¶ 110.

[899] González Report, **CER-3**, ¶ 163 (f); SEGOB Resolution (Aug. 28, 2013), **C-289**.

[900] González Report, **CER-3**, ¶ 160 (f).

363. As explained above,[901] in the November 16, 2012 Resolution, SEGOB expressly concluded that E-Games' independent permit was unrelated to and separate from E-Mex's permit, as well as from the May 27, 2009 Resolution, and that SEGOB's decision to grant E-Games its permit was based on E-Games' (i) acquired rights; and, (ii) full compliance with all requirements contained in the Gaming Regulation for the issuance of a new permit.[902] Now, in August 2013, the PRI-controlled SEGOB was arbitrarily ignoring and contradicting what the same executive agency had decided only eight months earlier.

364. It also directly contradicted what the Sixteeenth District Judge ruled and his very clear statements that he did not find unconstitutional the "acquired rights" doctrine or the November 16, 2012 Resolution.[903]

365. Based on that flawed reasoning, SEGOB rescinded each and every resolution that it had issued in favor of E-Games following the May 27, 2009 Resolution, including the November 16, 2012 Resolution that granted E-Games the November 2012 permit.

366. SEGOB's flawed reasoning resulted in the improper introduction into the *Amparo* 1668/2011 proceeding—a proceeding which was already in the enforcement stage—of the November 16, 2012 Resolution, a resolution which had not even been challenged by E-Mex in the *Amparo* 1668/2011 proceeding. As explained in Section IV.P, there is no procedural or logical relationship (*secuela lógica o procesal*) between the November 16, 2012 Resolution and the May 27, 2009 Resolution.[904] SEGOB should have known this, not only for the reasons explained above in Section IV.P, but due to SEGOB's own unequivocal conclusions in the November 16, 2012 Resolution that the independent permit was unrelated

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[901] *See supra* Section IV.O.

[902] González Report, **CER-3**, ¶ 73.

[903] Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Jan. 31, 2013), **C-18;** Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), **C-24**.

[904] González Report, **CER-3**, ¶¶ 94-95; 115-121.

to and separate from the May 27, 2009 Resolution and its participation in the Second *Amparo* Proceeding where E-Mex unsuccessfully attempted to obtain a ruling that the November resolution was unconstitutional.[905] Given the lack of a procedural or logical relationship (*secuela*) between the November 16, 2012 Resolution and the May 27, 2009 Resolution, it was unlawful for SEGOB to introduce the November 16, 2012 Resolution in the enforcement stage of the *Amparo* 1668/2011 proceeding and to determine that the November 16, 2012 Resolution had to be revoked as a result of the Sixteenth District Judge's January 31, 2013 and August 26, 2013 Orders.

367. Furthermore, once the *incidente de inejecución* was underway, SEGOB filed a motion before the Collegiate Tribunal requesting that it: (i) confirm SEGOB's rescission of all resolutions, including the November 16, 2012 Resolution; and (ii) determine that SEGOB's rescission of all resolutions was proper.[906] SEGOB's submission was a total *volte face* from its previous stance, both in the underlying *Amparo* 1668/2011 litigation and when, under the PAN administration, it issued the repeated administrative resolutions and ultimately an independent and autonomous permit confirming Claimants' right to operate the Casinos until at least 2037.

368. Additionally, SEGOB was attacking the legality of its own resolutions, which it had repeatedly upheld as valid and even defended vigorously during the initial *Amparo* proceeding. This was highly irregular, especially because in *amparo* proceedings authorities tend to defend their own resolutions, as SEGOB was doing at the beginning of the *Amparo*1668/2011 proceeding, but, in this instance, SEGOB—instead of defending its prior resolutions—instead argued why its own resolutions should be rescinded.[907] SEGOB's new

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[905] González Report, **CER-3**, ¶¶ 73-75, 80-81; SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16**; *see also supra* Section IV.X.1.f.

[906] SEGOB Motion Before the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (Dec. 3, 2013), **C-298**.

[907] Julio Gutiérrez Statement, **CWS-52**, ¶ 64.

stance was squarely in line with the PRI's political agenda to reverse, without precedent or legal basis, the granting of Claimants' November 16, 2012 permit by the PAN administration, and destroy their operations and investments in Mexico.

b. SEGOB Unlawfully Revoked E-Games' Permit Because It Failed to Follow the Mechanisms Provided in the Law for the Legal Revocation of a Permit

369. SEGOB should never have attempted to revoke E-Games' independent permit through the *Amparo* 1668/2011 proceeding.[908] As explained in further detail below, it was unlawful for SEGOB to revoke the November 16, 2012 Resolution in the *amparo* proceeding, because Mexican administrative law only provides three legal means for the revocation of an administrative act, such as the November 16, 2012 Resolution—none of which is the revocation of an administrative act in the enforcement stage of an *amparo* proceeding. Therefore, SEGOB revoked E-Games' independent permit in clear contravention of Mexican administrative law.[909]

370. Under Mexican administrative law, there are three mechanisms that a relevant authority—in this case, SEGOB—may use to deprive a gaming permit of its legal effects.[910] All of the alternatives involve either the commencement by the relevant authority of an administrative proceeding or a federal contentious-administrative judicial proceeding.[911]

371. The first alternative is for the relevant authority to initiate an administrative proceeding against the permit holder to revoke its permit if it considers that the permit holder was involved in any of the specific circumstances described in Article 151 of the Gaming

[908] González Report, **CER-3**, ¶ 179.

[909] González Report, **CER-3**, ¶ 136, 158.

[910] González Report, **CER-3**, ¶ 136, 151.

[911] González Report, **CER-3**, ¶ 151.

Regulation.[912] The circumstances in Article 151 of the Gaming Regulation[913] were never at issue here and SEGOB never initiated an administrative proceeding of this sort against E-Games.[914]

372. The second alternative is for the relevant authority to initiate an administrative proceeding against the permit holder to nullify its permit in the event it considers that the permit suffers from any of the omissions or irregularities described in Article 3 of the Federal Law for Administrative Procedure (*Ley Federal de Procedimiento Administrativo*).[915] If a proceeding of this sort is initiated, the hierarchical superior to the authority who issued the permit would have to declare the nullity of the permit.[916] SEGOB never initiated an administrative proceeding of this sort against E-Games, the irregularities in Article 3 of the Federal Law for Administrative Procedure were never invoked, nor was E-Games' permit nullified by SEGOB's hierarchical superior.[917]

373. The third and last alternative is for the relevant authority to, if it considers that the permit was illegally granted, initiate a federal administrative judicial proceeding to demand that the Federal Court of Administrative Justice declare the permit null.[918] SEGOB never initiated a federal administrative judicial proceeding of this sort against E-Games.[919]

374. Therefore, for SEGOB to have legally deprived E-Games of its permit, it should have initiated either one of the administrative proceedings described above, or a federal

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912 González Report, **CER-3**, ¶ 155 (a).

913 Article 151 of the Gaming Regulation lists a series of serious violations on the part of the permit holder that cause the revocation of the permit including, among others, when the permit holder or any of its shareholders are declared in bankruptcy or when the information provided to SEGOB to obtain the permit is false; González Expert Report, **CER-3**, ¶ 155 (a).

914 González Report, **CER-3**, ¶ 155 (a).

915 González Report, **CER-3**, ¶ 155 (b).

916 González Report, **CER-3**, ¶ 155 (b).

917 González Report, **CER-3**, ¶ 155 (b).

918 González Report, **CER-3**, ¶ 155 (c).

919 González Report, **CER-3**, ¶ 155 (c).

administrative judicial proceeding.[920] It never did.[921] Instead, SEGOB unlawfully revoked the November 16, 2012 Resolution in the enforcement stage of the *Amparo* 1668/2011 proceeding by invoking flawed reasoning that directly contradicted not only its prior resolution granting the permit but also the *Amparo* judge's express findings all in an effort to create a "smoke-screen" justification—that it was following an order of the *Amparo* judge—for its illegal actions. SEGOB's actions are plainly impermissible under Mexican law and amount to a gross violation of the Claimants' rights.

c. SEGOB Failed to Inform the Sixteenth District Judge of the Impossibility to Comply with Its March 10, 2014 Order

375. As described above, E-Mex launched constitutional attacks against various actions taken by SEGOB in the *Amparo* 1668/2011 and *Amparo* 1151/2012 proceedings.[922] Both *amparo* proceedings were initiated by the same complainant, E-Mex, against the same authority, SEGOB.[923] Therefore, under Mexican *Amparo* law, the *Amparo* 1668/2011 and *Amparo* 1151/2012 proceedings are considered to be related to each other (*conexos*).[924] The consequences of two *amparo* proceedings being related to each other is that what happens in one of the *amparo* proceedings can, and in some instances must, cause an effect in the other *amparo* proceeding—as explained in Section IV.X.1.f.[925]

376. As described above, following the Sixteenth District Judge's receipt of SEGOB's July 19, 2013 Resolution confirming compliance with the January 31, 2013 Order, the Sixteenth District Judge was required by law[926] to afford the complainant (E-Mex) and the

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920 González Report, **CER-3**, ¶ 136, 151, 155.

921 González Report, **CER-3**, ¶ 152.

922 Guerrero Report, **CER-2**, ¶ 15, 17.

923 Guerrero Report, **CER-2**, ¶ 341.

924 Guerrero Report, **CER-2**, ¶ 348; Abrogated *Amparo* Law, Art. 57, **CL-75**.

925 Guerrero Report, **CER-2**, ¶ 348.

926 Guerrero Report, **CER-2**, ¶ 246.

interested third parties (E-Games and SEGOB) an opportunity to respond and to state whatever may be in their best interest in respect to SEGOB's compliance with the January 31, 2013 Order.[927] After this, the Sixteenth District Judge was required to issue an order stating whether the judgment had been fulfilled or not, whether there were excesses or defects in the fulfillment of the judgment, or whether complying with the judgment was impossible.[928]

377. Based on the fact that the *Amparo* 1668/2011 and *Amparo* 1151/2012 proceedings are considered to be related to each other (*conexos*) under Mexican *Amparo* Law,[929] SEGOB was required to inform the Sixteenth District Judge that it could not comply with its March 10, 2014 Order in the *Amparo* 1668/2011 proceeding to the extent that it genuinely believed that the order required it to rescind the November 16, 2012 Resolution.[930] This was because SEGOB was fully aware that as a result of the First Collegiate Tribunal's October 17, 2013 Order in the *Amparo* 1151/2012 proceeding finding that the November 16, 2012 Resolution constituted an implicitly consented act by E-Mex, the November 16, 2012 Resolution could not be afforded *amparo* protection in a related proceeding *between the same parties*.[931]

378. Therefore, when the Sixteenth District Judge ordered SEGOB to rescind the resolutions that were directly, legally flowing from the May 27, 2009 Resolution, SEGOB, if it believed that this required the rescission of the November 16, 2012 Resolution in the in the *Amparo* 1668/2011 proceeding, was required by law to inform the Sixteenth District Judge that it was impossible for SEGOB to comply with such mandate because it had already been determined in the *Amparo* 1151/2012 proceeding that the November 16, 2012 Resolution could

927 Guerrero Report, **CER-2**, ¶ 247; Abrogated *Amparo* Law, Art. 196, **CL-75**.

928 Guerrero Report, **CER-2**, ¶ 251; Abrogated *Amparo* Law, Art. 196, **CL-75**.

929 Guerrero Report, **CER-2**, ¶ 356; Abrogated *Amparo* Law, Art. 196, **CL-75**.

930 Guerrero Report, **CER-2**, ¶ 357, 361.

931 Guerrero Report, **CER-2**, ¶ 359.

not be afforded *amparo* protection, and therefore, compliance with the judgment was impossible.[932] Had SEGOB done so, the Sixteenth District Judge would in turn have declared that the fulfillment of the January 31, 2013 Order in regards to the November 12, 2016 Order was in fact impossible if that is what the judge had intended (and we know from his own words that this is not what he intended).[933]

379. However, SEGOB never informed the Sixteenth District Judge of the First Collegiate Tribunal's October 17, 2013 Order.[934] As such, SEGOB's failure to inform the Sixteenth District Judge that it was unable to comply with the court's mandate is a further violation of Mexican law as well as the Claimants' rights.

d. SEGOB's Illegal Closure of Claimants' Casinos

380. On April 24, 2014, a day after E-Games filed its *recursos de inconformidad* to the Supreme Court and while Claimants' appeal proceedings remained pending,[935] SEGOB illegally closed down all of Claimants' Casinos in a commando-style raid.[936] This was a highly irregular move, because the alleged main reason for the closure, that is, the lack of a permit for the operation of the establishments, was still *sub judice* in the *Amparo* 1668/2011 proceeding at the time that SEGOB closed Claimants' Casinos.[937]

381. Remarkably, these closures happened despite that E-Games, on September 2, 2013 had sought and obtained an injunction barring the Government from impeding or otherwise hindering the Casinos' operations pending the final resolution of the *Amparo*

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932 Guerrero Report, **CER-2**, ¶ 360.

933 Guerrero Report, **CER-2**, ¶ 361.

934 Guerrero Report, **CER-2**, ¶ 361.

936 Julio Gutiérrez Statement, **CWS-52**, ¶ 68.

937 González Report, **CER-3**, ¶ 186 (b).

1668/2011 proceeding,[938] which was pending at the time before the Supreme Court.[939] Therefore, SEGOB was legally prevented from closing down the Casinos because (i) Claimants' appeal proceedings regarding the fulfilment and enforcement of the *amparo* judgment in the *Amparo* 1668/2011 proceeding had not yet been resolved and Mexican law provides that pending a final resolution of the case, the relevant authorities cannot act to the detriment of any of the parties;[940] and (ii) there was a judicial order that explicitly prevented SEGOB from acting against E-Games pending a final resolution in the *Amparo* 1668/2011 proceeding.[941]

382. Despite the above, in clear defiance of the law and the judicial order, SEGOB illegally closed down all of Claimants' Casinos.[942] The closure was a carefully orchestrated spectacle. Among other illegal and irregular tactics, SEGOB personnel, aided by Mexican federal police dressed in special operations SWAT gear and toting long guns, (i) entered the Casinos and immediately blocked all entrances and exits, eventually allowing customers to leave but in some instances restricting employees to management's offices;[943] (ii) prevented the individuals attending to SEGOB's inspection proceedings and the Casino employees from contacting attorneys;[944](iii) refused to provide a copy of the closure orders to management;[945] and (iv) proceeded to close down the Casinos even though the closure orders were not directed

938 Injunctive Relief (Sept. 2, 2013), **C-299**.

939 Julio Gutiérrez Statement, **CWS-52**, ¶ 70.

940 Julio Gutiérrez Statement, **CWS-52**, ¶ 70.

941 Julio Gutiérrez Statement, **CWS-52**, ¶ 70; Injunctive Relief (Sept. 2, 2013), **C-299**.

942 González Report, **CER-3**, ¶ 186 (b).

943 Galván Statement, **CWS-56**, ¶ 14; Witness Statement of Héctor Ruiz ("Ruiz Statement"), **CWS-55**, ¶ 22; Chávez Statement, **CWS-54**, ¶ 24.

944 Galván Statement, **CWS-56**, ¶ 24; Ruiz Statement, **CWS-55**, ¶ 13; Chávez Statement, **CWS-54**, ¶ 24.

945 Galván Statement, **CWS-56**, ¶ 21; Ruiz Statement, **CWS-55**, ¶ 18; Chávez Statement, **CWS-54**, ¶ 29.

at E-Games.[946] The events that ensued on the morning of April 24, 2014 in the Casinos defied reality.

i. SEGOB Arrived at the Naucalpan, Villahermosa, and Puebla Casinos with an Excessive Presence of Federal Policemen

383. SEGOB arrived at each of the Naucalpan, Villahermosa, and Puebla Casinos escorted by at least 15 to 20 police cars, with an average of two to four Mexican federal policemen in each police car dressed in special operations SWAT gear and toting long guns.[947] The SEGOB officials in charge (the "**Official**" or "**Officials**") of the pretextual inspection proceedings (*diligencias*) at the Casinos (the "**Closure Proceeding**" or "**Closure Proceedings**")—which, as described below, were in reality raids to close down Claimants' Casinos—were accompanied by at least two other SEGOB employees.[948] At all times, at least two federal police officers escorted the Officials and other SEGOB employees during the Closure Proceedings.[949]

384. At the Naucalpan, Villahermosa, and Puebla Casinos, Patricio Gerardo Chávez Nuño ("**Mr. Chávez**"), the Casino's Corporate Security Manager; Héctor Ruiz ("**Mr. Ruiz**"), the Villahermosa Casino's Operations Manager; and Alfredo Galván Menses ("**Mr. Galván**"), the Puebla Casino's Operations Manager, respectively, were responsible for attending to the Closure Proceedings.[950] Upon learning that SEGOB was trying to close down Claimants' Casinos, Claimants' Mexican counsel immediately went to the Naucalpan casino.[951] Claimants' Mexican counsel stated that he was the company lawyer and that he wished to speak with a SEGOB official to understand what was happening and to see the closure order issued

946 Galván Statement, **CWS-56**, ¶ 21; Ruiz Statement, **CWS-55**, ¶ 21; Chávez Statement, **CWS-54**, ¶ 29.

947 Chávez Statement, **CWS-54**, ¶ 13.

948 Galván Statement, **CWS-56**, ¶ 15; Ruiz Statement, **CWS-55**, ¶ 12;Chávez Statement, **CWS-54**, ¶ 14.

949 Galván Statement, **CWS-56**, ¶ 15; Ruiz Statement, **CWS-55**, ¶ 11;Chávez Statement, **CWS-54**, ¶ 14.

950 Galván Statement, **CWS-56**, ¶ 30; Ruiz Statement, **CWS-55**, ¶ 23;Chávez Statement, **CWS-54**, ¶ 28.

951 Julio Gutiérrez Statement, **CWS-52**, ¶ 69.

by SEGOB.[952] However, federal policemen denied Claimants' counsel entrance to the Casino, the opportunity to speak with a SEGOB official, and never showed him the closure order.[953]

385. Upon SEGOB's arrival at the Naucalpan and Villahermosa Casinos, the Officials told Mr. Chávez and Mr. Ruiz that SEGOB had an inspection order and would proceed to verify the Casinos' operating licenses.[954] Specifically, in Naucalpan, the Official explained to Mr. Chávez that SEGOB's records indicated that the Casino could not operate because it did not have a valid license, and that if SEGOB determined that the Casino was not operating in accordance with the law, it would proceed to immediately close the facilities.[955] In Villahermosa, the Official also told Mr. Ruiz that that SEGOB had an inspection order and would proceed to verify the Casino's operations.[956]

386. Mr. Ruiz instantly doubted SEGOB's intentions. Therefore, in response to the Official's statements, Mr. Ruiz told the Official that he believed that the way in which SEGOB had arrived at the Casino to carry out the proceeding (*diligencia*) was very strange, since he had been in charge of attending to SEGOB proceedings (*diligencias*) in the past, and never before had they appeared at the Casino accompanied by federal police.[957] The SEGOB officials completely ignored Mr. Ruiz's concerns and proceeded to inspect the premises.[958]

387. Upon SEGOB's arrival at the Puebla Casino, the Official told Mr. Galván that they had a closure order and were therefore going to proceed to close down the Casino.[959] Immediately afterwards, one of the SEGOB officials requested that Mr. Galván take him to the

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952 Julio Gutiérrez Statement, **CWS-52**, ¶ 69.

953 Julio Gutiérrez Statement, **CWS-52**, ¶ 69.

954 Chávez Statement, **CWS-54**, ¶ 15.

955 Chávez Statement, **CWS-54**, ¶ 15.

956 Ruiz Statement, **CWS-55**, ¶ 12.

957 Ruiz Statement, **CWS-55**, ¶ 12.

958 Ruiz Statement, **CWS-55**, ¶ 12.

959 Galván Statement, **CWS-56**, ¶ 14.

Casino monitoring area—where all of the systems controlling the Casino's security cameras were located—and ordered Mr. Galván to turn off the security cameras.[960] This was completely out of the ordinary.[961] In addition, once the security cameras were turned off, SEGOB officials placed a federal policeman at the entrance of the monitoring area and refused to allow anyone, including the Casino employees, to access the area.[962]

ii. SEGOB Arrived at the Cuernavaca and Mexico City Casinos with Instructions to Close the Casinos Down

388. At the same time that SEGOB was initiating the Closure Proceeding at the Naucalpan Casino, Mr. Chávez received a message through his radio set (which allowed him to communicate with the management of the other Casinos) from the Cuernavaca Casino Operations Manager.[963] He confirmed to Mr. Chávez that SEGOB officials had arrived at the Casino and informed him that they were going to close down the Casino.[964] The Cuernavaca Casino's Operations Manager explained to Mr. Chávez that SEGOB was reviewing the Casino's documentation, but had confirmed that their intention was to proceed to close down the Casino immediately.[965] Mr. Chávez was also able to confirm with the Mexico City Casino Operations Manager that SEGOB had arrived at the Casino with orders to close it down.[966] The Mexico City and Cuernavaca Casino Certificates of Inspection prepared by SEGOB both confirm that SEGOB proceeded to close down the Casinos because, according to SEGOB, they lacked a permit to operate.[967]

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960 Ruiz Statement, **CWS-55**, ¶ 12-13.

961 Ruiz Statement, **CWS-55**, ¶ 12-13.

962 Galván Statement, **CWS-56**, ¶ 22.

963 Chávez Statement, **CWS-54**, ¶ 30.

964 Chávez Statement, **CWS-54**, ¶ 30.

965 Chávez Statement, **CWS-54**, ¶ 30.

966 Chávez Statement, **CWS-54**, ¶ 33.

967 Certificate of Inspection Mexico City casino (Apr. 24, 2014), **C-300**; Certificate of Inspection Cuernavaca casino (Apr. 24, 2014), **C-301**.

389. Importantly, the Certificate of Inspection for the Mexico City Casino states that SEGOB arrived at the Casino "in order to carry out this Verification Visit in the establishment of the company Entretenimiento de Mexico Exciting Games."[968] As discussed in detail below, all of the closure orders were directed at E-Mex instead of at E-Games. This is evidence that SEGOB only had authorization to close down E-Mex's casinos, not E-Games' Casinos, and despite the same, proceeded to illegally close down Claimants' Casinos.

iii. The Closure Orders Were Directed at E-Mex's Casinos, Not at E-Games' Casinos

390. In Naucalpan, after explaining to Mr. Chávez the purported reason for SEGOB's inspection, the Official proceeded to show Mr. Chávez a closure order.[969] However, the closure order was not directed at E-Games.[970] It was directed at E-Mex.[971] Upon realizing that the closure order was directed at E-Mex instead of E-Games, Mr. Chávez alerted the Official that the Casinos belonged to E-Games, not E-Mex.[972] Surprisingly, the Official ignored Mr. Chávez's comment.[973]

391. At the Villahermosa Casino, after explaining to Mr. Ruiz the purported reason why SEGOB was conducting an inspection and after reviewing documentation regarding the Casinos' operation, the Official informed Mr. Ruiz that SEGOB had a closure order and was therefore going to proceed to close down the Casino immediately.[974] Upon seeing the closure order, Mr. Ruiz was able to clearly identify that it was directed at E-Mex, not E-Games.[975] In

968 Certificate of Inspection Mexico City casino (Apr. 24, 2014), **C-300**, emphasis added.

969 Chávez Statement, **CWS-54**, ¶ 17.

970 Chávez Statement, **CWS-54**, ¶ 17.

971 Chávez Statement, **CWS-54**, ¶ 17.

972 Chávez Statement, **CWS-54**, ¶ 18.

973 Chávez Statement, **CWS-54**, ¶ 18.

974 Ruiz Statement, **CWS-55**, ¶ 20.

975 Ruiz Statement, **CWS-55**, ¶ 20.

fact, the Official herself informed Mr. Ruiz that the closure order was directed at E-Mex.[976] Mr. Ruiz asked the Official to provide him with a copy of the closure order, but the Official categorically refused to do so without an explanation.[977] Mr. Ruiz informed the Official that SEGOB was mistaken, that the permit holder who operated the Casino was E-Games, not E-Mex, and, in addition, showed the Official the judicial order prohibiting SEGOB from taking any actions to close the Casinos.[978] Mr. Ruiz told the Official that based upon the court order, it was illegal for SEGOB to proceed to close down the Casino.[979] But the Official completely ignored Mr. Ruiz's comments.[980]

392. In Puebla, after informing Mr. Galván that SEGOB had a closure order and they were therefore going to proceed to close down the Casino, Mr. Galván requested that the Official show him the closure order.[981] The Official vehemently refused to show Mr. Galván the closure order, arguing that he had already shown it to another Casino employee upon SEGOB's arrival at the casino.[982] Mr. Galván, discontent with the Official's response, explained to the Official that if he did not show him the closure order, Mr. Galván would not allow SEGOB to move forward with the Closure Proceeding.[983] The Official became very angry, retrieved the closure order, and—holding it firmly with both of his hands—aggressively placed it only a few inches away from Mr. Galván' face.[984] The Official only allowed Mr. Galván to observe the closure order for a few seconds.[985] He did not allow Mr. Galván to hold

976 Ruiz Statement, **CWS-55**, ¶ 21.

977 Ruiz Statement, **CWS-55**, ¶ 20.

978 Ruiz Statement, **CWS-55**, ¶ 20.

979 Ruiz Statement, **CWS-55**, ¶ 21.

980 Ruiz Statement, **CWS-55**, ¶ 22.

981 Galván Statement, **CWS-56**, ¶ 19.

982 Galván Statement, **CWS-56**, ¶ 19.

983 Galván Statement, **CWS-56**, ¶ 20.

984 Galván Statement, **CWS-56**, ¶ 20.

985 Galván Statement, **CWS-56**, ¶ 20.

the closure order or to examine it in detail.[986] Mr. Galván asked the Official to allow him to make a copy of the closure order, which, without providing any explanation, the Official categorically refused.[987] As was the case for the Naucalpan and Villahermosa Casinos, the closure order was not directed at E-Games; it was directed at E-Mex.[988] Upon realizing this, Mr. Galván informed the Official that SEGOB could not proceed to close down the Casino because the closure order was directed at E-Mex, not at E-Games.[989] The Official's response to Mr. Galván's comment corroborated the Claimants' worst fears.[990] The Official confirmed that their orders were to close down the Casino, regardless of the circumstances.[991]

iv. SEGOB Illegally Closed Down the Casinos Despite the Closure Orders Being Directed at E-Mex; and Conducted the Closure Proceedings in a Rushed and Hostile Manner, With the Clear Objective of Closing Down the Casinos Regardless of the Circumstances

(a) SEGOB's Illegal Closure of the Puebla Casino

393. In the Puebla Casino, after Mr. Galván informed the Official that SEGOB could not proceed to close down the Casino because the closure order was directed at E-Mex, and that he would not allow SEGOB to continue with the Closure Proceeding until the Official showed him a closure order directed at E-Games, the Official stepped away to make a call.[992] After finishing the call, and without saying a word to Mr. Galván, the Official ordered the federal police to block all Casino entrances and exits; and asked the clientele and employees to leave the premises immediately.[993] The federal policemen then entered the Casino and began

986 Galván Statement, **CWS-56**, ¶ 20.

987 Galván Statement, **CWS-56**, ¶ 20.

988 Galván Statement, **CWS-56**, ¶ 20.

989 Galván Statement, **CWS-56**, ¶ 20.

990 Galván Statement, **CWS-56**, ¶ 20.

991 Galván Statement, **CWS-56**, ¶ 20.

992 Galván Statement, **CWS-56**, ¶ 22.

993 Galván Statement, **CWS-56**, ¶ 22.

to lead—quite aggressively, with pushing and shoving—the clients and employees off the Casino premises.[994] Thereafter, the Official told Mr. Galván—once again—that SEGOB had orders to close down the Casino, regardless of the circumstances.[995]

394. The Official then requested that Mr. Galván show him the documentation that accredited the Casino's legal operation.[996] Mr. Galván then asked the Official for permission to contact the Juegos Companies and E-Games' legal department so that they could instruct him on how to handle the Closure Proceeding correctly, since he had never attended to a proceeding (*diligencia*) like this before.[997] The Official denied Mr. Galván's request, and told Mr. Galván that he was forbidden from contacting anyone or accessing documents or information of any kind.[998] Throughout the entire Closure Proceeding, the SEGOB officials closely and constantly monitored Mr. Galván, ensuring that he did not contact anyone or access any document or information.[999] As required by law, all of the documentation proving that the Casino was operating legally was kept in public view and could be inspected by anyone.[1000] Notably, among these documents, was a judicial order prohibiting SEGOB from taking any actions to close the Casinos.[1001] Mr. Galván tried to show the Official the judicial order and the other documents, but the Official refused to even look at the judicial order or any of the other documents.[1002] The Official instructed Mr. Galván to put the documents away, and told him that SEGOB was going to close the Casino down no matter the circumstances and

994 Galván Statement, **CWS-56**, ¶ 22.

995 Galván Statement, **CWS-56**, ¶ 22.

996 Galván Statement, **CWS-56**, ¶ 23.

997 Galván Statement, **CWS-56**, ¶ 24.

998 Galván Statement, **CWS-56**, ¶ 24.

999 Chávez Statement, **CWS-54**, ¶ 21.

1000 Chávez Statement, **CWS-54**, ¶ 23.

1001 Chávez Statement, **CWS-54**, ¶ 23; Injunctive Relief (Sept. 2, 2013), **C-299**.

1002 Galván Statement, **CWS-54**, ¶ 24.

regardless of any documents Mr. Galván showed him.[1003] The Official also told Mr. Galván—without having reviewed the documents—that they were useless because they did not prove that the Casino was operating legally.[1004]

395. After the Official informed Mr. Galván that they were going to proceed to close down the Casino, he recommended that Mr. Galván remove all perishable products and personal belongings from the Casino's premises because, in the Official's words "*the casino would never re-open.*"[1005] According to the Certificate of Inspection prepared by SEGOB for the Puebla Casino, SEGOB shut down the casino because, according to SEGOB, it lacked a permit to operate.[1006]

(b) SEGOB's Illegal Closure of the Naucalpan Casino

396. In the Naucalpan Casino, after showing Mr. Chávez the closure order and ignoring his comments regarding the fact that it was directed at E-Mex, not E-Games, the Official informed Mr. Chávez that she needed to speak with the casinos' legal representative.[1007] Mr. Chávez explained to the Official that none of the legal representatives were at the Casino at the time: neither Mr. Ramírez—the Juegos Companies and E-Games' Legal Director—nor any of the companies' lawyers and legal representatives.[1008] However, Mr. Chávez explained to the Official that the companies' lawyers and legal representatives had already been informed of the situation, and that they were on their way to the Casino and would arrive very soon to attend to the Closure Proceeding.[1009] Nevertheless, the Official refused to

[1003] Galván Statement, **CWS-56**, ¶ 27.

[1004] Galván Statement, **CWS-56**, ¶ 27.

[1005] Galván Statement, **CWS-56**, ¶ 29 (emphasis added).

[1006] Certificate of Inspection Puebla casino (Apr. 24, 2014), **C-302**.

[1007] Chávez Statement, **CWS-54**, ¶ 19.

[1008] Chávez Statement, **CWS-54**, ¶ 19.

[1009] Chávez Statement, **CWS-54**, ¶ 19.

wait for Mr. Ramírez and the other lawyers, and informed Mr. Chávez that she would attend to the Closure Proceeding with him.[1010]

397. Mr. Chávez asked the Official for permission to contact the Juegos Companies and E-Games' legal department so that they could instruct him on how to handle the Closure Proceeding correctly.[1011] The Official refused Mr. Chávez's request, and threatened him with arrest, telling Mr. Chávez that he was forbidden from contacting anyone or accessing any document or information of any kind.[1012] Throughout the entire Closure Proceeding, the SEGOB officials closely and constantly monitored Mr. Chávez, ensuring that he did not contact anyone or access any document or information.[1013]

398. The Official requested that Mr. Chávez show her the documents accrediting the Casino's legal operation.[1014] Mr. Chávez obtained the documents, including a judicial order prohibiting SEGOB from taking any actions to close the Casinos, and showed them to the Official.[1015] The Official reviewed the documents in a hurry.[1016] Mr. Chávez's impression was that the Official reviewed the documents simply to fulfill the requirement to do so, but that she was going to close down the Casino no matter what the documents showed or proved.[1017] Indeed, once the Official finalized her speedy review of the documents, she informed Mr. Chávez that the documents did not accredit the Casino's legal operation, and that she was therefore going to close down the Casino.[1018] The Official then ordered the federal police to block all Casino entrances and exits; asked the clientele to leave the premises immediately; and

[1010] Chávez Statement, **CWS-54**, ¶ 19.

[1011] Chávez Statement, **CWS-54**, ¶ 20.

[1012] Chávez Statement, **CWS-54**, ¶ 21.

[1013] Chávez Statement, **CWS-54**, ¶ 22.

[1014] Chávez Statement, **CWS-54**, ¶ 23.

[1015] Chávez Statement, **CWS-54**, ¶ 23; Injunctive Relief (Sept. 2, 2013), **C-299**.

[1016] Chávez Statement, **CWS-54**, ¶ 24.

[1017] Chávez Statement, **CWS-54**, ¶ 24.

[1018] Chávez Statement, **CWS-54**, ¶ 24.

instructed the employees to stay in the Casino's corporate offices.[1019] The Official also prohibited the Casino's employees from contacting anyone who worked for the Juegos Companies, including their attorneys.[1020]

399. Despite the above, and as is reflected in the Certificate of Inspection for the Naucalpan Casino which was prepared by the Official upon the conclusion of the Closure Proceeding, the Official determined that the judicial order prohibiting SEGOB from taking any actions to close the Casinos[1021]bore no relation whatsoever to the closure, nor would it cause any effects with respect to the Closure Proceeding.[1022] The Official also questioned the veracity of the judicial order.[1023] Once the Closure Proceeding concluded, the Official proceeded to close down the Casino.[1024]

400. Once the Closure Proceeding was over and the SEGOB Official had exited the Casino's premises, Claimants' Mexican counsel, Mr. Gutiérrez—who had been waiting outside for several hours because he was denied entrance to the casino—approached the SEGOB Official and requested that, in his capacity as E-Games' legal representative, he be provided with the closure order and the certificate of inspection.[1025] The SEGOB Official refused to show Mr. Gutiérrez the closure order or the certificate of inspection, but told Mr. Gutiérrez that that if he wished to see the documents, he would have to go to SEGOB immediately after all of SEGOB's employees had left the Casino.[1026]

[1019] Chávez Statement, **CWS-54**, ¶ 24.

[1020] Chávez Statement, **CWS-54**, ¶ 24.

[1021] Injunctive Relief (Sept. 2, 2013), **C-299**.

[1022] Chávez Statement, **CWS-54**, ¶ 25; Certificate of Inspection Naucalpan casino (Apr. 24, 2014), **C-303**.

[1023] Chávez Statement, **CWS-54**, ¶ 24; Certificate of Inspection Naucalpan casino (Apr. 24, 2014), **C-303**.

[1024] Chávez Statement, **CWS-54**, ¶ 28; Certificate of Inspection Naucalpan casino (Apr. 24, 2014), **C-303**.

[1025] Julio Gutiérrez Statement, **CWS-52**, ¶ 71.

[1026] Julio Gutiérrez Statement, **CWS-52**, ¶ 71.

401. Following the SEGOB Official's instructions, Mr. Gutiérrez went to SEGOB on several occasions, some of them with Mr. Burr, to request a copy of the closure orders and certificates of inspection related to the closures of the Casinos.[1027] However, the copies were never provided to Claimants, and the General Director of the Games and Raffles Division never met with Claimants' counsel, despite Claimants' counsel's numerous attempts to get copies of the requested documents and to obtain an explanation as to why the Casinos had been closed down.[1028] SEGOB employees never afforded Claimants' counsel an explanation regarding why the Casinos had been closed down; except for one instance in which a lawyer in the Games and Raffles Division—in response to Claimants' counsel's inquiry as to why SEGOB had closed down the Casinos while Claimants' appeal proceedings regarding the fulfilment and enforcement of the *amparo* judgment in the *Amparo* 1668/2011 proceeding were still pending—astonishgly stated that the appeal was only a formality because it would be resolved by the same Collegiate Tribunal that resolved the *Incidente de Inejecución* 82/2013.[1029]

(c) SEGOB's Illegal Closure of the Villahermosa Casino

402. On April 24, 2014, SEGOB arrived at the Villahermosa Casino to shut it down.[1030] Mr. Ruiz informed the Official that the permit holder who operated the Casino was E-Games and not E-Mex (contrary to what the closure order stated); that there was a judicial order which prohibited SEGOB from taking any actions to close the Casinos; and that therefore it was illegal for SEGOB to proceed to close down the Casino.[1031] The Official excused herself

[1027] Julio Gutiérrez Statement, **CWS-52**, ¶ 72; Gordon Burr Statement **CWS-50**, ¶ 105; Erin Burr Statement, **CWS-51**, ¶ 114.

[1028] Julio Gutiérrez Statement, **CWS-52**, ¶ 72; Gordon Burr Statement, **CWS-50**, ¶ 105 ; Erin Burr Statement, **CWS-51**, ¶ 114.

[1029] Julio Gutiérrez Statement, **CWS-52**, ¶ 72.

[1030] Injunctive Relief (Sept. 2, 2013), **C-299**; Ruiz Statement, **CWS-55**, ¶ 10.

[1031] Injunctive Relief (Sept. 2, 2013), **C-299**; Ruiz Statement, **CWS-55**, ¶ 21.

to make a call.[1032] Once the Official returned, Mr. Ruiz told the Official that he was going to call the local police, because SEGOB was violating a federal judicial order prohibiting SEGOB from taking any actions to close the Casinos.[1033] The Official, without responding to Mr. Ruiz's comment, stepped away to make another call.[1034] Immediately thereafter, the Official informed Mr. Ruiz that she had orders to close down the Casino, and that she would therefore proceed to immediately close the Casino.[1035] The Official then ordered the federal police to block all Casino entrances and exits, and asked the clientele and employees to leave the premises immediately.[1036] According to the Certificate of Inspection prepared by SEGOB for the Villahermosa Casino, SEGOB proceeded to close down the Casino because, according to SEGOB, it lacked a permit to operate.[1037]

e. SEGOB's Violations in the Administrative Proceedings Regarding the Casinos' Closures

403. Adding insult to injury, Mexico also failed to provide basic procedural rights to Claimants during the administrative review proceedings that SEGOB initiated when it ordered the inspection visits to Claimants' Casinos and the provisional closures of the same (the "**Closure Administrative Review Proceedings**"), flouting notice requirements and statutes of limitations, and barring E-Games from producing evidence to demonstrate that the closures were improper, among other violations.

404. Following the illegal closures—independently and in parallel to the Closure Administrative Review Proceedings—Claimants filed a *recurso de revision* against the orders issued by SEGOB authorizing the inspection visits to the Casinos (*órdenes de verificación*) on

[1032] Ruiz Statement, **CWS-55**, ¶ 22.

[1033] Ruiz Statement, **CWS-55**, ¶ 22; Injunctive Relief (Sept. 2, 2013), **C-299**.

[1034] Ruiz Statement, **CWS-55**, ¶ 22.

[1035] Ruiz Statement, **CWS-55**, ¶ 22.

[1036] Ruiz Statement, **CWS-55**, ¶ 22.

[1037] Certificate of Inspection Villahermosa casino (Apr. 24, 2014), **C-304**.

April 24, 2014 and against SEGOB's provisional closures of Claimants' Casinos.[1038] In the *recurso de revision,* E-Games argued, among other things, that the Casinos could not be provisionally closed down, because E-Games' *recurso de inconformidad* before the Mexican Supreme Court was pending, which meant that SEGOB's alleged basis for the closures, that is, the lack of a permit for the operation of the establishments, was *sub judice* in the *Amparo* 1668/2011 proceeding at the time that SEGOB closed Claimants' Casinos.[1039]

405. On June 5, 2014, SEGOB's hierarchical superior, SEGOB's Undersecretary of the Interior (*Subsecretario de Gobierno*), improperly dismissed E-Games' *recurso de revision* without addressing E-Games' argument that the closure was improper by virtue of E-Games' pending appeal.[1040] In the dismissal, SEGOB simply stated that Claimants' Casinos had been closed down, because E-Games did not have a valid permit and that it dismissed E-Games' *recurso de revisión* because the administrative acts being challenged by E-Games were not final.[1041]

406. Moreover, after it unlawfully shut down the Casinos on April 24, 2014, SEGOB failed to prompt the initiation of the second phase of the Closure Administrative Review Proceedings—SEGOB's ordering of the inspection visits to Claimants' Casinos and provisional closures of the Casinos constituted the first phase of such proceedings—in which E-Games would be afforded the opportunity to be heard with respect to SEGOB's actions in provisionally closing down the Casinos.[1042] Importantly, Mexican law states that after 30 days

[1038] Julio Gutiérrez Statement, **CWS-52**, ¶ 84; Certificate of Inspection Mexico City casino (Apr. 24, 2014), **C-300**; Certificate of Inspection Cuernavaca casino (Apr. 24, 2014), **C-301**; Certificate of Inspection Puebla casino (Apr. 24, 2014), **C-302**; Certificate of Inspection Naucalpan casino (Apr. 24, 2014), **C-303**; Certificate of Inspection Villahermosa casino (Apr. 24, 2014), **C-304**.

[1039] Julio Gutiérrez Statement, **CWS-52**, ¶ 85.

[1040] At this point, E-Games' recurso de inconformidad was still pending before the Mexican Supreme Court; Julio Gutiérrez Statement, **CWS-52**, ¶ 86.

[1041] Julio Gutiérrez Statement, **CWS-52**, ¶ 86.

[1042] Julio Gutiérrez Statement, **CWS-52**, ¶ 87.

have elapsed from the date on which the relevant authority—in this case, SEGOB—should have issued a resolution regarding the first phase of the administrative proceedings at issue; here, the Casinos' provisional closures, the administrative proceeding expires.[1043] Therefore, on July 8, 2014—considering that SEGOB had not issued a resolution regarding the provisional closures and more than 30 days had surely elapsed since the day on which SEGOB should have issued a resolution to this effect—E-Games filed a writ under Article 60 of the Federal Law for Administrative Procedure.[1044] In the writ, E-Games requested that the Closure Administrative Review Proceedings—and consequently the provisional closures of Claimant's Casinos—be declared expired.[1045]

407. On July 18, 2014—after having unjustifiably paralyzed and delayed the Closure Administrative Review Proceedings for over 75 days—SEGOB decided against E-Games' July 8, 2014 request ("**July 18, 2014 Resolution**").[1046] SEGOB based its denial on the fact that, on July 17, 2014, despite the 30 day term provided in the Federal Law for Administrative Procedure having elapsed, SEGOB had notified E-Games of a series of resolutions that it allegedly had issued on July 7, 2014 (the "**July 7, 2014 Resolutions**") initiating the second phase of the Closure Administrative Review Proceedings.[1047] Coincidentally, the July 7, 2014 Resolutions—of which E-Games had never heard of nor received notice of prior to SEGOB's July 18, 2014 Resolution—were issued only one day before E-Games' filed its brief requesting that the Closures Administrative Review Proceedings expire.

408. The July 7, 2014 Resolutions provided that E-Games *probably* did not have a permit to operate gambling centers and lottery rooms, and that E-Games was not authorized to

[1043] Julio Gutiérrez Statement, **CWS-52**, ¶ 87.

[1044] Julio Gutiérrez Statement, **CWS-52**, ¶ 87.

[1045] Julio Gutiérrez Statement, **CWS-52**, ¶ 87.

[1046] Julio Gutiérrez Statement, **CWS-52**, ¶ 87.

[1047] Julio Gutiérrez Statement, **CWS-52**, ¶ 87.

operate slot machines that accepted coins or cash.[1048] None of this was actualy true. SEGOB's inclusion of the latter argument was particularly surprising because the certificates of inspection (*actas de verificación*) prepared by SEGOB on the day of the closures did not identify any slot machines accepting coins or cash in any of the Casinos.[1049] Furthermore, as explained above, Claimants' operation was entirely cashless in accordance with Mexican law. Claimants in fact did not operate slot machines that accepted coins or cash in their Casinos.[1050]

409. It was clear from SEGOB's irregular behavior that it had not formally initiated the second phase of the Closure Administrative Review Proceedings prior to July 7, 2014—as it should have done—and instead backtracked and initiated the second phase—in which E-Games was supposed to be afforded the opportunity to be heard with respect to SEGOB's actions in provisionally closing down the Casinos—after it received E-Games' July 8, 2014 Request. [1051] On information and belief, SEGOB did not properly initiate the second phase of the Closure Administrative Review Proceedings because it was awaiting the Supreme Court's ruling on the *Recurso de Inconformidad* 406/2012.[1052] Furthermore, SEGOB's included language in the July 7, 2014 Resolutions explaining that E-Games was not authorized to operate slot machines that accepted coins or cash. It specifically did so in the unlikely event that the Supreme Court did not confirm the revocation of E-Games' permit, SEGOB would have a fallback plan to confirm the Casinos' closures based on the fact that, according to its July 7, 2014 Resolutions, E-Games allegedly operated slot machines that accepted coins or cash even

[1048] Julio Gutiérrez Statement, **CWS-52**, ¶ 88.

[1049] Julio Gutiérrez Statement, **CWS-52**, ¶ 88; Certificate of Inspection Mexico City casino (Apr. 24, 2014), **C-300**; Certificate of Inspection Cuernavaca casino (Apr. 24, 2014), **C-301**; Certificate of Inspection Puebla casino (Apr. 24, 2014), **C-302**; Certificate of Inspection Naucalpan casino (Apr. 24, 2014), **C-303**; Certificate of Inspection Villahermosa casino (Apr. 24, 2014), **C-304**.

[1050] Julio Gutiérrez Statement, **CWS-52**, ¶ 88.

[1051] Julio Gutiérrez Statement, **CWS-52**, ¶ 88.

[1052] Julio Gutiérrez Statement, **CWS-52**, ¶ 88.

though it did not have the necessary permit to do so.[1053] This back-up argument was fabricated by SEGOB, as none of this was true.

410. In response to SEGOB's July 7, 2014 Resolutions, E-Games filed evidence to prove that there were no slot machines that accepted coins or cash in its Casinos.[1054] However, this evidence was improperly rejected by SEGOB; it simply declined to consider it even though it had a duty to do so.[1055] Following SEGOB's improper rejection of the evidence offered by E-Games, E-Games' access to the Closure Administrative Review Proceedings files was restricted, allegedly because E-Games' authorizations were revoked.[1056]

411. Not surprisingly, after the Supreme Court dismissed *Recurso de Inconformidad* 406/2012 and remanded the case to the Collegiate Tribunal, and once the Collegiate Tribunal had confirmed its prior decision resolving *Incidente de Inejecución* 82/2013 , on February 26, 2015 and March 3, 2015, SEGOB issued final resolutions in the Closure Administrative Review Proceedings ordering the permanent closure of Claimants' Casinos.[1057]

412. E-Games then filed a *recurso de revisión* against SEGOB's February 26, 2015 and March 3, 2015 resolutions.[1058] SEGOB's Undersecretary of the Interior (*Subsecretario de Gobierno*) resolved E-Games' *recurso de revisión* confirming SEGOB's February 26, 2015 and March 3, 2015 resolutions declaring the definitive closure of Claimants' Casinos.[1059] E-Games then initiated a *juicio de nulidad* (a type of enforcement proceeding in Mexico) against SEGOB's Undersecretary of the Interior's decision, but was eventually forced to withdraw

[1053] Julio Gutiérrez Statement, **CWS-52**, ¶ 88.

[1054] Julio Gutiérrez Statement, **CWS-52**, ¶ 89.

[1055] Julio Gutiérrez Statement, **CWS-52**, ¶ 89.

[1056] Julio Gutiérrez Statement, **CWS-52**, ¶ 89.

[1057] Julio Gutiérrez Statement, **CWS-52**, ¶ 90.

[1058] Julio Gutiérrez Statement, **CWS-52**, ¶ 91.

[1059] Julio Gutiérrez Statement, **CWS-52**, ¶ 91.

from this proceeding given the initiation of the present NAFTA arbitration, which does not allow for such parallel proceeding to continue.[1060]

f. SEGOB Irregularly Lifted the Casinos' Closure Seals Without Notifying Claimants and Improperly Allowed Other Mexican Nationals to Possess and/or Operate Claimants' Casinos

413. To date, as it concerns Claimants, all of their Casinos remain closed and Claimants are unable to enter the Casinos to remove their property and assets. This is because when the Casinos were closed, SEGOB placed closure seals on the entrances of each Casino, preventing anyone from entering the premises. This notwithstanding, Mexico improperly lifted the closure seals in all of Claimants Casino locations and incorrectly returned legal possession of the premises to individuals or companies other than E-Games.[1061] Claimants only became aware that the Mexican government had lifted the closure seals and returned legal possession of the premises to other third parties through Claimants' own research and investigations.[1062] Claimants were never informed that Mexico lifted the seals from the premises.[1063]

414. On April 24, 2014 Mexico placed closure seals on Claimants' Casinos, and importantly, on premises over which Claimants had legal rights. E-Games had property rights over all locations in which the Casinos were located because it legally leased the premises. Having placed closure seals on the Casinos, Mexico was required by law to notify E-Games of the lifting of the seals and, once the seals had been lifted, to return possession of the premises—and of the property therein owned by E-Games—to E-Games as the property's legal possessor.[1064] However, as described below, Mexico never notified Claimants that the closure seals had been lifted, nor was legal possession of the Casinos' premises, or of E-Games' assets

[1060] Julio Gutiérrez Statement, **CWS-52**, ¶ 91.

[1061] Julio Gutiérrez Statement, **CWS-52**, ¶ 108.

[1062] Witness Statement of Óscar Alejandro Vargas Ramírez ("Vargas Statement"), **CWS-58** ¶ 4.

[1063] Julio Gutiérrez Statement, **CWS-52**, ¶ 108.

[1064] Julio Gutiérrez Statement, **CWS-52**, ¶ 108.

within, ever returned to E-Games.[1065] Claimants were thus deprived of their right to regain possession of the establishments in which the Casinos were located, and of their right to retrieve their property and assets.[1066]

415. In May 2017, a fire consumed the facility that had housed Claimants' Naucalpan Casino.[1067] Shortly after the May 2017 fire, *Protección Civil Naucalpan*—a unit within SEGOB tasked with executing actions and programs for the prevention, relief, recovery and restoration in emergency situations—lifted the closure seals and returned legal possession of the premises to the owners of the premises.[1068] Neither SEGOB nor *Protección Civil Naucalpan* informed Claimants, or Claimants' Mexican counsel (who is also E-Games' legal representative), that the seals were going to be lifted and possession of the premises would be returned to the premises' owners.[1069]

416. Claimants' Mexican counsel, Mr. Gutiérrez, was contacted by the premises' owners, who informed Mr. Gutiérrez that the seals had been lifted and that unidentified individuals had removed assets from within the Casino, including Claimants' gaming machines.[1070] SEGOB had also never informed Claimants that their property had been removed from the Casino.[1071] The gaming machines, most of which Claimants owned, are valuable assets that belonged to Claimants.[1072] In February 2020, Claimants confirmed that the establishment where Claimants' Naucalpan Casino used to be located remains closed and in the exact same conditions as after the May 2017 fire.[1073] Furthermore, Claimants confirmed

[1065] Julio Gutiérrez Statement, **CWS-52**, ¶ 108.

[1066] Julio Gutiérrez Statement, **CWS-52**, ¶ 108.

[1067] Julio Gutiérrez Statement, **CWS-52**, ¶ 108.

[1068] Julio Gutiérrez Statement, **CWS-52**, ¶ 108.

[1069] Julio Gutiérrez Statement, **CWS-52**, ¶ 108.

[1070] Julio Gutiérrez Statement, **CWS-52**, ¶ 108.

[1071] Julio Gutiérrez Statement, **CWS-52**, ¶ 108.

[1072] Julio Gutiérrez Statement, **CWS-52**, ¶ 108.

[1073] *Fe de Hechos* Naucalpan casino (Feb. 27, 2020), pp. 2-4, **C-305**; Vargas Statement, **CWS-58**, ¶ 17.

that there are no signs of closure seals or visible signs of that there previously were closure seals on the premises; and that the establishment is available for rent.[1074] Despite this, Claimants have been unable to gain access to the Naucalpan casino or to retrieve any remaining property or assets.[1075]

417. SEGOB also issued a resolution authorizing the owners of the building where Claimants' Mexico City Casino used to be located to regain possession of the premises.[1076] In doing so, SEGOB improperly lifted the closure seals and returned legal possession of the premises to the premises' owners—instead of to E-Games—although E-Games was the company whose Casino SEGOB had closed down and whose assets SEGOB had seized.[1077] Furthermore, SEGOB failed, again, to notify Claimants, or Claimants' Mexican counsel and E-Games' legal representative, that the seals had been lifted and possession of the premises returned to the owners.[1078] Claimants only learned of this because the premises' owners contacted Claimants' counsel in Mexico in order to return to Claimants the gaming machines located within the premises.[1079]

418. In February 2020, Claimants confirmed that the premises on which Claimants' Mexico City Casino used to be located remain closed, notwithstanding that the premises' owners have confirmed real estate development plans on such premises.[1080] To date, Claimants have been unable to gain access to the Mexico City Casino or to retrieve their property therein, other than the gaming machines given to Claimants by the premises' owners.[1081]

[1074] Vargas Statement, **CWS-58** ¶ 18.

[1075] Julio Gutiérrez Statement, **CWS-52**, ¶ 108.

[1076] Julio Gutiérrez Statement, **CWS-52**, ¶ 109.

[1077] Julio Gutiérrez Statement, **CWS-52**, ¶ 109.

[1078] Julio Gutiérrez Statement, **CWS-52**, ¶ 109.

[1079] Julio Gutiérrez Statement, **CWS-52**, ¶ 109.

[1080] Julio Gutiérrez Statement, **CWS-52**, ¶ 109.

[1081] Julio Gutiérrez Statement, **CWS-52**, ¶ 109.

419. In July 2019, Claimants confirmed that the establishment where Claimants' Cuernavaca Casino used to be located was open and operating as another casino—the "Winland" casino—and that the casino was operating under Permit Number DGJS/DGAAD/DCRCA/P-01/2017.[1082] Claimants also confirmed that some of the machines in the "Winland" casino had a metal plate displaying the company name "Ainsworth Game Technology, Ltd."[1083]—the same brand that Claimants used to offer in their Casinos.[1084] On information and belief, the Winland casino is illegally using gaming machines from Claimants' Cuernavaca Casino.[1085] This was confirmed by a Notary Public through a *fe de hechos*, a certified statement of facts.[1086] *Fes de hechos* provide legal certainty to the facts that are certified and confirm that the facts or circumstances described therein are true and accurate. Interestingly, SEGOB issued Permit Number DGJS/DGAAD/DCRCA/P-01/2017 to the company Operadora de Coincidencias Numéricas, S.A. de C.V. ("**Operadora de Coincidencias Numéricas**") on May 23, 2017, under the Peña Nieto administration.[1087] SEGOB's website confirms that the "Winland" casino is one of Operadora de Coincidencias Numéricas' registered establishments in Cuernavaca, Morelos and is operated by Operadora de Salas Fortune de México, S.A. de C.V.[1088]

420. Furthermore, in February 2020, Claimants confirmed that the establishment where Claimants' Cuernavaca Casino used to be located is still open and operating as the

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[1082] *Fe de Hechos* Cuernavaca casino (Jul. 17, 2019), pp. 2-4, **C-306**; Vargas Statement, **CWS-58**, ¶ 6.

[1083] *Fe de Hechos* Cuernavaca casino (Jul. 17, 2019), p. 3, **C-306**; Vargas Statement, **CWS-58**, ¶ 6.

[1084] Erin Burr Statement, **CWS-51**, ¶ 15.

[1085] Vargas Statement, **CWS-58,** ¶ 6.

[1086] *Fe de Hechos* Cuernavaca casino (Jul. 17, 2019), **C-306**.

[1087] Permit Number DGJS/DGAAD/DCRCA/P-01/2017 *Operadora de Coincidencias Numéricas* http://www.juegosysorteos.gob.mx/es/Juegos_y_Sorteos/Salas_de_Sorteos_de_Numeros (May 23, 2017), **C-307**.

[1088] Winland Registered Establishment Screenshot, SEGOB website, http://www.juegosysorteos.gob.mx/es/Juegos_y_Sorteos/Salas_de_Sorteos_de_Numeros, **C-308**.

"Winland" casino under Operadora de Coincidencias Numéricas' permit.[1089] In February 2020, the Notary Public also examined SEGOB's website and confirmed (i) that the permit number she mentioned in her earlier visit to the "Winland" casino (Permit Number DGJS/DGAAD/DCRCA/P-01/2017) belongs to Operadora de Coincidencias Numericas; (ii) that the "Winland" casino is one of the registered establishments under Operadora de Coincidencias Numericas' permit; (iii) that Operadora de Salas Fortune de México, S.A. de C.V. is the operator of the Winland" casino; and (iv) that the permit was granted on May 23, 2017.[1090]

421. In light of the above, there is absolutely no doubt that SEGOB is aware that the establishment where Claimants' Cuernavaca Casino used to be located—which SEGOB itself illegally closed in April 2014 and, in the process of doing so, placed closure seals—is open and operating as a casino under a different permit holder.[1091] Nevertheless, SEGOB never notified Claimants, or Claimants' Mexican counsel and E-Games' legal representative, that it had lifted the closure seals and returned legal possession of the premises to a company other than E-Games.[1092] To date, Claimants have been unable to gain access to the Cuernavaca Casino or to retrieve their property and assets.[1093]

422. In late 2017, Claimants confirmed that the establishment where Claimants' Villahermosa Casino used to be located was open and operating as the "Vegas Casino."[1094] Moreover, in January 2020, Claimants returned to the location—this time with a Notary Public—and were able to confirm that the establishment is currently closed.[1095] Claimants also

[1089] *Fe de Hechos* Cuernavaca casino (Feb. 7, 2020), pp. 2-8, **C-306**; Vargas Statement, **CWS-58**, ¶ 7.

[1090] *Fe de Hechos* Cuernavaca casino (Feb. 7, 2020), pp. 2-8, **C-306**.

[1091] Julio Gutiérrez Statement, **CWS-52**, ¶ 110.

[1092] Julio Gutiérrez Statement, **CWS-52**, ¶ 110.

[1093] Julio Gutiérrez Statement, **CWS-52**, ¶ 110.

[1094] Vargas Statement, **CWS-58**, ¶ 9.

[1095] *Fe de Hechos* Villahermosa casino (Jan. 22, 2020), **C-309**; Vargas Statement, **CWS-58**, ¶ 10.

confirmed that the establishment is available for rent.[1096] Claimants also confirmed that there are no signs of closure seals or visible signs of there having been any closure seals on the premises.[1097] Once again, neither Claimants, nor Claimants' Mexican counsel and E-Games' legal representative, were ever notified that the closure seals had been lifted or that legal possession of the premises had been returned to an individual or company other than E-Games.[1098] To date, Claimants have been unable to gain access to the Villahermosa Casino or to retrieve their property and assets.[1099]

423. In addition, Claimants confirmed—as corroborated in a *fe de hechos* from Claimants' visit to what used to be Claimants' Puebla Casino—that the establishment where Claimants' Puebla Casino used to be located is currently open and operating as a winery called "PRISSA".[1100] Nevertheless, SEGOB never notified Claimants, or Claimants' Mexican counsel and E-Games' legal representative, that it had lifted the closure seals and returned legal possession of the premises to a company other than E-Games.[1101] To date, Claimants have been unable to gain access to the Puebla Casino or to retrieve their property and assets.[1102]

g. SEGOB To Date Illegally Refuses to Provide Claimants Copies of E-Games' Closure Files

424. As described above, after Mexico illegally closed down Claimants' Casinos on April 24, 2014, Claimants participated in the Closure Administrative Review Proceedings, in which E-Games challenged the closure of the Casinos and requested that the closure seals be lifted.[1103] In early 2015, SEGOB resolved the Closure Administrative Review Proceedings by

[1096] *Fe de Hechos* Villahermosa casino (Jan. 22, 2020), **C-309**; Vargas Statement, **CWS-58**, ¶ 13.

[1097] *Fe de Hechos* Villahermosa casino (Jan. 22, 2020), p. **C-309**; Vargas Statement, **CWS-58**, ¶ 12.

[1098] Julio Gutiérrez Statement, **CWS-52**, ¶ 111.

[1099] Julio Gutiérrez Statement, **CWS-52**, ¶ 111.

[1100] *Fe de Hechos* Puebla casino (Jan. 24, 2020), **C-310**; Vargas Statement, **CWS-58**, ¶ 15.

[1101] Julio Gutiérrez Statement, **CWS-52**, ¶ 112.

[1102] Julio Gutiérrez Statement, **CWS-52**, ¶ 112.

[1103] Julio Gutiérrez Statement, **CWS-52**, ¶ 84.

ordering the permanent closure of the Casinos.[1104] SEGOB improperly determined that the April 24, 2014 closures had been done in accordance with the law because the Casinos did not have a valid permit to operate as a result of E-Games' permit being declared "*insubsistente*" by means of the Sixteenth District Judge's March 10, 2014 Order in the *Amparo* 1668/2011 proceeding.[1105]

425. Claimants have requested from SEGOB copies of these administrative case files (the case files for the Closure Administrative Review Proceedings) in numerous instances in the past two years.[1106] Claimants have made these requests both in writing and through in-persons visits to SEGOB.[1107] SEGOB is required by law to provide E-Games copies of the case files since it is an interested party to the administrative proceedings; in this case, the Closure Administrative Review Proceedings.[1108] However, SEGOB has arbitrarily denied Claimants' requests every single time.[1109]

426. It has done so by imposing procedural hurdles, and without offering adequate or valid grounds for its failure to provide E-Games with the requested copies.[1110] For example, SEGOB arbitrarily decided that it could only issue certified copies of the case files, instead of simple copies.[1111] Certified copies are substantially more expensive than simple copies, and given the volume of the case files, in requesting that Claimants pay for certified copies, SEGOB imposed an unnecessary financial burden on the Claimants.[1112] Despite the arbitrariness of the request, Claimants complied and paid the substantial sum of $ 93,722.00 (approximately US $

[1104] Julio Gutiérrez Statement, **CWS-52**, ¶ 90.

[1105] Julio Gutiérrez Statement, **CWS-52**, ¶ 90.

[1106] Julio Gutiérrez Statement, **CWS-52**, ¶ 92; Gordon Burr Statement, **CWS-50**, ¶ 136.

[1107] Gordon Burr Statement, **CWS-50**, ¶ 136; Julio Gutiérrez Statement, **CWS-52**, ¶ 92.

[1108] Julio Gutiérrez Statement, **CWS-52**, ¶ 92.

[1109] Julio Gutiérrez Statement, **CWS-52**, ¶ 92; Gordon Burr Statement, **CWS-50**, ¶ 136.

[1110] Julio Gutiérrez Statement, **CWS-52**, ¶ 93.

[1111] Julio Gutiérrez Statement, **CWS-52**, ¶ 93.

[1112] Julio Gutiérrez Statement, **CWS-52**, ¶ 93.

5,000) for certified copies.[1113] However, SEGOB still failed to provide Claimants with these copies.[1114] Moreover, almost every time Claimants inquire about the status of the copies, SEGOB argues that the copies are not ready because the Director has not yet signed the certification (*certificación*).[1115] To date, SEGOB has still refused to provide Claimants with a copy of the files.[1116]

427. For the past two years, SEGOB has improperly denied Claimants' access to the case files involving the closure of the Casinos, to which Claimants are lawfully entitled.[1117] This is nothing short of astonishing, and it proves that SEGOB is attempting to conceal its illegal actions towards Claimants and their investments.

h. SEGOB Blocks Claimants' Attempts to Sell the Casino Assets and Mitigate Damages

428. Shortly after Mexico illegally closed the Casinos on April 24, 2014, Claimants sought to mitigate the damages caused by Mexico's illegal actions, including by continuing in their efforts to convince SEGOB to reopen the Casinos, or, alternatively, to sell the Casinos and/or their assets.[1118] In furtherance of this effort, Claimants approached a series of high profile potential partners and purchasers, some with strong ties to the PRI administration of President Peña Nieto and with an even stronger presence institutionally in Mexico.[1119]

429. As early as 2013, Mr. Burr had meetings with Televisa, the Mexican media and entertainment conglomerate, to discuss the possibility of working together.[1120] The initial contact between Claimants and Televisa was made shortly after SEGOB, on February 25, 2013,

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[1113] Julio Gutiérrez Statement, **CWS-52**, ¶ 93.

[1114] Julio Gutiérrez Statement, **CWS-52**, ¶ 93; Gordon Burr Statement, **CWS-50**, ¶ 136.

[1115] Julio Gutiérrez Statement, **CWS-52**, ¶ 94.

[1116] Julio Gutiérrez Statement, **CWS-52**, ¶ 95; Gordon Burr Statement, **CWS-50**, ¶ 136.

[1117] Gordon Burr Statement, **CWS-50**, ¶ 136.

[1118] Gordon Burr Statement, **CWS-50**, ¶¶ 109-115; Erin Burr Statement, **CWS-51**, ¶ 116.

[1119] Julio Gutiérrez Statement, **CWS-52**, ¶ 82; Gordon Burr Statement, **CWS-50**, ¶¶ 109-115.

[1120] Gordon Burr Statement, **CWS-50**, ¶ 109; Erin Burr Statement, **CWS-51**, ¶ 117.

published in its website that E-Games' permit was suspended.[1121] Televisa's representatives who attended the meetings included José Antonio García ("**Mr. García**"), who is the VP of Corporate Administration and Mr. Rosenberg, who as previously noted is the Director of Business Development at Televisa.[1122]

430. In early 2014, while the irregular *Amparo* proceeding was still pending but before Claimants' Casinos were illegally shut down on April 24, 2014, Mr. Burr met with Televisa again in hopes of exploring the opportunity to work together.[1123] During that meeting, Mr. García informed Mr. Burr that SEGOB would eventually close down Claimants' Casinos and that it was time for Mr. Burr to leave Mexico because Claimants' business would not survive in Mexico.[1124] At the time, Mr. Burr considered that Mr. García's statements, albeit strong and confident, were lacking in credibility, but still informed Televisa representatives that if they wanted to buy Claimants' Casinos, they should make an offer first.[1125]

431. After SEGOB illegally closed Claimants' Casinos on April 24, 2014, Mr. Burr met again with Televisa on May 20, 2014.[1126] During this meeting, Televisa offered to purchase Claimants' Casinos for US$ 12 million, which Mr. Burr, immediately declined because it was insultingly low given the profitability and value of the Casinos.[1127] Throughout the negotiations with Televisa, its representatives, including Mr. García, treated Mr. Burr as if they were at a dead end and conveyed the clear impression that SEGOB, for reasons unknown

[1121] José Ramón Moreno Statement, **CWS-53**, ¶ 14.

[1122] José Ramón Moreno Statement, **CWS-53**, ¶ 14.

[1123] Gordon Burr Statement, **CWS-50**, ¶ 110.

[1124] José Ramón Moreno Statement, **CWS-53**, ¶ 15; Gordon Burr Statement, **CWS-50**, ¶ 110.

[1125] Gordon Burr Statement, **CWS-50**, ¶ 110; Erin Burr Statement, **CWS-51**, ¶ 117.

[1126] Gordon Burr Statement, **CWS-50**, ¶ 111.

[1127] José Ramón Moreno Statement, **CWS-53**, ¶ 18; Gordon Burr Statement, **CWS-50**, ¶ 111.

at the time to Claimants, would block every attempt by Claimants to reopen the Casinos and/or recuperate their investments in any meaningful way.[1128]

432. Indeed, following the illegal closure of the Casinos, Claimants contacted various other individuals and companies to discuss potential partnership and/or sale of Casino assets.[1129] These potential partners and purchasers included, but were not limited to, Mr. Juan Cortina Gallardo ("**Mr. Cortina**"), a prominent Mexican businessman who also had casinos in Mexico; CODERE, a major Spanish gaming company with casinos in Mexico; and José Benjamin Chow del Campo ("**Mr. Chow**") and Luc Pelchat ("**Mr. Pelchat**"), both with significant experience and involvement in the Mexican casino industry.[1130] Ultimately, each of these companies and individuals expressed an interest in working with Claimants to reopen the Casinos and/or acquire Claimants' Casino assets, but SEGOB expressly rebuffed Claimants' efforts to move forward with each at every turn.[1131]

433. As early as May 2014, Claimants approached Mr. Cortina and discussed a potential deal to combine their respective casino operations.[1132] The negotiation progressed to the point that Mr. Cortina brought in Credit Suisse to prepare modeling on the transition.[1133] Unfortunately, when Mr. Cortina contacted Ms. Salas at SEGOB about this potential transaction, she refused to approve, which forced Mr. Cortina and Claimants to abandon their negotiations.[1134] Shortly thereafter, Mr. Cortina sold his casinos, informing Mr. Burr that he

[1128] José Ramón Moreno Statement, **CWS-53**, ¶ 17; Gordon Burr Statement, **CWS-50**, ¶ 110; Erin Burr Statement, **CWS-51**, ¶ 118.

[1129] Gordon Burr Statement, **CWS-50**, ¶ 112-115.

[1130] Gordon Burr Statement, **CWS-50**, ¶ 112-115; Erin Burr Statement, **CWS-51**, ¶¶ 119-121.

[1131] Gordon Burr Statement, **CWS-50**, ¶ 114; Erin Burr Statement, **CWS-51**, ¶¶ 119-121 .

[1132] Gordon Burr Statement, **CWS-50**, ¶ 112; Erin Burr Statement, **CWS-51**, ¶ 119.

[1133] Gordon Burr Statement, **CWS-50**, ¶ 112; Erin Burr Statement, **CWS-51**, ¶ 119.

[1134] Gordon Burr Statement, **CWS-50**, ¶ 112; Erin Burr Statement, **CWS-51**, ¶ 119.

sold his casinos because he realized that the Mexican government was not going to accept any foreign investment in the gambling industry.[1135]

434. Claimants also reached out to CODERE that operates more than 140 casinos in Europe and Latin America, including in Mexico, as well as other Mexican casino companies such as Prensa, about the possibility of reaching a solution that would allow Claimants' Casinos to reopen.[1136] Each of them also expressed interest, but again, SEGOB expressly denied each of these projects.[1137]

435. Lastly, as was discussed in detail during the jurisdictional phase of these proceedings, Claimants engaged in lengthy negotiations with Messrs. Chow and Pelchat, who proposed a merger transaction involving the Juegos Companies.[1138] Messrs. Chow and Pelchat's proposal included the possible sale of the Juegos Companies and their assets to Mr. Chow's company, Grand Odyssey, S.A. de C.V. ("Grand Odyssey"), who would in turn sell all of Grand Odyssey's shares to a Canadian shell company.[1139] The Canadian shell company would then issue securities to the owners of the Juegos Companies, including all of the U.S. investors.[1140] The idea behind this transaction was for the U.S. shareholders to retain indirect control of the Juegos Companies through their ownership in the Canadian shell company.[1141] This transaction ultimately failed because SEGOB never gave Messrs. Chow and Pelchat approval for the Casinos to reopen and both Ms. Salas and her successor, Luis Felipe Cangas ("Mr. Cangas"), explicitly said that they would not allow the Casinos to reopen as long as the

[1135] Gordon Burr Statement, **CWS-50**, ¶ 112; Erin Burr Statement, **CWS-51**, ¶ 119.

[1136] Gordon Burr Statement, **CWS-50**, ¶ 113; Erin Burr Statement, **CWS-51**, ¶ 120.

[1137] Gordon Burr Statement, **CWS-50**, ¶ 113; Erin Burr Statement, **CWS-51**, ¶ 120.

[1138] Gordon Burr Statement, **CWS-50**, ¶ 114; Erin Burr Statement, **CWS-51**, ¶ 121.

[1139] Gordon Burr Statement, **CWS-50**, ¶ 114; Erin Burr Statement, **CWS-51**, ¶ 121.

[1140] Counter-Memorial on Jurisdictional Objections (Jul. 25, 2017), ¶ 87.

[1141] First Witness Statement of Gordon Burr, **CWS-1**, ¶ 51; Julio Gutiérrez Witness Statement (July 20,2017), **CWS-3**, ¶ 28; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶¶ 7-8.

U.S. shareholders remained involved in the management of the Casinos or the Juegos Companies. [1142]

436. As Mr. García from Televisa had warned Claimants, SEGOB shut down all of the Claimants' Casinos in April 2014 and then thwarted every attempt Claimants made to sell their Casinos, to partner with another group, or mitigate their damages. [1143] Neither did Claimants have any opportunity within the Mexican judicial and administrative systems to undo the closure of their Casinos, which left the present NAFTA proceedings as the only avenue available for Claimants to seek redress for Mexico's unlawful actions.[1144]

i. SEGOB Denies E-Games' Requests for New Permits Without Legal Basis

437. On April 4, 2014, while the *Amparo* 1668/2011 and 1151/2012 proceedings were still pending and shortly before SEGOB's unlawful closure of the Casinos on April 24, 2014, E-Games made a good faith attempt to fix the unravelling situation by requesting new and independent permits for the Casinos it had been operating since 2006 in addition to two new locations in Veracruz and Huixquilucan.[1145] E-Games again fully complied with all requirements set forth in the Gaming Regulation, despite that it had already obtained an independent permit in its own name to operate the Casinos.[1146]

438. On August 15, 2014, SEGOB denied E-Games' requests for the new permits relying on unsubstantiated and purely technical grounds.[1147] Remarkably, SEGOB based its denial of the permits on allegations that the facilities where it would operate (Claimants' five existing Casinos as well as Claimants' temporary Casino location in Huixquilucan) were

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[1142] Gordon Burr Statement, **CWS-50**, ¶ 114; Erin Burr Statement, **CWS-51**, ¶ 121; Luc Pelchat Statement (July 21, 2017), **CWS-4**, ¶¶ 7-8.

[1143] Gordon Burr Statement, **CWS-50**, ¶¶ 110, 115.

[1144] Julio Gutiérrez Statement, **CWS-52**, ¶ 83; Gordon Burr Statement, **CWS-50**, ¶ 115.

[1145] Julio Gutiérrez Statement, **CWS-52**, ¶ 73; Gordon Burr Statement, **CWS-50**, ¶ 126.

[1146] Julio Gutiérrez Statement, **CWS-52**, ¶ 74; Gordon Burr Statement, **CWS-50**, ¶ 126.

[1147] SEGOB's denial of E-Games' requests (Aug. 15, 2015), **C-27 – C-33**.

closed.[1148] This ground does not pass even the straight-face test, much less international standards for governmental conduct with respect to foreign investors. Not only were the Casinos closed because Mexico had ordered them shut down (unlawfully and in breach of Claimants' rights as described above), but more importantly, the existence of open, operating casinos is not a requirement for the granting of a permit under the Gaming Regulation and never has been a requirement for the issuance of permits.[1149] In fact, no one can open and operate a casino without a validly issued permit, and SEGOB's denial of E-Games' requests for new permits on the basis that the facilities were no longer in operation is sheer nonsense.[1150]

439. Pursuant to Article 22 of the Gaming Regulation that had been issued in 2004, an applicant for a new casino permit must accompany the request with certain information and documentation.[1151] In particular, the requirements of Article 22 of the Gaming Regulation are as follows:

i. To file a study proving the geographical location and financial viability of the establishment intended to be installed and operated (Article 22, Section VI);[1152]

ii. To represent in writing the exact location of the place where the premises are to be installed (Article 22, Section VII);[1153]

iii. To indicate the legal basis on which the applicant company has or intends to obtain the legitimate possession or ownership of the property in which the establishment is to be installed (Article 22, Section VIII);[1154]

[1148] SEGOB's denial of E-Games' requests (Aug. 15, 2015), **C-27 – C-33**.

[1149] González Report, **CER-3**, ¶ 190.

[1150] Julio Gutiérrez Statement, **CWS-52**, ¶ 75.

[1151] González Report, **CER-3**, ¶ 189. 2004 Gaming Regulation, Article 22, **CL-72**.

[1152] González Report, **CER-3**, ¶ 189; 2004 Gaming Regulation, Article 22, Section VI, **CL-72**.

[1153] González Report, **CER-3**, ¶ 189; 2004 Gaming Regulation, Article 22, Section VII, **CL-72**.

[1154] González Report, **CER-3**, ¶ 189; 2004 Gaming Regulation, Article 22, Section VIII, **CL-72**.

iv. To submit documentation proving that the applicant has the favorable opinion of the state entity, city council or regional authority for the installation of the establishment for which the permit is requested (Article 22, section IX); [1155] and

v. To file the general program for the operation of the establishment (Article 22, Section X).[1156]

440. Therefore, an open location for the casino to operate in is not a requirement for the granting of a permit under the Gaming Regulations.[1157] Furthermore, under Mexican law, it would be completely reasonable and legally valid for SEGOB to grant a permit under these circumstances, since not only is an open location not a requirement under the law, but the locations were closed by SEGOB itself, and therefore the granting of the requested permits would eliminate the alleged reason for the closures (in this case, the lack of a permit).[1158] Importantly, in compliance with these requirements, E-Games, in its requests for the new casino permits, indicated the exact addresses of its five existing Casinos that SEGOB had unlawfully closed.[1159] As proof of the "legal basis" for E-Games' rightful possession of the real property on which the Casinos were located, E-Games further provided the copies of the sub-lease agreements entered between the Juegos Companies and E-Games establishing E-Games' legal right to possess the real property on which each of the five Casinos was to

[1155] González Report, **CER-3,** ¶ 189; 2004 Gaming Regulation, Article 22, Section IX, **CL-72**.

[1156] González Report, **CER-3**, ¶ 189; 2004 Gaming Regulation, Article 22, Section X, **CL-72**.

[1157] González Report, **CER-3**, ¶ 190; Julio Gutiérrez Statement, **CWS-52**, ¶ 75.

[1158] González Report, **CER-3**, ¶ 193.

[1159] Julio Gutiérrez Statement, **CWS-52**, ¶ 75; SEGOB Resolution No. DGJS/2738/2014 (Aug. 15, 2015), p. 1, **C-27**; SEGOB Resolution No. DGJS/2739/2014 (Aug. 15, 2015), p. 1, **C-28**; SEGOB Resolution No. DGJS/2740/2014 (Aug. 15, 2015), p. 1, **C-29**; SEGOB Resolution No. DGJS/2741/2014 (Aug. 15, 2015), p. 1, **C-30**; SEGOB Resolution No. DGJS/2743/2014 (Aug. 15, 2015), p. 1, **C-32**.

operate.[1160] SEGOB did not dispute the existence or validity of such sub-lease agreements,[1161] and that should have been the end of SEGOB's inquiry regarding E-Games' compliance with the Article 22, Sections VII and VIII of the Gaming Regulation.[1162]

441. Surprisingly, however, SEGOB refused to acknowledge E-Games' legitimate possession of the five existing Casinos on grounds that E-Games' Casinos were closed and no longer in operation.[1163] This conclusion is not only viciously circular and defies common sense, but is clearly discriminatory when compared to SEGOB's application of the same legal requirements set forth in Article 22 of the Gaming Regulation to Mexican gaming companies.

442. Both before and after E-Games made its requests for new casino permits in 2014, SEGOB has granted casino permit requests made mostly by Mexican companies even though such companies did not have open casinos operating at the time the requests were made.[1164] For instance, in the wake of the enactment of the Gaming Regulation on September 17, 2004, SEGOB issued new casino permits to various Mexican companies, including, but not limited to, E-Mex,[1165] Comercializadora de Entretenimiento de Chihuahua, S.A. de C.V.,[1166] Eventos Festivos,[1167] Juega y Juega, S. A. de C. V.,[1168] and El Palacio de Los Numeros, S.A.

[1160] Julio Gutiérrez Statement, **CWS-52**, ¶ 74; SEGOB Resolution No. DGJS/2738/2014 (Aug. 15, 2015), p. 5, **C-27**; SEGOB Resolution No. DGJS/2739/2014 (Aug. 15, 2015), p. 5, **C-28**; SEGOB Resolution No. DGJS/2740/2014 (Aug. 15, 2015), p. 5, **C-29**; SEGOB Resolution No. DGJS/2741/2014 (Aug. 15, 2015), p. 5, **C-30**; SEGOB Resolution No. DGJS/2743/2014 (Aug. 15, 2015), p. 5, **C-32**.

[1161] Julio Gutiérrez Statement, **CWS-52**, ¶ 74; SEGOB Resolution No. DGJS/2738/2014 (Aug. 15, 2015), p. 7, **C-27**; SEGOB Resolution No. DGJS/2739/2014 (Aug. 15, 2015), p. 7, **C-28**; SEGOB Resolution No. DGJS/2740/2014 (Aug. 15, 2015), p. 7, **C-29**; SEGOB Resolution No. DGJS/2741/2014 (Aug. 15, 2015), p. 7, **C-30**; SEGOB Resolution No. DGJS/2743/2014 (Aug. 15, 2015), p. 7, **C-32**.

[1162] Julio Gutiérrez Statement, **CWS-52**, ¶ 75.

[1163] Julio Gutiérrez Statement, **CWS-52**, ¶ 75; SEGOB Resolution No. DGJS/2738/2014 (Aug. 15, 2015), pp. 6-7, **C-27**; SEGOB Resolution No. DGJS/2739/2014 (Aug. 15, 2015), pp. 6-7, **C-28**; SEGOB Resolution No. DGJS/2740/2014 (Aug. 15, 2015), pp. 6-7, **C-29**; SEGOB Resolution No. DGJS/2741/2014 (Aug. 15, 2015), pp. 6-7, **C-30**; SEGOB Resolution No. DGJS/2743/2014 (Aug. 15, 2015), pp. 6-7, **C-32**.

[1164] Julio Gutiérrez Statement, **CWS-52**, ¶ 75.

[1165] SEGOB Permit No. DGAJS/SCEVF/P-06/2005 (May 25, 2005), **C-235**.

[1166] SEGOB Permit No. DGAJS/SCEVF/P-08/2005 (Nov. 28, 2005), **C-311**.

[1167] SEGOB Permit No. DGAJS/SCEVF/P-02/2005 (May 6, 2005), **C-312**.

[1168] SEGOB Permit No. DGAJS/SCEVF/P-07/2005 (May 25, 2005), **C-313**.

de C.V.[1169] None of these companies which obtained casino permits in 2005 and 2006 had open and operating facilities at the time they requested the permits from SEGOB.

443. As previously mentioned, prior to the enactment of the Gaming Regulation, most forms of gaming activities were illegal in Mexico, and the Gaming Regulation was introduced in part to attract more participants to and promote competition within the Mexican gaming industry. The existence of open, operating casinos has never been a requirement for the issuance of permits under the Gaming Regulation.[1170]

444. Even during the Peña Nieto administration, SEGOB granted casino permits to Mexican companies without an open and operating facility. For instance, on two separate occasions in November 2014—first on 24th and then on 27th of November 2014—SEGOB altogether issued seven permits to Pur Umazal Tov, S.A. de C.V ("**Pur Umazal Tov**") to operate casinos in Playa del Carmen, Quintana Roo; Mérida, Yucatán; Tlalnepantla, State of México; Mexicali, Baja California; Nogales, Sonora; Tula de Allende, Hidalgo; and in the capital of the State of Puebla.[1171] Notably, these permits cover many of the exact same premises where CIA. Operadora Megasport, S.A. de C.V. ("**Megasport**") had operated its casinos under Permit No. DGAJS/P-01/2011.[1172] SEGOB revoked Megasport's permit by a resolution dated October 24, 2014 for its use of a false municipal authorization in connection with the operation of the establishment named Casino 777 Fortuna.[1173] The resolution also assessed fines on Megasport and ordered the closure of all casino establishments that

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[1169] SEGOB Permit No. DGAJS/SCEVF/P-01/2006 (Feb. 7, 2006), **C-314**.

[1170] Julio Gutiérrez Statement, **CWS-52**, ¶ 75.

[1171] Julio Gutiérrez Statement, **CWS-52**, ¶ 77; SEGOB Permits to Pur Umazal Tov, **C-315–C-320.**

[1172] Julio Gutiérrez Statement, **CWS-52**, ¶ 77.

[1173] Julio Gutiérrez Statement, **CWS-52**, ¶ 77; CÍA Operadora Megasport, S.A. de C.V. Permit No. DGAJS/P-01/2011, *("El 06 de noviembre de 2014 se notificó a Cia Operadora Megasport S. A. de C.V. la resolución administrativa de fecha 24 de octubre de la anualidad, en la que se determinó sancionar con multa, la revocación del permiso DGAJS/P-01/2011; la clausura definitiva del establecimiento denominado CASINO 777 FORTUNA y los demás establecimientos que operan bajo el amparo de dicho permiso.").* Retrieved from https://sijscasinos.segob.gob.mx/AppDGTI/SIJS/docs_salas/permisos/permini_10_1.pdf, **C-321**.

Megasport had been operating.[1174] However, within a month after the revocation of Megasport's permit, SEGOB allowed the reopening of certain casinos that previously belonged to Megasport, by granting seven new permits to Pur Umazal Tov, an entity formed in August 2014 and owned and managed by the very same individuals who were affiliated with Megasport in various capacities.[1175] Notwithstanding that Pur Umazal Tov's casino establishments were to be located in the same premises as then-closed gambling facilities of Megasport, SEGOB still found no fault in Pur Umazal Tov's permit request.[1176] To date, Pur Umazal Tov continues to operate several casinos throughout Mexico, using the same trade names (WINPOT and CAPRI) and addresses as those operated under Megasport's permit.[1177]

445. Another example from the Peña Nieto administration is the 25-year-long permit issued to Discos y Producciones Premier, S. A. de C. V. ("**Discos y Producciones Premier**") on November 27, 2018.[1178] Under the permit, which was granted three days before the end of President Peña Nieto's six-year term, Discos y Producciones Premier is authorized to establish one casino in Tlalnepantla, State of México. The company had no open casino at the time of its request for the permit, and until now it has no registered establishment.[1179]

[1174] Id.

[1175] Julio Gutiérrez Statement, **CWS-52**, ¶ 77; Horacio Jiménez et al., *Polemizan con Segob por permisos*, *El Universal* (Dec. 4, 2014), https://archivo.eluniversal.com.mx/nacion-mexico/2014/impreso/polemizan-con-segob-por-permisos-220905.html , **C-322**; Emmanuel Campos, *Winpot Pachuca podría reabrir sus puertas en cuestión de días*, *Quadratin Hidalgo* (Dec. 4, 2014), https://hidalgo.quadratin.com.mx/principal/Winpot-Pachuca-podria-reabrir-sus-puertas-en-cuestion-de-dias/#, **C-323**; *Álvaro Delgado, Osorio Chong favorece a casineros de Hidalgo*, *Proceso* (Feb. 21, 2015), https://www.proceso.com.mx/396600 , **C-324**.

[1176] Julio Gutiérrez Statement, **CWS-52**, ¶ 77.

[1177] Julio Gutiérrez Statement, **CWS-52**, ¶ 77; *See*, e.g., SEGOB *Información sobre el Permisionario*, Pur Umazal Tov, S.A. de C.V. (Permit No. DGJS/DGAFJ/DCRCA/P-05/2014), https://sijscasinos.segob.gob.mx/consultaWebCasinos/AppDGTI/consultaWeb/receiver.php?do=Consulta&action=200&id=263, **C-315**; SEGOB *Información sobre el Permisionario*, Pur Umazal Tov, S.A. de C.V. (Permit No. DGJS/DGAFJ/DCRCA/P-09/2014), https://sijscasinos.segob.gob.mx/consultaWebCasinos/AppDGTI/consultaWeb/receiver.php?do=Consulta&action=200&id=266, **C-316**.

[1178] Julio Gutiérrez Statement, **CWS-52**, ¶ 78; Discos y Producciones Premier, S. A. de C. V., SEGOB Permit No. DGJS/DGAAD/DCRCA/P-03/2018 (Nov. 27, 2018), **C-325**.

[1179] Julio Gutiérrez Statement, **CWS-52**, ¶ 78; SEGOB Discos y Producciones Premier, S.A. de C.V. Registrados Screenshot,

446. As these examples clearly demonstrate, SEGOB has routinely granted casino permits to companies which did not have open and operating casinos at the time the requests were made.[1180] The fact that Claimants' Casinos were closed by SEGOB's unlawful action should have had no impact on SEGOB's determination as to E-Games' compliance with the requirements set forth in Article 22, Sections VII and VIII of the Gaming Regulation. However, SEGOB discriminatorily applied the Gaming Regulation to deny E-Games' requests for the new permits, while authorizing Mexican-owned companies under similar circumstances to start operating casinos.

447. In denying E-Games' requests for the new permits, SEGOB resorted to additional rationalizations that were equally specious and arbitrary.[1181] Specifically, SEGOB denied the new permits because one of the many documents E-Games submitted with its requests–a certificate of good standing from the relevant municipalities—was supposedly outdated, did not comply with certain formalities and was originally tied to E-Mex's permit.[1182] In deploying these hollow justifications, SEGOB not only rested on an insignificant technicality, but also associated yet again E-Games' certificate of good standing with E-Mex's permit, despite that the municipalities (Naucalpan, Puebla, Villahermosa, Cuernavaca, Mexico City, Veracruz, and Huixquilucán) had already transferred those certificates to E-Games since at least 2009.[1183] This certificate of good standing was a single document out of the voluminous set of documents that E-Games submitted with its requests and is one that could have been

https://sijscasinos.segob.gob.mx/consultaWebCasinos/AppDGTI/consultaWeb/receiver.php?do=Consulta&action=200&id=260, **C-326**.

[1180] Julio Gutiérrez Statement, **CWS-52**, ¶ 79.

[1181] Julio Gutiérrez Statement, **CWS-52**, ¶ 80.

[1182] Julio Gutiérrez Statement, **CWS-52**, ¶ 81; SEGOB's denial of E-Games' requests (Aug. 15, 2015), **C-27 – C-33**.

[1183] Julio Gutiérrez Statement, **CWS-52**, ¶ 81.

easily rectified had SEGOB acted in accordance with its Gaming Regulation and treated E-Games fairly and transparently.[1184] But it did not do so.

448. Far from basing it on legality and the principles of due process and fairness that Mexico is bound by international law and the NAFTA to observe, SEGOB's conduct with respect to E-Games' new permit requests was arbitrary, discriminatory and driven by the same animus that guided Mexico's conduct with respect to E-Games' pre-existing, valid permit: the PRI Government's agenda to wipe out E-Games from the Mexican gaming industry at any cost.

j. SEGOB's Discriminatory Treatment of E-Games Against Other Competitors in Similar Circumstances

449. Mexico unlawfully rescinded E-Games' November 16, 2012 permit, shut down Claimants' Casinos, refused to grant E-Games new permits, and defeated every attempt by Claimants to reopen the Casinos and/or sell the Casino assets. Through this series of irregular, arbitrary and unlawful measures, Mexico completely drove out Claimants from the Mexican casino industry. Meanwhile, Mexico has allowed other Mexican casino companies and nationals that operate casinos in identical circumstances as Claimants to remain open.

450. In a striking example, SEGOB and the Mexican judiciary have left essentially undisturbed the casino operations of Producciones Móviles, a company that sought and obtained its own, independent casino permit under almost identical legal arguments and factual circumstances as E-Games.[1185] As explained above, both were operating under E-Mex's permits as operators, and both sought independent casino permits given their track record of having complied with the Gaming Regulation and because E-Mex's casino permit was in jeopardy given the bankruptcy proceedings that had been initiated against it by its creditors.[1186]

[1184] Julio Gutiérrez Statement, **CWS-52**, ¶ 81.

[1185] Julio Gutiérrez Statement, **CWS-52**, ¶ 41; González Report, **CER-3**, ¶ 89, 91-93.

[1186] Julio Gutiérrez Statement, **CWS-52**, ¶ 41; González Report, **CER-3**, ¶ 84.

451. Producciones Móviles in fact received its independent permit in part by expressly asking that SEGOB apply the same administrative criteria it had applied in considering E-Games' request for, and that had led to the issuance to E-Games of, an independent permit (i.e., conditioning E-Games' ability to obtain its permit to its compliance with all legal requirements under the Gaming Regulation and to E-Mex's final insolvency).[1187] In response to Producciones Móviles' request, SEGOB issued Resolution No. DGJS/SCEV/1458/2012, by means of which it granted Producciones Móviles its own independent permit.[1188] SEGOB adopted a very similar reasoning regarding why it decided to grant E-Games' and Producciones Móviles' permits.[1189] In fact, many of the arguments used by SEGOB to support the issuance of Producciones Móviles' permit were the same that SEGOB used in the November 16, 2012 Resolution, by means of which E-Games' permit was granted.[1190]

452. In both resolutions, SEGOB (i) established that such resolutions were being issued in response to requests for permits in accordance with the terms of Articles 20, 21 and 22 of the Gaming Regulation;[1191] (ii) approved a change of status and recognized that the applicants were entitled to independent permits;[1192] and (iii) recognized that the applicants had complied with all material requirements under the Gaming Regulation to have an independent and autonomous permit issued to them.[1193]

[1187] Julio Gutiérrez Statement, **CWS-52**, ¶ 41.

[1188] SEGOB Resolution No. DGJS/SCEV/1458/2012 (Nov. 22, 2012), **C-327.**

[1189] Julio Gutiérrez Statement, **CWS-52**, ¶ 42; González Report, **CER-3**, ¶ 88.

[1190] SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16**; SEGOB Resolution No. DGJS/SCEV/1458/2012 (Nov. 22, 2012), **C-327**.

[1191] González Report, **CER-3**, ¶ 88 (a).

[1192] González Report, **CER-3**, ¶ 88 (b).

[1193] González Report, **CER-3**, ¶ 88 (c).

453. The permits were issued within days of each other. E-Games' permit was issued on November 16, 2012,[1194] and Producciones Móviles' permit was issued on November 22, 2012.[1195] Furthermore, both E-Games and Producciones Móviles were granted independent permits subject to the same conditions and obligations as E-Mex's permit DGJAS/SCEVF/P-06/2005 and its modifications.[1196] This meant that while E-Games' and Producciones Móviles' ability to operate their casinos was no longer tied legally to E-Mex' permit, E-Games' and Producciones Móviles' new permits encompassed the same rights and obligations as E-Mex's permit.[1197] Moreover, both E-Games and Producciones Móviles were granted their own independent permit with a permit number separate and distinct from E-Mex's permit. E-Games was assigned permit number DGAJS/SCEVF/P-06/2005-BIS,[1198] and Producciones Móviles was assigned permit number DGJS/SCEVF/P-06/2005-TER.[1199]

454. Despite the elements proving a substantive legal (virtually identical) similarity between E-Games' permit and Producciones Móviles' permit,[1200] SEGOB has invalidated E-Games' November 16, 2012 permit, but has allowed Producciones Móviles to remain in business.[1201] This is clearly discriminatory. While the *Amparo* 1668/2011 judgement did not order SEGOB to act in any specific way in relation to Producciones Móviles' permit, such ruling clearly constituted a judicial precedent in regards to a very similar case of Producciones Móviles, and therefore, in accordance with the principle of legal certainty, SEGOB should have

[1194] SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16**.

[1195] SEGOB Resolution No. DGJS/SCEV/1458/2012 (Nov. 22, 2012), **C-327**.

[1196] González Report, **CER-3**, ¶ 90; SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16**; SEGOB Resolution No. DGJS/SCEV/1458/2012 (Nov. 22, 2012), **C-327.**

[1197] González Report, **CER-3**, ¶ 90.

[1198] SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16**.

[1199] SEGOB Resolution No. DGJS/SCEV/1458/2012 (Nov. 22, 2012), **C-327.**

[1200] González Report, **CER-3**, ¶ 90.

[1201] González Report, **CER-3**, ¶ 90; http://www.juegosysorteos.gob.mx/es/Juegos_y_Sorteos/Salas_de_Sorteos_de_Numeros

utilized such precedent to reevaluate the criteria it had previously applied to Producciones Móviles' permit request.[1202] This, of course, presumes that SEGOB was acting for legal, and not political or other improper, motives in invalidating E-Games' permit and closing all of Claimants' Casinos, which the evidence very stongly suggest was not the case.

455. Under Mexican law, the principle of legal certainty in administrative matters dictates that authorities conduct themselves in accordance with consistent and homogeneous legal criteria, so as to limit arbitrary or unconscionable actions.[1203] In this regard, SEGOB's differential treatment of companies in similar circumstances, such as is the case of E-Games' and Producciones Móviles' permits, denotes a lack of uniformity in the authority's criteria.[1204]

456. Petolof is but another example of such an arbitrary and discriminatory application of the Gaming Regulation by SEGOB. As explained in detail above in Section IV.L, SEGOB relied on the principle of "acquired rights" to recognize both Petolof and E-Games as independent operators under third party's permits (EDN's and E-Mex's permits, respectively).

457. Remarkably, as described above, on August 28, 2013 in the *Amparo* 1668/2011 proceeding, SEGOB reasoned that E-Games' November 16, 2012 permit had to be rescinded because all of the resolutions subsequent to the May 27, 2009 Resolution—including the November 16, 2012 Resolution—were based on the principle of "acquired rights," which SEGOB argued had been ruled unconstitutional by the *Amparo* judge,[1205] Surprisingly, three years later, on May 27, 2016, SEGOB issued Petolof its own independent permit.[1206] SEGOB did so despite having previously recognized Petolof had "acquired rights" in connection with

[1202] González Report, **CER-3**, ¶ 91.

[1203] González Report, **CER-3**, ¶ 93.

[1204] González Report, **CER-3**, ¶ 92.

[1205] González Report, **CER-3**, ¶ 163 (f).

[1206] González Report, **CER-3**, ¶ 56; Petolof Permit No. DGJS/DGAAD/DCRCA/P-01/2016 (May 27, 2016), https://sijscasinos.segob.gob.mx/AppDGTI/SIJS/docs_salas/permisos/permini_32_.pdf, **C-328**.

a third party's permit, and having stated in the *Amparo* 1668/2011 proceeding that the principle of "acquired rights" was unconstitutional.[1207] Therefore, SEGOB's actions in revoking E-Games' independent permit on the grounds that it was based on the principle of "acquired rights" while grating Petolof an independent permit based at least in part on the same doctrine and allowing it to remain in business are clearly discriminatory.[1208]

458. In sum, Claimants operated their Casinos in Mexico, with SEGOB's knowledge, and/or administrative authorization for nine (9) years from 2005 until 2014. Only after the PRI took power and sought to attack persons perceived to be aligned with the PAN administration, do favors for influential PRI supporters whose gaming businesses benefitted by the closure of Claimants's Casinos, and punish Claimants for being "uncontrollable" given their strong and public stances against corruption, did Mexico, its gaming authority and the judiciary seek to invalidate Claimants' rights to operate their Casinos within Mexico, leading to the complete destruction of Claimants' businesses and investments in the country. This happened even though Mexico left other Mexican Casino companies who were in like circumstances as Claimants in business, and even though it had accepted and benefitted from Claimants' operation of the Casinos in Mexico for years, including through the receipt of a roughly 2% monthly participation fees (*participación*) that Claimants were required to pay to SEGOB under Mexican law while they operated their Casinos, as well as through receipt of special and regular tax payments as required by law.

Y. Mexico Subjects Claimants to Harassment and Retaliatory Measures

459. The PRI Government's systematic attack on Claimants was not limited to the total annihilation of their Casino operations, but also included a pattern of harassment and retaliatory measures that caused Claimants substantial harm, interfered with their ability to

[1207] González Report, **CER-3**, ¶ 58.

[1208] González Report, **CER-3,** ¶ 59.

continue operating and benefiting from their investments in Mexico, and likely have as their aim to claw back illegally any damages awarded against Mexico in the present proceedings. More specifically, Mexico carried out unlawful, discriminatory and highly retaliatory tax measures against E-Games and conducted unwarranted criminal investigations against E-Games representatives that resulted in equally unsubstantiated criminal charges against them.

1. Mexico Uses Its Tax Authorities To Further Harass Claimants

460. Claimants always complied with all applicable tax legislation under Mexican law, so much so that they repeatedly sought advice from the SAT on E-Games' reporting obligations of the casino operations.[1209] In 2012, the SAT carried out a tax audit on E-Games' Casino operations for 2011 and determined that E-Games was in compliance with all applicable tax legislation and, as such, had no observations on its tax returns.[1210]

461. However, in September of that same year, right around the time when the Mexican government's hostilities against E-Games' permit began, the SAT commenced another audit related to E-Games' 2009 operations.[1211] Shortly thereafter, on December 1, 2012, the PRI took power and used that existing audit to further harass and retaliate against Claimants. Specifically, on February 28, 2014, the SAT issued a resolution finding that E-Games had not complied with its reporting obligations and ordering it to pay $170,475,625.02 (which on said date amounted to approximately US$ 12,796,600) in back taxes. This resolution came as a complete surprise to Claimants, particularly since E-Games' had reported and accounted for its operations in the exact same manner as E-Games' tax returns for 2011, which

[1209] Gordon Burr Statement, **CWS-50**, ¶ 133; Erin Burr Statement, **CWS-51**, ¶ 139.

[1210] Julio Gutiérrez Statement, **CWS-52**, ¶ 106.

[1211] Julio Gutiérrez Statement, **CWS-52**, ¶ 106.

were based on the SAT's responses to E-Games' prior inquiries.[1212] E-Games filed a *juicio de nulidad* against the SAT's February 28, 2014 resolution.[1213]

462. On March 8, 2016, the tribunal responsible for reviewing E-Games' *juicio de nulidad* confirmed the SAT's February 28, 2014 resolution.[1214] E-Games then initiated an *amparo* proceeding against the March 8, 2016 resolution. E-Games' request for *amparo* was dismissed. Against such dismissal, E-Games filed a *recurso de revisión* before the Supreme Court.[1215]

463. On April 4, 2018, the Supreme Court dismissed E-Games' *recurso de revisión* confirming the March 8, 2016 resolution and, thereby, the SAT's February 28, 2014 resolution imposing a tax debt on E-Games.[1216] E-Games' efforts to combat the SAT's February 28, 2014 resolution were all to no avail since, as confirmed by Claimants' Mexican counsel from conversations with E-Games' tax lawyers responsible for defending E-Games against the SAT's resolution, the matter was politically charged.[1217]

2. Mexico Also Has Harassed And Retaliated Against Claimants By Launching A Criminal Investigation And Filing Spurious Criminal Charges Against Claimants' Representatives In Mexico

464. In a similar vein, the PRI Government, and most notably SEGOB, used the Attorney General's office ("**PGR**" by its Spanish acronym) in an unlawful and arbitrary manner to trump up unwarranted criminal charges against E-Games' representatives.[1218] On information and belief, Claimants understand that SEGOB has alleged that E-Games illegally operated the Casinos since August 2013, when the Sixteenth District Judge ordered SEGOB to

[1212] Gordon Burr Statement, **CWS-50**, ¶ 133; Erin Burr Statement, **CWS-51**, ¶ 139.

[1213] Julio Gutiérrez Statement, **CWS-52**, ¶ 106.

[1214] Julio Gutiérrez Statement, **CWS-52**, ¶ 107.

[1215] Julio Gutiérrez Statement, **CWS-52**, ¶ 107.

[1216] Julio Gutiérrez Statement, **CWS-52**, ¶ 107.

[1217] Julio Gutiérrez Statement, **CWS-52**, ¶ 107.

[1218] Julio Gutiérrez Statement, **CWS-52**, ¶ 55.

rescind all resolutions derived from the May 27, 2009 Resolution, until April 2014 when SEGOB closed down all of the Casinos.[1219] SEGOB has used the PGR to intimidate and harass Claimants' representatives in Mexico by exposing them to criminal fines and possible imprisonment.[1220]

465. Despite Claimants representatives' attempts to access the formal criminal complaint, the PGR has refused to share the file, leaving Claimants and their representatives in Mexico in the dark about the facts alleged against them and the identity of their accusers.[1221] On information and belief, Mexico has resorted to these criminal investigation and prosecution in retaliation for Claimant's recourse to the dispute resolution mechanism offered to them under the NAFTA, as those measures came on the heels of the Notice of Intent Claimants filed on May 23, 2014, a month after SEGOB's closure of the Casinos.[1222]

466. Once the most prosperous and beloved in Mexico, Claimants' Casinos never reopened their doors. As discussed above, Claimants tirelessly sought redress for Mexico's wrongdoings, including by appealing to the highest court in the land, applying for new gaming permits, exploring the possible sale of their investments, and invoking their protections under the NAFTA. And yet, Mexico's systematic, malicious, and discriminatory attack against Claimants and their flourishing Casino businesses did not stop, eventually leading to the total destruction of Claimants' investments in Mexico. Moreover, by prosecuting retaliatory tax and criminal claims against E-Games and its representatives, unjustifiably refusing to grant Claimants access to the closure files, and disposing of the Casino premises and assets in violation of Claimants' due process rights, Mexico has continued in its harassment and retaliation against Claimants. Thus, Claimants were left with no option to but to turn to the

[1219] Gordon Burr Statement, **CWS-50**, ¶ 134; Erin Burr Statement, **CWS-51**, ¶ 140.

[1220] Julio Gutiérrez Statement, **CWS-52**, ¶¶ 104-107; Gordon Burr Statement, **CWS-50**, ¶ 134.

[1221] Gordon Burr Statement, **CWS-50**, ¶ 135; Erin Burr Statement, **CWS-51**, ¶ 140.

[1222] Julio Gutiérrez Statement, **CWS-52**, ¶ 55.

present proceedings and their rights under the NAFTA to find the justice they require and deserve.

467. In the following sections, Claimants detail each of the violations of the NAFTA that Mexico has committed through its various actions, including the unlawful expropriation of Claimants' investments (Article 1110); the failure to accord Claimants fair and equitable treatment (Article 1105); the denial of justice to Claimants in judicial and administrative proceedings (Article 1105); and the failure to accord Claimants national treatment (Article 1102) and most favored nation treatment (Article 1103).

V. ARGUMENT

A. Claimants Have Established That They Made a Protected Investment in Mexico Under the NAFTA

468. Claimants have already established, and the Tribunal has agreed, that each of the 38 Claimants is an "investor" and has made a protected "investment" under the NAFTA. NAFTA Article 1139 defines the term "investment" for purposes of the NAFTA in "exceedingly broad terms," covering "almost every type of financial interest . . . ."[1223] The term includes, among many other interests:

> (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; (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution [. . .][1224]

469. Overall, Claimants made various types of investments encompassed within the definition of "investments" in Article 1139 of the NAFTA. Those investments include, without limitation: (a) the Juegos Companies, (b) each of the other Mexican Enterprises; (c) Claimants' share ownership in each of the Mexican Enterprises; (d) E-Games' gaming permit; (e) all of the gaming machines and other Casino assets; (f) each of the Casino locations.

[1223] *Marvin Roy Feldman Karpa v. United Mexican States* ("*Feldman*"), ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002), ¶ 96, **CL-96**.

[1224] NAFTA Article 1139, **CL-78**.

470. Each of the Claimants bring claims against Mexico for its breaches of the NAFTA on their own behalf under NAFTA Article 1116. In addition, Claimants control, and have at all relevant times controlled, the Mexican Enterprises in this dispute and have standing to assert claims on their behalf under NAFTA Article 1117.

471. In its Partial Award on Jurisdiction, issued on July 19, 2019, the Tribunal agreed with Claimants when it found that Claimants controlled the Juegos Companies and E-Games, and therefore, through those entities, made qualifying investments in Mexico.[1225]

472. Specifically, the Tribunal found that that Claimants had made substantial investments in the Casinos, based upon their control of the Juegos Companies, which served as the asset holding corporate vehicles for the Casinos and their respective business operations.[1226] The Tribunal further found that Claimants controlled E-Games, a Mexican company that eventually became the operator and permit holder of the Casinos.[1227]

473. On the U.S. side of the corporate structure, the Claimants established, owned, and controlled the B-Mex Companies to form, capitalize, and control the Mexican Enterprises that would own the facilities in Mexico.[1228] Additionally, Claimants formed and capitalized B-Cabo, LLC and Colorado Cancun LLC to make investments in and develop a hotel and casino project in Cancun and Cabo, respectively.[1229] As such, Claimants are all investors who have made protected investments under NAFTA.

474. As developed further below, Mexico, through its measures and breaches of its obligations under the NAFTA, has completely destroyed the value of each of Claimants' investments.

[1225] Partial Award (Jul, 19, 2019), ¶¶ 232, 241.

[1226] Partial Award (Jul, 19, 2019), ¶ 232.

[1227] Partial Award (Jul, 19, 2019), ¶ 241.

[1228] Partial Award (Jul, 19, 2019), ¶ 35.

[1229] Partial Award (Jul, 19, 2019), ¶¶ 34, 36–37.

B. Mexico Expropriated Claimants' Investments in Breach of its Obligations Under Article 1110 of the NAFTA

1. The Expropriation Standard Under the NAFTA

475. Article 1110 of the NAFTA provides that neither Party shall directly or indirectly expropriate investments of an investor of another Party, except under certain conditions:

> (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 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.[1230]

476. The above standard is what the NAFTA Parties agreed would be required for one of the Parties to effectuate a legal expropriation, and the standard of compensation assumes a legal expropriation. The NAFTA Parties did not agree on the standard to be due to an investor for an illegal expropriation, as has occurred here.

[1230] NAFTA Article 1110, **CL-78**.

477. Expropriations can be effected indirectly, incrementally, and through a variety of State actions. Here, Mexico indirectly expropriated Claimants' investments through a series of illegal State measures. The expropriation was illegal, because (i) it was not effectuated for a public purpose and instead was carried out for illegal reasons, including because Claimants would not pay bribes and thus could not be "controlled"; (ii) it was carried out, in part, for discriminatory reasons to benefit local, Mexican gaming companies and, in particular, the Hank Rhon family to whom the Peña Nieto administration owed a political favor; (iii) Mexico did not afford Claimants due process in taking their gaming permit or shutting down their Casinos; and, (iv) Mexico has not paid, and has to date refused to pay, compensation for its illegal actions.

a. Expropriation May Be Effected Indirectly and Incrementally Leading to a Creeping Expropriation

478. Article 1110 of the NAFTA encompasses both "direct and indirect expropriation"[1231] and measures "tantamount to . . . expropriation"[1232] (also known as *de facto* expropriation).

479. The foregoing captures the well-established principle that expropriation can either occur directly, through formal acts of outright seizure or transfer of property to the State, or indirectly, when the State's measures relating to the investment of an investor have the same practical effect as a direct expropriation—specifically, the substantial deprivation of the use or economic benefit of property.[1233] As 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

[1231] NAFTA Article 1110(1), **CL-78**.

[1232] *Id.*, **CL-78**.

[1233] *Metalclad Corporation v. United Mexican States* ("*Metalclad*"), ICSID Case No ARB(AF)/97/1, Award (Aug. 30, 2000), ¶ 103, **CL-79**; *see also Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* ("*Middle East Cement Shipping*"), ICSID Case No. ARB/99/6, Award (Apr. 12, 2002), ¶ 107, **CL-80**; *Compañía del Desarrollo de Santa Elena SA v. The Republic of Costa Rica* ("*Santa Elena*"), ICSID Case No ARB/96/1, Final Award (Feb. 17, 2000), ¶ 77, **CL-81**.

> 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.[1234]

480. Importantly, expropriation encompasses not only forced transfers of title, but also other types of interference with property. The 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens ("**Harvard Draft**") provided that "[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."[1235] This includes takings that ultimately benefit third parties whether or not the State also benefits.[1236]

481. NAFTA tribunals have reached similar conclusions. For example, in *Pope & Talbot*, the tribunal established that the test is whether the "interference is sufficiently

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[1234] *Metalclad*, Award, ¶ 103, **CL-79**.

[1235] 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, 553 ("Harvard Draft"), **CL-82**. See also United Nations Conference on Trade and Development ("UNCTAD"), Taking of Property, 3-4, 20, UNCTAD/ITE/IIT/15 (2000) ("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 . . . .[…] 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."), **CL-83**.

[1236] *Metalclad*, Award, ¶ 103 ("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.") (emphasis added), **CL-79**; *Técnicas Medioambientales Tecmed S.A. v. United Mexican States* ("*Tecmed*"), ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), ¶ 113 ("The Agreement does not define the term 'expropriation', nor does it establish the measures, actions or behaviors that would be equivalent to an expropriation or that would have similar characteristics. Although formally an expropriation means a forcible taking by the Government of tangible or intangible property owned by private persons by means of administrative or legislative action to that effect, the term also covers a number of situations defined as de facto expropriation, where such actions or laws transfer assets to third parties different from the expropriating State or where such laws or actions deprive persons of their ownership over such assets, without allocating such assets to third parties or to the Government.") (emphasis added), **CL-84**.

restrictive to support a conclusion that the property has been 'taken' from the owner."[1237] In a similar manner, the *Archer Daniels* tribunal established that an indirect expropriation occurs if the interference is "substantial and deprives the owner of all or most of the benefits of the investment."[1238]

482. Other investment treaty tribunals outside of the NAFTA context have agreed. In *Middle East Cement Shipping*, the tribunal noted that "[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 'creeping' or 'indirect' expropriation . . . ."[1239] Similarly, the *Tecmed* tribunal observed that indirect expropriation:

> 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.[1240]

483. The conclusions of the aforementioned tribunals are further supported by academic commentators. The Restatement of the Foreign Relations Law of the U.S. describes indirect expropriation, including "creeping" expropriation, as "action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property."[1241] Similarly, Professors Michael Reisman and Robert Sloane explain:

[1237] *Pope & Talbot, Inc. v. Canada*, UNCITRAL, Interim Award (Jun. 26, 2000), ¶ 102, **CL-85**.

[1238] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States* ("*Archer Daniels*"), ICSID Case No. ARB (AF)/04/5, Award (Nov. 21, 2007), ¶ 240, **CL-86**.

[1239] *Middle East Cement Shipping*, Award, ¶ 107, **CL-80**.

[1240] *Tecmed*, Award, ¶ 114, **CL-84**. *See Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (Dec. 14, 2012), ¶ 397 ("When a measure affects the environment or conditions under which the investor carries on its business, what appears to be decisive, in assessing whether there is a substantial deprivation, is the loss of the economic value or economic viability of the investment. In this sense, some tribunals have focused on the use and enjoyment of property. The loss of viability does not necessarily imply a loss of management or control."), **CL-87**.

[1241] Restatement (Third) of the Foreign Relations Law of the U.S., § 712, comment (g) (Am. Law Inst. 1987), **CL-88**.

> [F]oreign investments may be expropriated 'indirectly through measures tantamount to expropriation or nationalization.' This phrase . . . also captures the multiplicity of inappropriate regulatory acts, omissions, and other deleterious conduct that undermines the vital normative framework created and maintained by BITs – and by which governments can, in effect but not name, now be deemed to have expropriated a foreign national's investment. The major innovation of the 'tantamount' clause, found in substance in almost all BITs, therefore consists in extending the concept of indirect expropriation to an egregious failure to create or maintain the normative 'favorable conditions' in the host state.[1242]

484. Reisman and Sloane further identify a wide variety of measures that might result in an indirect expropriation "[w]ithout concurrently purporting to take title to property" such as "taxation, regulation, denial of due process, delay and non-performance, and other forms of governmental malfeasance, misfeasance, and nonfeasance."[1243] The key is whether those "measures significantly reduce[d] an investor's property rights or render[ed] them practically useless."[1244]

b. Expropriation May Be Effected Incrementally

485. An indirect expropriation that takes place through a series of measures over time, with the aggregate effect of destroying the value of an investment, is referred to as a "creeping" expropriation. As the tribunal in *Fireman's Fund* observed, expropriation can take place over a period of time: "[t]he taking may have the form of a single measure or a series of related or unrelated measures over a period of time (the so-called "creeping" expropriation)."[1245]

486. In *Siemens v. Argentina*, the tribunal also noted that an expropriation can happen over time:

> By definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that

[1242] M. W. Reisman & R. D. Sloane, Indirect Expropriation and its Valuation in the BIT Generation, 1002 FACULTY SCHOLARSHIP SERIES 118-119 (2004) ("Reisman & Sloane"), **CL-89**.

[1243] *Id*. at 123, **CL-89**.

[1244] *Id*., **CL-89**.

[1245] *Fireman's Fund Insurance Company v. The United Mexican States* ("*Fireman's Fund*"), ICSID Case No. ARB(AF)/02/1, Award (Jul. 17, 2006), ¶ 176(i), **CL-90**.

> point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel's back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break.[1246]

487. In isolation, the measures might not have an expropriatory effect—however, the cumulative effect of the measures can result in expropriation.[1247] The tribunal in *Feldman v. Mexico* confirmed that "creeping expropriation" is a form of indirect expropriation.[1248] The comments to the 1967 OECD Draft Convention on the Protection of Foreign Property further describe creeping expropriation as the "measures otherwise lawful[, which] are applied in such a way as to deprive ultimately the alien of the enjoyment or value of his property, without any specific act being identifiable as outright deprivation."[1249]

488. Furthermore, as Reisman and Sloane recognize, the deprivation from a creeping expropriation may be evident only upon reflection after the fact:

> Discrete acts, analyzed in isolation rather than in the context of the overall flow of events, may, whether legal or not in themselves, seem innocuous vis-à-vis a potential expropriation. Some may not be expropriatory in themselves. Only in retrospect will it become evident that those acts comprised part of an accretion

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[1246] *Siemens A.G. v. Argentine Republic* ("*Siemens*"), ICSID Case No. ARB/02/8, Award (Feb. 6, 2007), ¶ 263, **CL-91**. See Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic ("Vivendi II"), ICSID Case No. ARB/97/3, Award (Aug. 20, 2007), ¶ 7.5.31 ("It is well established under international law that even if a single act or omission by a government may not constitute a violation of an international obligation, several acts taken together can warrant finding that such obligation has been breached."), **CL-92**; Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award (Sept. 16, 2003), ¶ 20.22 ("Creeping expropriation is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property."), **CL-93**.

[1247] *See* International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) Article 15(1) ("The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.") ("ILC Articles"), **CL-94**. *See, e.g., Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/11/2, Award (Apr. 4, 2016), ¶ 669 ("State responsibility for creeping expropriation is reflected in the concept of a composite act, defined in Article 15(1) of the ILC Articles on State Responsibility."), **CL-95**.

[1248] *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002), ¶¶ 101, 104, 105, 109, **CL-96**.

[1249] OECD Draft Convention on the Protection of Foreign Property, 7 ILM 117 (1968), p. 11, **CL-97**.

> of deleterious acts and omissions, which in the aggregate expropriated the foreign investor's property rights.[1250]

c. The Relevant Factor for Indirect Expropriation is the Economic Impact on the Investment, Not the State's Intent or Motive

489. The essential factor in determining whether a government measure constitutes an expropriation is the measure's effect on the asset in question, i.e., deprivation of its *use, value, or economic benefit for the investor*. Measures that amount to expropriation can also include conduct which deprives the investor of "its ability to manage, use or control the property in a meaningful way."[1251] As the tribunal in *Archer Daniels* explained:

> Judicial practice indicates that the severity of the economic impact is the decisive criterion in deciding whether an indirect expropriation or a measure tantamount to expropriation has taken place. An expropriation occurs if the interference is substantial and deprives the investor of all or most of the benefits of the investment.[1252]

490. Importantly, neither the State's intent, nor its subjective motives, nor the form of the action, constitute relevant criteria for finding whether a measure amounts to expropriation.[1253] As explained by the tribunal in *Waste Management II*:

> [T]here is no general requirement of *mens rea* or intent in Section A of Chapter 11. The standards are in principle objective: if an investor suffers loss or damage by reason of conduct which amounts to a breach of Articles 1105 or 1110, it is no defence for the Respondent State to argue that it was not aware of the investor's identity or national character. The only question is whether the various requirements of Chapter 11 in this regard are satisfied.[1254]

[1250] Reisman & Sloane at 123-124, **CL-89**.

[1251] UNCTAD, Expropriation, xi, UNCTAD/DIAE/IA/2011/7 (2012), **CL-98.**

[1252] *Archer Daniels*, Award, ¶ 240 (emphasis added), **CL-86**; see also AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary ("AES v. Hungary"), ICSID Case No ARB/07/22, Award (Sept. 23 2010), ¶ 14.3.1 (finding that an expropriation occurs when the investor is "deprived, in whole or significant part, of the property in or effective control of its investment: or for its investment to be deprived, in whole or significant part, of its value"), **CL-99**.

[1253] *See, e.g*., *Santa Elena*, Final Award, ¶ 77, **CL-81**; Vivendi II, Award, ¶ 7.5.20, **CL-92**.

[1254] *Waste Management, Inc. v. United Mexican States (II)* ("*Waste Management II*"), ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), ¶ 79, **CL-36**.

491. Similarly, the tribunal in *Metalclad* held that it "need not consider the motivation or intent of the adoption"[1255] of the government measure, and the tribunal in *National Grid v. Argentina* also noted that "to expropriate or to nationalize in taking measures equivalent to either is not a requirement."[1256] Consistent with prior cases, the *Fireman's Fund* tribunal confirmed that "[t]he effects of the host State's measures are dispositive, not the underlying intent, for determining whether there is expropriation."[1257] The tribunal in *Inmaris v. Ukraine* also stated that "improper motive or intent is not a prerequisite to a finding of expropriation."[1258] Tribunals that consider the intent of the State explain that while the intent may be relevant to determine whether an expropriation has occurred, it is neither necessary nor decisive as to the question of whether or not there has been an expropriation.[1259]

492. Importantly, a State does not need to benefit from the expropriation for the State's actions to be in violation of its international obligation. In *Flughafen Zurich v. Venezuela*, the tribunal observed that the expropriation does not require that the dispossession was intended, nor proof that the State benefited from the expropriation.[1260] In other words, not only is the intent either irrelevant or have little probative value, but whether or not the State benefited is also irrelevant.

493. In sum, the question of whether a measure constitutes an expropriation depends upon the ultimate actual effect of the measures on the investor's property. A series of measures that deprive an investor of the use or enjoyment of its investment, including the deprivation of

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[1255] *Metalclad*, Award, ¶ 111, **CL-79**.

[1256] *National Grid P.L.C. v. The Argentine Republic*, UNCITRAL, Award (Nov. 3, 2008), ¶ 147, **CL-100**.

[1257] *Fireman's Fund*, Award, ¶ 176(f), **CL-90**.

[1258] *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Excerpts of Award (Mar. 1, 2012), ¶ 304, **CL-101**.

[1259] *See, e.g.*, *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award (Dec. 7, 2011), ¶ 330, **CL-102**; Vivendi II, Award, ¶ 7.5.20, **CL-92**.

[1260] *Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/10/19, Award (Nov. 18, 2014), ¶ 456, **CL-103**.

all or a significant part of the economic benefit of its property, amounts to expropriation. If the measures at stake have these effects, there is no need to inquire into the State's motives or intentions, or form of the measures, in order to conclude that an expropriation has occurred.

d. Expropriation May Affect Rights, Not Only Physical Assets

494. An investment is defined under the NAFTA to include "an enterprise", "an equity security of an enterprise", "a loan to an enterprise", an interest in an enterprise that entitles the owner to share in income or profits of the enterprise", "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 "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory" such as "contracts where remuneration depends substantially on the production, revenues or profits of an enterprise."[1261] It follows that an expropriation of such rights must comply with the NAFTA's provisions on expropriation.

495. Numerous authorities confirm that rights and interests under government permits or licenses may be expropriated and that such expropriations occur when a State uses its governmental authority to deprive a foreign investor of the use, enjoyment or value of such rights. [1262] As Christie observed in his study of takings of property under international law, these "intangible rights can, under certain circumstances, be expropriated, even by indirect interference . . . ."[1263]

496. The NAFTA tribunal in *Metalclad* held that a municipal government's unjustified and unlawful refusal to issue a construction permit amounted to an "indirect

[1261] NAFTA Article 1139, **CL-78**.

[1262] *See, e.g.*, UNCTAD, Expropriation, 15, UNCTAD/DIAE/IA/2011/7 (2012) (expropriations can "revocation, cancellation or denial of concessions, permits, licenses or authorizations that are necessary for the operation of a business"), **CL-98.**

[1263] George C. Christie, What Constitutes a Taking of Property Under International Law?, 38 BRIT. Y.B. INT'L L. 307, 318-319 (1962), **CL-104**. Contractual rights are also included.

expropriation."[1264] Similarly, in *Tecmed*, the tribunal found that Mexico expropriated the claimant's investment by refusing to renew the operating permit of, and permanently closing down, the claimant's landfill, because these measures led to the frustration of the claimant's legitimate expectation of "the recovery of its investment . . . through the operation of the Landfill during its entire useful life."[1265]

497. In *Middle East Cement Shipping v. Egypt*, the tribunal concluded that Egypt's decree prohibiting the import of cement had "an effect tantamount to expropriation" of the claimant's license rights to import, store, and sell cement within the country, notwithstanding that the claimant still "retain[ed] nominal ownership of the respective rights."[1266] According to the tribunal, Egypt' decree deprived the claimant of the use and benefit of its investment, including the claimant's "legitimate expectation that it could have earned additional profits under the license."[1267]

498. The tribunal in *CME v. Czech Republic* similarly found that the claimant's license rights had been expropriated indirectly through interference by a regulatory authority, the Media Council:

> 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… always has been held by the original Licensee and kept untouched, is irrelevant. What was touched and indeed destroyed was the Claimant's and its predecessor's investment as protected by the Treaty. What was destroyed was the commercial value of the investment . . .[1268]

[1264] *Metalclad*, Award, ¶ 107, **CL-79.**

[1265] *Técnicas Medioambientales Tecmed S.A. v. United Mexican States* ("*Tecmed*"), ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), ¶¶139,149, 151, **CL-84**.

[1266] *Middle East Cement Shipping*, Award, ¶ 107, **CL-80**.

[1267] *Middle East Cement Shipping*, Award, ¶ 127, **CL-80**.

[1268] *CME Czech Republic BV v. Czech Republic* ("*CME*"), UNCITRAL, Partial Award (Sept. 13, 2001), ¶ 591, **CL-108**.

499. In addition to the rights under government permits or licenses, contractual rights have long been recognized as being protected both against direct and indirect expropriation.[1269] Furthermore, the Iran-United States Claims Tribunal in the Amoco case ruled that expropriation "may extend to any right which can be the object of a commercial transaction . . . ."[1270] The tribunal in Pope & Talbot regarded an investor's access to the U.S. softwood lumber market as a property right protected by the NAFTA.[1271]

500. In fact, as noted by Abdala, Spiller and Zuccon, "[i]n economic terms, the seizure of property and the seizure of rights to cash flows have exactly the same consequences."[1272] Wälde and Kolo similarly observed that the modern rules regarding investment protection are aimed not only at the protection of tangible property, but also the recognition and protection of the value of property 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."[1273]

[1269] See, e.g., Norwegian Shipowners' Claims *(Norway v. United States), Award (Oct. 13, 1922), 1 RIAA 307,* 325, ***CL-105****;* Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt, *ICSID Case No. ARB/84/3, Award (May 20, 1992), ¶¶ 164-165 (citing* Certain German Interests in Polish Upper Silesia *(Germany v. Poland), Judgment (May 25, 1925), 1926 P.C.I.J. (ser. A) No. 7, p. 44)),* ***CL-106****.*

[1270] *Amoco Int'l Finance Corp. v. Iran*, Iran-US Claims Tribunal, Partial Award (Jul. 14, 1987), 15 Iran-US CTR 189, ¶ 108, **CL-107**.

[1271] *Pope & Talbot, Inc. v. Canada*, UNCITRAL, Interim Award (Jun. 26, 2000), ¶ 96, **CL-85**.

[1272] S. Ripinsky & K. Williams, Damages in International Investment Law 70 (2008) (citing M. Abdala, P. Spiller and S. Zuccon, Chorzow's Compensation Standard as Applied in ADC v. Hungary, 3(4) TRANSNAT'L DISP. MGMT 6 (2007)), **CL-109**; see A. Reinisch, Expropriation, in THE OXFORD 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."), **CL-110**.

[1273] T. Wälde & A. Kolo, Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law, 50 INT'L & COMP. L. Q. 811, 835 (2001), **CL-111**.

e. **Expropriation Can Occur Through Judicial Measures**

501. It is also well established that expropriation can occur or crystallize through any measure taken by the State or its organs, including its courts. In *Eli Lilly & Co. v. Canada*, the tribunal held that:

> [T]he judiciary is an organ of the State. Judicial acts will therefore in principle be attributable to the State by reference to uncontroversial principles of attribution under the law of State responsibility. As a matter of broad proposition, therefore, it is possible to contemplate circumstances in which a judicial act (or omission) may engage questions of expropriation under NAFTA Article 1110, such as, perhaps, in circumstances in which a judicial decision crystallizes a taking alleged to be contrary to NAFTA Article 1110.[1274]

502. Tribunals outside the NAFTA context have reached similar conclusions. In *Rumeli v. Kazakhstan*, the tribunal held that "a taking by the judicial arm of the State may also amount to an expropriation."[1275] In *Sistem v. Kyrgyzstan* the tribunal also held that the claimant's investment, which consisted in the construction and operation of a hotel, was expropriated by local court decisions, which ultimately had the effect of abolishing the claimant's ownership rights in the hotel.[1276] Finally, in *Saipem v. Bangladesh*, in finding that the actions of the Bangladeshi courts amounted to expropriation, the Tribunal held:

> In respect of the taking, the actions of the Bangladeshi courts do not constitute an instance of direct expropriation, but rather of "measures having similar effects" within the meaning of Article 5(2) of the BIT. Such actions resulted in substantially depriving Saipem of the benefit of the ICC Award. This is plain in light of the decision of the Bangladeshi Supreme Court that the ICC Award is "a nullity". Such a ruling is tantamount to a taking of the residual contractual rights arising from the investments as crystallised in the ICC Award. As such, it amounts to an expropriation within the meaning of Article 5 of the BIT.[1277]

[1274] *Eli Lilly & Co. v. Government of Canada*, ICSID Case No. UNCT/14/2, Final Award (Mar. 16, 2017), ¶ 221, **CL-112**.

[1275] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16 ("Rumeli Telekom"), Award (Jul. 29, 2008), ¶¶ 702-704, **CL-113**.

[1276] *Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award (Sept. 9, 2009), ¶ 122, **CL-114**.

[1277] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award (Jun. 30, 2009), ¶ 129, **CL-115**.

2. Mexico Unlawfully Expropriated Claimants' Investments

503. Consistent with the provisions of the NAFTA, an "investment is not a single right but is, like property, correctly conceived of as a bundle of rights, some of which are inseparable from others and some of which are comparatively free-standing."[1278] As Professor James Crawford explained in a statement adopted by the tribunal in *ADC v. Hungary*, "what was expropriated was that bundle of rights and legitimate expectations."[1279]

504. Here, Claimants had a bundle of rights and legitimate expectations in relation to their investments in the Mexican casino business. As noted, this included not only their gaming permit granted to E-Games, but also their investments in the local companies that operated the Casinos—the Juegos Companies—as well as the various other facets of their casino operations. Claimants had a legitimate expectation that they would continue to operate these investments through 2037 and then, conservatively, for at least one 15-year renewal of their permit. Through a series of measures, acts and omissions, Mexico ultimately deprived Claimants of the value, benefit, use, and enjoyment of their rights and investments, as Mexico ultimately frustrated and eventually entirely destroyed Claimants' operations and investments in Mexico.

505. Mexico's expropriation of the investments made by Claimants in Mexico was creeping and indirect and thus constituted measures having an effect equivalent to expropriation. As mentioned above, whether Mexico intended to expropriate the investment is not determinative, although in this case, Mexico knowingly and intentionally discriminated

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[1278] *ATA Construction, Industrial and Trading Co. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award (May 18, 2010), ¶ 96, **CL-116**.

[1279] *ADC Affiliate Ltd. et. al. v. The Republic of Hungary* ("*ADC v. Hungary*"), ICSID Case No. ARB/03/16, Award (Oct. 2, 2006), ¶¶ 303-304, **CL-117**. See Telenor Mobile Communications A.S. v. The Republic of Hungary, ICSID Case No. ARB/04/15, Award (Sept. 13, 2006), ¶ 67 ("The Tribunal considers that … the investment must be viewed as a whole and that the test the Tribunal has to apply is whether, viewed as a whole, the investment has suffered substantial erosion of value."), **CL-118**.

against E-Games and Claimants, in violation of Mexican law and without regard for the rights of international investors.

506. The investments made by Claimants in E-Games, its gaming permit, and the Juegos Companies were based on their ability to operate the Casinos under E-Games, including eventually through its independent permit, granted by SEGOB on November 16, 2012. Through various acts and omissions, Mexico deprived Claimants of the use, value and benefit of the investment by interfering with their operations and later illegally revoking E-Games' independent permit. Mexico's various expropriatory actions in revoking the permit include the following:

> (i)Mexico, through SEGOB, delayed the issuance of E-Games' independent permit for over a year and a half after E-Games had complied with all of the legal requirements under the Gaming Regulation for the issuance of a new gaming permit.[1280] For purely political reasons, the Calderón administration made Claimants wait until E-Mex was formally declared bankrupt so it could say that E-Games' permit was merely a replacement for E-Mex's permit that had been revoked, complying with the administration's stated goal not to issue any new permits.[1281] In its November 16, 2012 Resolution, SEGOB also expressly concluded that E-Games' independent permit was unrelated to and independent from E-Mex's permit.[1282]
>
> (ii)Mexico, through SEGOB, illegally revoked the Resolution granting E-Games' permit—declaring it "*insubsistente*[1283]" and thus no longer valid—for political reasons, in order to benefit the PRI as well as the PRI-allied Grupo Caliente (Mexico's leading gambling company), and to discredit the previous, PAN-

[1280] Julio Gutiérrez Statement, **CWS-52**, ¶ 33.

[1281] Ernestia Álvarez, *Conocía ex funcionario de SEGOB denuncias de presunta corrupción por casinos*, *Nacionales* (Jan. 15, 2013). Retrieved from https://mvsnoticias.com/noticias/nacionales/conocia-ex-funcionario-de-segob-denuncias-de-presunta-corrupcion-por-casinos-648/, **C-258**; Julio Gutiérrez Statement, **CWS-52**, ¶ 33.

[1282] González Report, **CER-3**, ¶ 3, 73, 75; SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16**.

[1283] 2004 Gaming Regulation, **CL-72**. This term does not even exist in the Gaming Regulation. It appears to have been invented by Mexico to attempt to justify its illegal actions in relation to Claimants investments.

affiliated government.[1284] Specifically, SEGOB's head under the new PRI administration took aim at E-Games' permit and Claimant's business, calling it "illegal" in media reports only days after taking her new position at SEGOB.[1285] In an internal memorandum, SEGOB admits that it "cancelled" E-Games' permit because it had been issued at the end of the Calderon's administration "in an irregular manner."[1286] Mr. Ávila Mayo, former Undersecretary of SEGOB, has confirmed that the true reason for SEGOB's revocation of E-Games' permit was for the PRI to compensate Grupo Caliente for not granting Carlos Hank Rhon and his brother the political positions they sought and were not granted—Governor of the state of Baja California and Governor of the state of Mexico, respectively.[1287] Claimants' Casinos were in direct competition with Grupo Caliente's casinos and therefore, the revocation of E-Games' permit favored Grupo Caliente's business in the Mexican casino industry. Mr. Ávila Mayo also confirmed that the Mexican government illegally revoked E-Games' permit to favor PRI-affiliated casinos and to ensure that the PRI could "control" the casino market and its players, since Claimants—and consequently E-Games—were not perceived to be allied with the PRI and had taken public stances against corruption in the gaming industry.[1288]

(iii)Mexico, through SEGOB, seized its opportunity in the *Amparo* 1668/2011 proceeding and unlawfully revoked the resolution that granted E-Games' permit—declaring it "*insubsistente*" and rendering it no longer usable by (i) improperly introducing the November 16, 2012 Resolution in the enforcement stage of the *Amparo* 1668/2011 proceeding by incorrectly claiming that the November 16, 2012 Resolution was based on the May 27, 2009 Resolution in direct contradiction of its own prior findings that the November resolution and the decision to grant Claimants' permit was not based on the 2009 resolution; [1289] and (ii) in

[1284] Black Cube Statement, **CWS-57**, ¶ 48.

[1285] *Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón* (Jan. 27, 2013). Retrieved from http://www.jornada.unam.mx/2013/01/27/politica/013n1pol, **C-17**.

[1286] E-Games Memo ("*La DGJS [Dirección General de Juegos y Sorteos de la SEGOB] nos comunicó que el Permiso Bis fue cancelado debido a que el mismo era un permiso que habia sido otorgado al final de la administración anterior de manera irregular*."), **C-261**.

[1287] Black Cube Statement, **CWS-57**, ¶¶ 44, 45, 48.

[1288] Black Cube Statement, **CWS-57**, ¶ 47.

[1289] González Report, **CER-3**, ¶ 163-175; SEGOB Resolution (Aug. 28, 2013), **C-289**; SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16**.

contravention of Mexican law, revoking E-Games' permit without affording E-Games or the other Claimants due process and following any of the three prescribed mechanisms under Mexican law to remove the permit's legal effects.[1290]

(iv)Mexico, through the Sixteenth District Judge and the Collegiate Tribunal, adopted a series of improper actions and issued a number of improper resolutions which ultimately resulted in the improper introduction of SEGOB's November 16, 2012 Resolution in the *Amparo* 1668/2011 proceeding, and, which then "rubber stamped" SEGOB's improper rescission of the November 16, 2012 resolution granting the permit. Among other unlawful actions and resolutions:

a.The Sixteenth District Judge and the Collegiate Tribunal improperly accepted E-Mex's Third Amendment, despite that it was evident from the legal proceedings and documents comprising the *Amparo* 1668/2011 case file that the Third Amendment was filed in a untimely manner.[1291] Given the "manifest and unquestionable" ground for inadmissibility present in the Third Amendment, the Sixteenth District Judge and the Collegiate Tribunal should have immediately dismissed the Third Amendment upon its filing, but they failed to do so in contravention of Mexican law.[1292]

b.Even after the Third Amendment was accepted—albeit incorrectly—the Sixteenth District Judge and the Collegiate Tribunal eventually should have dismissed it.[1293] However, the Sixteenth District Judge and the Collegiate Tribunal continued to ignore the undeniable evidence that the Third Amendment was filed in a untimely manner, and improperly concluded that the Third Amendment was admissible.[1294]

c.In contravention of basic principles of Mexican law, the Sixteenth District Judge and the Collegiate Tribunal failed to take into consideration in the *Amparo* 1668/2011 proceeding that the November 16, 2012 Resolution

[1290] González Report, **CER-3**, ¶ 136, 151-152.

[1291] Guerrero Report, **CER-2**, ¶ 24(a), 41-87.

[1292]Guerrero Report, **CER-2**, ¶¶ 44-47.

[1293] Guerrero Report, **CER-2**, ¶ 52, 24(b).

[1294]Guerrero Report, **CER-2**, ¶ 80, 24(b).

constituted an implicitly consented act (*acto consentido tácitamente*) by E-Mex due to the final and binding judgment in the *Amparo* 1151/2012 proceeding. Under Mexican *Amparo* law, an implicitly consented act could not be afforded *amparo* protection.[1295] Nonetheless, the Sixteenth District Judge and the Collegiate Tribunal extended *amparo* protection to E-Mex in regard to the November 16, 2012 Resolution, and unlawfully revoked E-Games' independent permit.[1296]

d. The Collegiate Tribunal, irregularly, unlawfully, and against the Sixteenth District Judge's interpretation of its own ruling, determined that *Incidente de Inejecución* 82/2013 was unsubstantiated (*infundado*) and that SEGOB had not exceeded its authority in fulfilling the Sixteenth District Judge's January 31, 2013 Order by rescinding the November 16, 2012 Resolution.[1297] It did so by attributing to the Sixteenth District Judge a ruling that he squarely stated he did not make: ruling unconstitutional the doctrine of "acquired rights." In a "clear and precise" manner, the Sixteenth District Judge's January 31, 2013 Order required SEGOB to rescind nothing but the May 27, 2009 Resolution, and the judge made clear that he never ruled unconstitutional the doctrine of "acquired rights".[1298] However, the Collegiate Tribunal, finding unexplainably that the Sixteenth District Judge ruled unconstitutional the doctrine of "acquired rights", affirmed SEGOB's rescission of *all* resolutions (including the November 16, 2012 Resolution) issued in favor of E-Games.[1299] In doing so, the Collegiate Tribunal unlawfully and arbitrarily altered the terms and scope of the January 31, 2013 Order,[1300] and egregiously violated Claimants' due process rights and Mexican law by declaring the November 16, 2012 Resolution

[1295] Guerrero Report, **CER-2**, ¶ 313, 315, 332.

[1296] Guerrero Report, **CER-2**, ¶ 196, 334.

[1297] Guerrero Report, **CER-2**, ¶¶ 165, 253, 334-335; Julio Gutiérrez Statement, **CWS-52**, ¶ 65; Order of the Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito (Feb. 19, 2014), **C-290**.

[1298] Guerrero Report, **CER-2**, ¶ 191-192, 201; See Order of the Juzgado Decimosexto de Distrito en Materia Administrativa en el Distrito Federal (Jan. 31, 2013), **C-18**.

[1299] Guerrero Report, **CER-2**, ¶ 180; Order of the Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito (Feb. 19, 2014), **C-290**.

[1300] Guerrero Report, **CER-2**, ¶ 214, 208.

unconstitutional in the enforcement stage of the *Amparo* 1668/2011 proceeding, which did not afford Claimants the opportunity to present evidence or argument in support of the validity of the November 16, 2012 Resolution.[1301]

e. All of the above improper actions and resolutions adopted by the Sixteenth District Judge and the Collegiate Tribunal can only be explained by the political and other improper motivations that influenced their rulings. The Sixteenth District Judge was being bribed and controlled by E-Mex. The Collegiate Tribunal was under the influence of the Peña Nieto administration and openly told one of E-Games' lawyers that this appellate court would never allow an gaming operator to be granted a gaming license.[1302] These actions, which read like a spy novel and which are based on hard evidence, ultimately resulted in the improper endorsement of SEGOB's illegal rescission of the November 2012 Resolution granting E-Games' permit and thus the effective revocation of E-Games' permit in the *Amparo* 1668/2011 proceeding.

(v) Because E-Games was not affiliated with the PRI, would not pay bribes, and in order to compensate the Hank Rhon family and PRI-affiliated casinos, the Peña Nieto administration, through the President's attorney, then illegally lobbied the Supreme Court to decline to exercise jurisdiction over Claimants' *Recurso de Inconformidad* 406/2012 and to remit the case to the same appellate court that had issued the decision that was the subject of the appeal to the Supreme Court.[1303] This effectively doomed Claimants' ability to "right the Peña Nieto administration's wrongs" through the Mexican judiciary. After the Supreme Court had been reviewing the case for months and working closely with Claimants' Mexican counsel, Mr. Gutiérrez, on analyzing the merits of the case, the Supreme Court abruptly did an about face on their analysis of the case after meeting with Mr. Castillejos, President Peña Nieto's head lawyer, dismissing the *Recurso de*

[1301] Guerrero Report, **CER-2**, ¶ 244-251.

[1302] Julio Gutiérrez Statement, **CWS-52**, ¶¶ 56-58.

[1303] Julio Gutiérrez Statement, **CWS-52**, ¶ 97; Guerrero Report, **CER-2**, ¶¶ 288; Mexican Supreme Court Order (Sept. 3, 2014), **C-26**.

Inconformidad on procedural grounds and denying to hear the matter on the merits.[1304]

(vi)Mexico, through the Supreme Court, then further denied Claimants' access to justice and violated Claimants' due process rights when it, under pressure by the Peña Nieto administration, remitted the case to the same appellate court that had issued the decision that was the subject of the appeal to the Supreme Court.[1305]

(vii)Unsurprisingly, the Collegiate Tribunal upheld its prior virtually unexplainable decision and thus upheld the Sixteenth District Judge's March 10, 2014 Order affirming SEGOB's resolution rescinding *all* administrative resolutions issued to E-Games, including the November 16, 2012 Resolution that granted E-Games its casino permit.[1306] E-Games' permit thus stood revoked, and Claimants, having no other avenue for appeal, saw their sizeable investments and Casino businesses effectively destroyed.

(viii)Mexico, through SEGOB, illegally closed down Claimants' Casinos on April 24, 2014. SEGOB's closure of Claimants' Casinos was illegal because (i) Claimants' appeal proceedings regarding the fulfilment and enforcement of the *amparo* judgment in the *Amparo* 1668/2011 proceeding had not yet been resolved and Mexican law provides that pending a final resolution the relevant authorities cannot act to the detriment of any of the parties;[1307] and (ii) there was a judicial order that explicitly prevented SEGOB from acting against E-Games pending a final resolution in the *Amparo* 1668/2011 proceeding.[1308] Claimants challenged the closure specifically on the grounds that the closure was improper by virtue of E-Games' pending appeal. Mexico, however, did not even bother addressing this argument.[1309]

[1304] Julio Gutiérrez Statement, **CWS-52**, ¶ 101; Gordon Burr Statement, **CWS-50**, ¶ 123; Erin Burr Statement, **CWS-51**, ¶ 132.

[1305] Guerrero Report, **CER-2**, ¶ 288; Julio Gutiérrez Statement, **CWS-52**, ¶ 101.

[1306] Julio Gutiérrez Statement, **CWS-52**, ¶ 103; Guerrero Report, **CER-2**, ¶ 290, 314; Order of the Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito (Jan. 29, 2015), **C-297**.

[1307] Julio Gutiérrez Statement, **CWS-52**, ¶ 70;

[1308] Julio Gutiérrez Statement, **CWS-52**, ¶ 70; Injunctive Relief (Sept. 2, 2013), **C-299**.

[1309] Julio Gutiérrez Statement, **CWS-52**, ¶ 86.

(ix)Mexico then, after having illegally canceled E-Games' permit and closed their Casinos for years, through SEGOB, illegally lifted the closure seals placed on Claimants' Casinos without notifying Claimants, and returned the possession of the premises and the assets therein to individuals or companies other than E-Games.[1310] This led to the pilfering of Claimants' remaining assets located within the Casinos and prohibited Claimants from accessing the Casino facilities and obtaining their property from inside the Casinos.

507. In total, Mexico's acts and omissions, when taken together, improperly deprived Claimants of the use, enjoyment, and disposal of their investments rendering them entirely valueless.

3. **Mexico's Expropriation Was Unlawful**

508. Mexico's expropriation of Claimants' investments was unlawful because Mexico did not comply with the terms in the NAFTA for lawful expropriation. Mexico's expropriation of Claimants' investments was unlawful because it (i) was not for a public purpose; (ii) lacked due process and was contrary to Article 1105(1); (iii) was discriminatory; and (iv) did not pay any compensation to Claimants.[1311] The wording of Article 1110 is clear in that that all conditions must be met for a lawful expropriation.[1312] Thus, if Mexico fails to satisfy any one of these four conditions, the expropriation is unlawful, and Claimants are owed damages for that unlawful expropriation.

[1310] Julio Gutiérrez Statement, **CWS-52**, ¶¶ 108-112.

[1311] NAFTA Article 1110, **CL-78**.

[1312] Arbitral tribunals have consistently held that when a treaty cumulatively requires several conditions for a lawful expropriation, failure of any one of those conditions makes the expropriation wrongful. *See, e.g., Vivendi II*, Award, ¶ 7.5.21 ("If we concluded that the challenged measures are expropriatory, there will be a violation of Article 5(2) of the Treaty [on expropriation], even if the measures might be for a public purpose and non-discriminatory, because no compensation has been paid."), **CL-92**; *Bernardus Henricus Funnekotter & Ors. v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award (Apr. 22, 2009), ¶ 98. ("The Tribunal observes that the conditions enumerated in Article 6 are cumulative. In other terms, if any of those conditions is violated, there is a breach of Article 6."), **CL-119**.

a. The Expropriation Was Not For a Public Purpose And Instead Was Carried Out For Illegal and Political Reasons

509. Under Article 1110 of the NAFTA, the expropriation must be adopted for a public purpose to be lawful. This requires a concrete, genuine interest of the public that is furthered by the expropriation.[1313] Here it was not. It was motivated by political and illegal purposes.

510. The tribunal in *ADC v. Hungary* explained that: "[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 Tribunal can imagine no situation where this requirement would not have been met."[1314] In that case, Hungary claimed that the legislation that served as the basis for the taking of the claimants' investment was "important for the harmonization of the Hungarian Government's transport strategy, laws and regulations with the EU law . . . ."[1315] However, the evidence showed that the Government's real motivation was to take the claimants' concession to operate an airport terminal to pave the way for a more lucrative deal for the State.[1316]

511. The *Siag v. Egypt* case demonstrates that a State must be transparent regarding the purpose of the expropriation. In that case, the State "failed to satisfy the 'public purpose' limb"[1317] of the BIT because while it argued that the expropriated land was later used for a public purpose, the public purpose was not authorized until a number of years after the expropriation took place and the expropriated land went entirely unused for six years. Under those purposes, the expropriation itself was not "for" a public purpose. The tribunal

[1313] *ADC v. Hungary*, Award,¶ 432, **CL-117**.

[1314] *Id.*, **CL-117**.

[1315] *Id.* at ¶ 430, **CL-117**.

[1316] *Id.* at ¶¶ 304, 433, 476, **CL-117**.

[1317] Waguih Elie George Siag and Corinda Vecchi v. Egypt ("Siag"), ICSID Case No ARB/05/15, Award (Jun. 1, 2009), ¶ 433, **CL-68**.

emphasized that the BIT required "that the public purpose [be] the reason the investment was expropriated."[1318]

512. Similarly, in *Siemens v. Argentina,* while the tribunal acknowledged that Argentina faced a dire fiscal situation and noted that an expropriation based on a related emergency law that followed could be in the public interest, the tribunal was not persuaded that the actions at issue in fact were taken on that basis. Rather, the evidence showed that Argentina began taking the actions that culminated in the deprivation of the claimant's property in order "to reduce the costs . . . of the Contract" and "as part of a change of policy," and that reference instead to the emergency law "became a convenient device to continue the process started more than a year earlier long before the onset of the fiscal crisis."[1319]

513. In the present case, there was no legitimate public purpose underlying the expropriation of Claimants' investments. Mexico's desire to favor domestic companies to the detriment of foreigners participating in the casino industry was not a legitimate public purpose.[1320] Neither was the PRI administration's desire to retaliate against the previous PAN regime, nor to compensate the Hank Rhon family for its political favors to President Peña Nieto.[1321] And it most certainly did not serve a public purpose to cancel Claimants' permit and close all of their Casinos, because they could not be "controlled."[1322]

514. The Sixteenth District Judge and Collegiate Tribunal's issuance of improper and unlawful resolutions in the *Amparo* 1168/2011 proceeding which ultimately resulted in SEGOB's cancellation of E-Games' permit did not serve a legitimate public purpose either.[1323]

[1318] *Id*. at ¶ 431, **CL-68**.

[1319] *Siemens*, Award, ¶ 273, **CL-91**.

[1320] *See supra* Section IV.V.6.

[1321] *See supra* Section IV.V.3.

[1322] Black Cube Statement, **CWS-57**, ¶ 47.

[1323] *See supra* Section IV.X.1.

And the evidence shows that the judiciary was acting for improper purposes and motivated by political purposes and under political influence.[1324] In fact, there has not been any "purpose" articulated by Mexico, as it never explained, for example, why the Collegiate Tribunal, in direct contravention of the Sixteenth District Judge's interpretation of its own ruling, determined that *Incidente de Inejecución* 82/2013 was unsubstantiated (*infundado*) and that SEGOB had not exceeded its authority in fulfilling the Sixteenth District Judge's January 31, 2013 Order by rescinding the November 16, 2012 Resolution.[1325] The Mexican Supreme Court's decision to dismiss E-Games' appeal on procedural grounds after actively reviewing the merits of the case for months and to remand the case to the same appellate court whose decision was the subject of the appeal was also made under the improper political pressure from the PRI administration.[1326]

515. Furthermore, SEGOB has also failed to provide Claimants with any explanation for its illegal closure of Claimants' Casinos on April 24, 2014.[1327] The closure was in direct defiance of a judicial order that prevented SEGOB from acting against E-Games pending a final resolution in the *Amparo* 1668/2011 proceeding.[1328] Furthermore, the closure directly contradicted the Mexican law principle that pending a final resolution of a case, the relevant authorities cannot act to the detriment of any of the parties.[1329]

516. In E-Games' *recurso de revision* against SEGOB's closure, Claimants clearly and specifically asserted that the closure was improper by virtue of E-Games' appeal pending before the Mexican Supreme Court, and yet, SEGOB's Undersecretary of Interior irrationally

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[1324] *See supra* Sections IV.V and X.2.

[1325] Guerrero Report, **CER-2**, ¶¶ 165, 253, 334-335, 205; Julio Gutiérrez Statement, **CWS-52**, ¶ 65; Order of the Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito (Feb. 19, 2014), **C-290**.

[1326] Julio Gutiérrez Statement, **CWS-52**, ¶¶ 101-102.

[1327] Julio Gutiérrez Statement, **CWS-52**, ¶ 72;

[1328] Julio Gutiérrez Statement, **CWS-52**, ¶ 70; Injunctive Relief (Sept. 2, 2013), **C-299**.

[1329] Julio Gutiérrez Statement, **CWS-52**, ¶ 70.

dismissed the *recurso de revision* without explanation.[1330] Neither did SEGOB explain why, in violation of Claimants' due process and property rights, it returned the possession of Claimants' casino facilities and assets therein to third parties.

517. The State's intention is not determinative of whether there has been an expropriation. The tribunal in *Biloune v. Ghana* observed in finding an expropriation that one need not plumb the Government's motivations to conclude on this record that the Government's conduct unquestionably caused the irreparable and total loss of Claimants' investments and other factors support the conclusion that this loss was an expropriation.[1331] However, where, as here, there is political and/or other improper motivations leading a government to destroy an investment, this is certainly relevant to the analysis.

518. Mexico's expropriation therefore lacked public interest and was unlawful under the NAFTA.

b. The Expropriation Lacked Due Process of Law and Was Contrary to Article 1105(1)

519. The NAFTA provides that an expropriation lacking due process of law and not in accordance with NAFTA Article 1105(1) is unlawful. The NAFTA does not distinguish between substantive and procedural due process. Accordingly, Mexico was bound to respect both substantive and procedural due process in carrying out the expropriation.[1332] Claimants were denied both forms of due process, and their investments were not accorded treatment in accordance with international law, including fair and equitable treatment (as discussed below).

520. Tribunals have confirmed that a lawful exercise of the right to expropriate requires compliance with *substantive* due process. In *Vivendi v. Argentina*, the tribunal

[1330] Julio Gutiérrez Statement, **CWS-52**, ¶ 70.

[1331] Antoine Biloune and Marince Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana, Award on Jurisdiction and Liability (Oct. 27, 1989), ICJ Reports 1993, p. 209, **CL-120**.

[1332] Siag, Award,¶ 440, **CL-68**.

recognized that a claimant could be denied substantive due process or "substantive justice" through a "substantively unfair" result.[1333]

521. As regards *procedural* due process, the tribunal in *ADC v. Hungary* explained:

> [It] demands an 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. Some 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.[1334]

522. To comply with the NAFTA's requirements, an expropriation cannot be motivated by discriminatory intent, must be effected under due process of law and the investment must be treated in accordance with Article 1105(1) of the NAFTA.

523. In this case, the Sixteenth District Judge and the Collegiate Tribunal's irregular and unlawful actions and resolutions in the *Amparo* 1668/2011 proceeding,[1335] as well as SEGOB's unlawful introduction of the November 16, 2012 Resolution in the enforcement stage of the *Amparo* 1668/2011 proceeding,[1336] ultimately resulted in the improper introduction of SEGOB's November 16, 2012 Resolution in the *Amparo* 1668/2012 proceeding, and, as a result, in the unlawful revocation of E-Games' permit.[1337] All of this, coupled with SEGOB's failure to follow the mechanisms provided for in Mexican law for the revocation of a permit,[1338] its failure to inform the Sixteenth District Judge of the impossibility to comply with its March

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[1333] *Compañía de Aguas del Aconquija S.A. and Compagnie Générale des Eaux v. Argentina, ICSID Case No. ARB/97/3, Award (Nov. 21, 2000), ¶ 80,* ***CL-121***.

[1334] ADC v. Hungary, Award,¶ 435, **CL-117**. See Ioannis Kardassopoulous v. Georgia ("Ioannis"), ICSID Case Nos. ARB/05/18 and ARB/07/15, Award (Mar. 3, 2010), ¶¶ 395-396, **CL-69**.

[1335] Guerrero Report, **CER-2**, ¶¶ 94-97, 104.

[1336] Guerrero Report, **CER-2,** ¶ 24; González Report, **CER-3**, ¶ 163-175.

[1337] Guerrero Report, **CER-2**, ¶ 24.

[1338] González Report, **CER-3**, ¶ 136; 151-152.

10, 2014 Order,[1339] its actions in defiance of the injunction barring the Mexican government from impeding or otherwise hindering the Casinos' operations pending the final resolution of the *Amparo* 1668/2011 proceeding, and its return of the Casino premises and Claimants' property to third parties,[1340] were contrary to Mexican law. They also violated Claimants' due process rights and resulted in Claimants' investments not being treated in accordance with Article 1105(1) of the NAFTA. Additionally, by improperly dismissing E-Games' appeal to the Mexican Supreme Court on procedural grounds and returning the case to the same Collegiate Tribunal that had previously ruled on the case—a court whose principal judge overseeing the appeal has admitted that the appellate court would never allow a gaming operator acquire a gaming permit[1341]—the Supreme Court denied Claimants' access to justice and violated their due process rights. These measures had a direct impact on E-Games, were specifically targeted towards E-Games, and directly resulted in the destruction of the Claimants' investments.

c. **The Expropriation Was Discriminatory**

524. Under Article 1110 of the NAFTA, an expropriation is unlawful if it is discriminatory. Several of Mexico's measures were targeted specifically at Claimants and E-Games with the aim of benefitting influential local companies and lashing back against the prior political administration. Among other things, Claimants have recorded statements by a former SEGOB official confirming that SEGOB singled out and discriminated against E-Games, in part, in order to benefit the PRI as well as the PRI-allied Grupo Caliente, and to discredit the previous, PAN-affiliated government.[1342] According to Mr. Ávila Mayo, SEGOB revoked E-Games' permit to reward Grupo Caliente for Carlos Hank Rhon's and his brother's

[1339] Guerrero Report, **CER-2**, ¶ 335-358.

[1340] Julio Gutiérrez Statement, **CWS-52**, ¶¶ 70, 108.

[1341] Julio Gutiérrez Statement, **CWS-52**, ¶ 65.

[1342] Black Cube Statement, **CWS-57**, ¶ 47.

decision to give up the political positions they sought in favor of other PRI candidates.[1343] Mexico also illegally revoked E-Games' permit to ensure that the PRI could control the casino market and its players, since Claimants—and consequently E-Games—was not allied with the PRI and presumably would not pay bribes to PRI government officials.[1344]

525. Moreover, SEGOB treated other permit holders, including Producciones Móviles, more favorably than it treated E-Games. As explained in more detail in Section IV.X.3.j, despite the existence of a series of elements proving a substantive legal similarity between E-Games' permit and Producciones Móviles' permit,[1345] SEGOB invalidated E-Games' November 16, 2012 permit, but has allowed Producciones Móviles to remain in business.

526. Mexico has also treated Claimants and E-Games in a less favorable way than it treated Petolof and other Mexican casino companies in discriminatorily revoking E-Games' November 16, 2012 permit and unlawfully denying E-Games' requests for new permits when it granted permits to Petolof and others using the same legal rationale and has allowed these other Mexican companies to retain their gaming permits and businesses.[1346]

527. Treating E-Games less favorably than other similarly situated permit holders—including other similarly situated Mexican companies—is by definition discriminatory. The discriminatory nature of Mexico's expropriation renders it unlawful under NAFTA.

d. The Expropriation Lacked Compensation

528. Article 1110 of NAFTA requires that expropriatory measures be accompanied by a compensation payment. The same provision defines how compensation must be

[1343] Black Cube Statement, **CWS-57**, ¶ 45.

[1344] Black Cube Statement, **CWS-57**, ¶ 47.

[1345] González Report, **CER-3**, ¶ 83-88; Julio Gutiérrez Statement, **CWS-52**, ¶¶ 41-42.

[1346] González Report, **CER-3**, ¶ 40-49; Petolof Permit No. DGJS/DGAAD/DCRCA/P-01/2016 (May 27, 2016) https://sijscasinos.segob.gob.mx/AppDGTI/SIJS/docs_salas/permisos/permini_32_.pdf, **C-328**.

calculated and how it must be paid when the expropriation is lawful having met the other Article 1110 criteria:

> 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.
>
> 4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.
>
> 5. If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.
>
> 6. On payment, compensation shall be freely transferable as provided in Article 1109.[1347]

529. The *Mondev v. United States* tribunal explained that:

> It is true that the obligation to compensate as a condition for a lawful expropriation (NAFTA Article 1110(1)(d)) does not require that the award of compensation should occur at exactly the same time as the taking. <u>But for a taking to be lawful under Article 1110, at least the obligation to compensate must be recognised by the taking State at the time of the taking, or a procedure must exist at that time which the claimant may effectively and promptly invoke in order to ensure compensation</u>.[1348]

530. To date, Mexico has not paid *any* compensation to the Claimants, much less the "fair market value" compensation required by the NAFTA. In addition, Mexico never recognized its obligation to compensate Claimants at the time of the expropriation, nor did the

[1347] NAFTA Article 1110, **CL-78**.

[1348] *Mondev International Ltd. v. United States of America* ("*Mondev*"), ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), ¶ 71 (emphasis added), **CL-17**.

Claimants have access to a procedure—neither in the *Amparo* 1668/2011 proceeding, in the Supreme Court proceeding, or before SEGOB—that they could have invoked in order to ensure compensation from Mexico. In fact, Mexico even expressly thwarted Claimants' numerous attempts to mitigate their damages and sell their assets after the Casinos were closed.[1349] Mexico's enduring failure to pay any compensation to the Claimants makes the expropriation unlawful under NAFTA.

531. For all of these reasons, Mexico has indirectly expropriated Claimants' investments and violated its obligations under Article 1110 of the NAFTA.

C. Mexico Breached Its Obligation To Provide Claimants' Investments Fair and Equitable Treatment Under Article 1105 of the NAFTA

1. The Fair and Equitable Treatment Standard

532. Article 1105(1) of the NAFTA states that, "[e]ach 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."[1350] The fair and equitable treatment ("**FET**") standard in the NAFTA encompasses various duties, including duties for the State to safeguard an investor's legitimate expectations; refrain from unreasonable, arbitrary and discriminatory measures; act transparently with due process; refrain from harassment, coercion, and abusive treatment; and act in good faith.[1351] In addition to expropriating Claimants' investments and breaching the national treatment and most favored nation obligations, Mexico also violated the fair and equitable treatment obligation in the NAFTA.

[1349] Gordon Burr Statement, **CWS-50**, ¶¶ 112-114; Erin Burr Statement, **CWS-51**, ¶ 119-121; Black Cube Statement, **CWS-57**, ¶ 50.

[1350] NAFTA, Article 1105, **CL-78**.

[1351] See, e.g., R. Dolzer & C. Schreuer, Principles of International Investment Law 145-160 (2d ed. 2012) ("Dolzer & Schreuer"), **CL-122**.

2. The Evolution of FET and the Minimum Standard of Treatment

533. In 2001, the NAFTA Free Trade Commission (FTC) interpreted the concept of fair and equitable treatment as "not requir[ing] treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[1352] Since this statement, both NAFTA tribunals and the NAFTA State Parties have agreed that both customary international law and the fair and equitable treatment standard have evolved over time and continue to evolve.[1353]

534. In the NAFTA case of *Mondev v. United States*, for example, the tribunal observed that each State party to the NAFTA, including Mexico, accepted that the minimum standard of treatment "can evolve" and "has evolved."[1354] The tribunal noted the considerable development over time in both substantive and procedural rights under international law, as well as the concordant body of practice reflected in more than 2,000 investment treaties that "almost uniformly provide for fair and equitable treatment of foreign investments."[1355] The tribunal in *Mondev* thus concluded that, in modern times, "what is unfair or inequitable need not equate with the outrageous or the egregious," and "a State may treat [a] foreign investment unfairly and inequitably without necessarily acting in bad faith."[1356]

[1352] NAFTA FTC, Notes of Interpretation of Certain Chapter 11 Provisions (Jul. 31, 2001), **CL-123**.

[1353] *ADF Group Inc. v. United States of America* ("*ADF*"), ICSID Case No. ARB (AF)/00/1, Award (Jan. 9, 2003), ¶ 179 (noting that Mexico, the United States, and Canada have all accepted "that the customary international law referred to in Article 1105(1) is not 'frozen in time' and that the minimum standard of treatment does evolve"), **CL-18**; *Mondev*, Award, ¶ 119, **CL-17**.

[1354] *Mondev*, Award, ¶¶ 119, 124, **CL-17**.

[1355] *Mondev*, Award, ¶ 117 (further observing that these treaties "will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law"), ¶ 125 (emphasizing that "the investments of investors under NAFTA are entitled, under the customary international law which NAFTA Parties interpret Article 1105(1) to comprehend, to fair and equitable treatment"), **CL-17**.

[1356] *Mondev*, Award, ¶ 116 (finding it "unconvincing to confine the meaning of 'fair and equitable treatment' . . . to what [that term] – had [it] been current at the time – might have meant in the 1920s when applied to the physical security of an alien"), **CL-17**; *Chemtura Corporation v. Government of Canada* ("*Chemtura*"), UNCITRAL, Award (Aug. 2, 2010), ¶ 121 (observing that it could not "overlook the evolution of customary international law, nor the impact of BITs on this evolution"), **CL-21**; *Merrill & Ring Forestry L.P. v. The Government of Canada* ("*Merrill*"), ICSID Case NO. UNCT/07/1, Award (Mar. 31, 2010), ¶ 193 (noting "a shared view that customary *international* law has not been frozen in time and that it continues to evolve in accordance with the realities of the international community"), **CL-124**.

535. Acknowledging the evolution of the minimum standard of treatment, many tribunals have observed that the content of the customary minimum standard of treatment is "indistinguishable" or at least "not materially different" from the content of the fair and equitable treatment standard as applied by investment treaty tribunals. For example, the tribunals in *Rusoro Mining v. Venezuela*,[1357] *Rumeli Telekom v. Kazakhstan*,[1358] *Biwater v. Tanzania*,[1359] *Azurix v. Argentina*,[1360] *Duke Energy v Ecuador*,[1361] *Saluka v Czech Republic*,[1362] and others[1363] have found that the minimum standard of treatment under customary international law "has evolved"[1364] and that the customary international minimum standard has essentially converged with the fair and equitable treatment standard. The *Rusoro* tribunal observed that the customary international minimum standard is "indistinguishable

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[1357] *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela* ("*Rusoro Mining*"), ICSID Case No. ARB(AF)/12/5, Award (Aug. 22, 2016) ¶ 520 (The customary international minimum 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 . . . the BIT incorporates or fails to incorporate the [customary international minimum] Standard when defining FET has become dogmatic: there is no substantive difference in the level of protection afforded by both standards"), **CL-125**.

[1358] *Rumeli Telekom*, Award, ¶ 611 (The tribunal "shares the view of several ICSID tribunals that the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law"), **CL-113**.

[1359] *Biwater Gauff* (*Tanzania) Ltd. v. United Republic of Tanzania* ("*Biwater v. Tanzania*"), ICSID Case No. ARB/05/22, Award (Jul. 24, 2008), ¶ 592 ("[T]he Tribunal also accepts, as found by a number of previous arbitral tribunals and commentators, that the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law."), **CL-22**.

[1360] *Azurix Corp. v. Argentine Republic* ("*Azurix*"), ICSID Case No. ARB/01/12, Award (Jul. 14, 2006), ¶ 361 ("[T]he minimum requirement to satisfy this standard [fair and equitable treatment] has evolved and the Tribunal considers that its content is substantially similar whether the terms are interpreted in their ordinary meaning, as required by the Vienna Convention, or in accordance with customary international law."), **CL-126**.

[1361] *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* ("*Duke Energy*"), ICSID Case No. ARB/04/19, Award (Aug. 18, 2008), ¶¶ 335-337, **CL-127**.

[1362] *Saluka Investments BV (The Netherlands) v. The Czech Republic* ("*Saluka*"), UNCITRAL, Partial Award (Mar. 17, 2006), ¶ 291 ("[I]t appears that the difference between the Treaty standard laid down in Article 3.1 and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real. To the extent that the case law reveals different formulations of the relevant thresholds, an in-depth analysis may well demonstrate that they could be explained by the contextual and factual differences of the cases to which the standards have been applied."), **CL-129**.

[1363] *See also Siemens*, Award, ¶ 291, **CL-91**; *CMS Gas Transmission Company v. The Argentine Republic* ("*CMS*"), ICSID Case No. ARB/01/8, Award (May 12, 2005), ¶ 284, **CL-129**; *Occidental Exploration and Production Co. v. The Republic of Ecuador* ("*Occidental v. Ecuador*"), LCIA Case No. UN3467, Final Award (Jul. 1. 2004), ¶¶ 188-90, **CL-130**.

[1364] *Azurix*, Award, ¶ 345; Siemens, Award, ¶¶ 295-297, 299, **CL-91**.

from the FET standard and grants investors an equivalent level of protection as the latter."[1365] The *Rumeli* tribunal noted that the customary international minimum standard is "not materially different" from the FET standard.[1366] In *Duke Energy v. Ecuador*, the tribunal held that the standard for fair and equitable treatment under the BIT and the minimum standard of treatment under customary international law are "essentially the same."[1367] Thus, in evaluating FET claims, awards rendered by both NAFTA and non-NAFTA tribunals are helpful in establishing the bounds of State behavior that violates the fair and equitable standard.

536. Against this backdrop, the tribunal in the seminal NAFTA case on the minimum standard of treatment, *Waste Management II*, found that "despite certain differences of emphasis a general standard for Article 1105 [providing content for the minimum standard of treatment] is emerging."[1368] In an frequently cited passage widely regarded as a recitation of the contemporary minimum standard of treatment with respect to foreign investment, the *Waste Management II* tribunal stated:

> 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

[1365] *Rusoro Mining*, Award, ¶ 520, **CL-125**.

[1366] *Rumeli Telekom*, Award, ¶ 611, **CL-113**; see also *Azurix*, Award, ¶ 364 ("The question whether fair and equitable treatment is or is not additional to the minimum treatment requirement under international law is a question about the substantive content of fair and equitable treatment and, whichever side of the argument one takes, the answer to the question may in substance be the same."), **CL-126**.

[1367] *Duke Energy, Award*, ¶¶ 333, 335-337, **CL-127**; see also *Saluka*, Partial Award, ¶ 291 (stating that "the difference between the Treaty standard . . . and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real"), **CL-128**; *Murphy Exploration and Production Company International v. Republic of Ecuador*, PCA Case No. 2012-16 (formerly AA 434), Partial Final Award (May 6, 2016), ¶¶ 205-206, 208 (noting that the debate between the "autonomous treaty standard" versus the "customary international law" standard is more theoretical than substantial, because "the repeated reference to 'fair and equitable' treatment in investment treaties and arbitral awards shows that the FET standard is now generally accepted as reflecting recognisable components, such as: transparency, consistency, stability, predictability, conduct in good faith and the fulfilment of an investor's legitimate expectations" and concluded that "there is no material difference between the customary international law standard and the FET standard" under the BIT at issue in the case"), **CL-131**.

[1368] *Waste Management II, Award*, ¶ 98, **CL-36**.

> 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.[1369]

537. The *Waste Management II* tribunal's articulation of the standard has been endorsed by numerous other tribunals, including (i) tribunals, that, like *Waste Management II*, were addressing FET provisions expressly tied to the customary international law minimum standard of treatment,[1370] and (ii) tribunals addressing FET provisions containing a general reference to international law,[1371] and (iii) tribunals addressing FET provisions without any

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[1369] *Id.*, **CL-36** (emphasis added).

[1370] *E.g.*, *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 (May 22, 2012), ¶ 141 ("The [Waste Management II] tribunal identified the customary international law standard . . . ."), **CL-132**; *Merrill*, Award, ¶ 199 ("*Waste Management* also identified unfair and inequitable treatment with conduct that is arbitrary, grossly unfair, unjust or idiosyncratic which, in so far as it also encompasses questions of due process, leads to an outcome which 'offends judicial propriety'."), **CL-124**; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award (Dec. 19, 2013), ¶ 455 ("The Arbitral Tribunal agrees with the many arbitral tribunals [including *Waste Management II*] and authorities that have confirmed that such is the content of the minimum standard of treatment in customary international law."), **CL-133**; *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award (Apr. 18, 2013), ¶ 641 ("The Tribunal refers to the Waste Management tribunal's opinion.") (counsel translation), **CL-134**; *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award (Jun. 29, 2012), ¶ 219 ("The Tribunal finds that Waste Management II persuasively integrates the accumulated analysis of prior NAFTA Tribunals and reflects a balanced description of the minimum standard of treatment. The Tribunal accordingly adopts the Waste Management II articulation of the minimum standard for purposes of this case."), **CL-135**; *Chemtura*, Award, ¶¶ 122, 215 (agreeing with the *Mondev* tribunal that "the evolution of international customary law" should be taken into account "in ascertaining the content of the international minimum standard" and further agreeing with the *Waste Management II, Mondev, and ADF* tribunals that a violation need not be "outrageous" to breach Article 1105), **CL-21**; *Cargill, Inc. v. United Mexican States* ("*Cargill v. Mexico*"), ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009), ¶ 283 ("The central inquiry therefore is: what does customary international law currently require in terms of the minimum standard of treatment to be accorded to foreigners? The Waste Management II tribunal concluded that a general interpretation was emerging from NAFTA awards."), **CL-136**; *Methanex Corp. v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (Aug. 3, 2005), Part IV, Chapter C, ¶ 12, Chapter D, ¶ 8 (referring to the fair and equitable treatment standard articulated in *Waste Management II* with approval), **CL-27**; *GAMI Investments Inc. v. Mexico*, UNCITRAL, Final Award (Nov. 15, 2004), ¶ 95 ("The ICSID tribunal in Waste Management II made what it called a 'survey' of standards of review applied by international tribunals dealing with complaints under Article 1105. It observed the emergence of a 'general standard for Article 1105.'"), **CL-39**.

[1371] *E.g.*, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* ("*Gold Reserve*"), ICSID Case No. ARB(AF)/09/1, Award (Sept. 22, 2014), ¶¶ 568–573 (noting that "[i]n *Waste Management v. Mexico* the tribunal summarized its position on the FET standard" and citing this summary with approval), **CL-137**; *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability (Sept. 12, 2014), ¶ 558, n. 878 ("[A]s has been found by many other investment treaty tribunals presented with the task of ascertaining the standard's meaning – even where the applicable treaty contains no reference to customary international law – there is much to be said for the general approach stated by the tribunal in Waste Management."), **CL-50***; OKO Pankki Oyj et al v. The Republic of Estonia*, ICSID Case No. ARB/04/6, Award (Nov. 19, 2007), ¶ 239 ("It is therefore helpful to consider what arbitration tribunals have decided in practice, in specific cases, particularly in . . . *Waste Management* . . . ."), **CL-138**; *El Paso Energy International Company v. Argentine Republic* ("*El Paso v. Argentina*"), ICSID Case No ARB/03/15, Award (Oct. 31.2011), ¶ 348 ("There is an overwhelming trend to consider the touchstone of fair and equitable treatment to be found in the legitimate and reasonable expectations of the Parties, which derive from the obligation of good faith. This has been aptly stated by the tribunal in *Waste Management*."), **CL-139**; *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID

such express references.[1372] This is consistent with the view that the FET standard as applied by investment treaty tribunals today reflects the evolution of the customary international law minimum standard of treatment.

3. Traditional Elements of the Fair and Equitable Treatment Standard

538. The FET standard of conduct is broadly designed to "fill gaps which may be left by the more specific standards" of international investment treaties, and the principle of good faith is the "common guiding beacon" orienting the understanding and interpretation of the

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Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006), ¶¶ 127-128 ("[T]he fair and equitable treatment analysis involves consideration of the investor's expectations when making its investment in reliance on the protections to be granted by the host State . . . this view is reflected in . . . *Waste Management*."), **CL-140**; *Azurix*, Award, ¶¶ 368–373 (referring to *Waste Management II* in discussing the modern interpretation of the fair and equitable treatment standard), **CL-126**.

[1372] *Biwater v. Tanzania*, Award, ¶¶ 597–600 (citing the NAFTA cases of *Waste Management II* and *International Thunderbird Gaming v. Mexico*, and stating that their "description of the general threshold for violations of this standard is appropriate"), **CL-22**; *British Caribbean Bank Ltd. (Turks & Caicos) v. Government of Belize*, PCA Case No. 2010-18, Award (Dec. 19, 2014), ¶ 282 (citing *Waste Management II* for the proposition that "fair and equitable treatment is frequently noted to include a prohibition on conduct that is 'arbitrary,' 'idiosyncratic,' or 'discriminatory'" and noting that "[t]here is an inherent logic to this association"), **CL-141**; *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Decision on Jurisdiction (Dec. 15, 2014), ¶ 337 (citing *Waste Management II* for the proposition that "a violation of the obligation to accord fair and equitable treatment involves 'arbitrary . . . notoriously unfair behavior . . . idiosyncratic' or that 'involves a lack of due process.'") (counsel translation), **CL-142**; *Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Final Award (May 21, 2013), ¶ 604 ("The Tribunal is then in agreement with what has been affirmed by other arbitral tribunals [including *Waste Management II*] in which the FET serves as the legal basis to protect foreign investors from arbitrary, inconsistent, not transparent and capricious behavior attributable to host States.") (counsel translation), **CL-143**; *Rupert Joseph Binder v. Czech Republic*, UNCITRAL, Final Award (Redacted) (Jul. 15, 2011), ¶ 445 (citing *Waste Management II* for the assertion that "[t]he state's failure to observe the legitimate expectations of the investor that it has itself induced will amount to a breach of the fair and equitable treatment standard"), **CL-144**; *EDF (Services) Ltd. v. Romania* ("*EDF v. Romania*"), ICSID Case No. ARB/05/13, Award (Oct. 8, 2009), ¶ 216 ("[O]ne of the major components of the FET standard is the parties' legitimate and reasonable expectations with respect to the investment they have made […] It comes into consideration whenever the treatment attributable to the State is in breach of representations made by it which were said to be reasonably relied upon by the Claimant. This concept was stated by the tribunal in Waste Management."), **CL-145**; *National Grid P.L.C. v. The Argentine Republic*, UNCITRAL, Award (Nov. 3, 2008), ¶ 173 ("Waste Management considered it 'relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.'"), **CL-100**; *Siemens*, Award, ¶ 299 ("[Under] Waste Management II, the current standard includes the frustration of expectations that the investor may have legitimately taken into account when it made the investment."), **CL-91**; *Saluka*, Partial Award, ¶ 302 ("The standard of 'fair and equitable treatment' is therefore closely tied to the notion of legitimate expectations [as] [t]he tribunal in Waste Management […] stated."), **CL-128**; *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award (Redacted) (Jun. 26, 2009), ¶ 203 (noting approvingly that Saluka endorsed and commended Waste Management II's threshold for infringement of the fair and equitable treatment standard as a useful guide), **CL-146**; *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Final Award (Dec. 11, 2013), ¶ 522 ("There is no dispute that conduct that is substantively improper, whether because it is arbitrary, manifestly unreasonable, discriminatory or in bad faith, will violate the fair and equitable treatment standard . . . [a]s stated by the *Waste Management II* tribunal . . . ."), **CL-147**.

obligation.[1373] Against this back drop of good faith, tribunals have concluded that the ordinary meaning of "fair and equitable" is generally "just," "even-handed," "unbiased," and "legitimate."[1374] As noted above, the NAFTA tribunal in *Waste Management II* pointed to "arbitrary, grossly unfair, unjust or idiosyncratic, [and/or] discriminatory" measures as violating the FET standard.[1375] Other NAFTA tribunals have also included the general standard of conduct that is "improper and discreditable."[1376]

539. Beyond general descriptions of the types of behavior that violate the fair and equitable treatment standard, tribunals and scholars have largely agreed on a few core, often related and overlapping, elements of the fair and equitable treatment obligation under customary international law, including:

(i) Safeguarding investors' legitimate expectations,

(ii) Refraining from unreasonable, arbitrary and discriminatory measures,

(iii) Refraining from harassment, coercion, and abusive treatment,

(iv) Acting in good faith,

(v) Providing transparency and due process.[1377]

[1373] Dolzer & Schreuer at 132, 156 (The clause is broadly designed "to fill gaps which may be left by the more specific standards, in order to obtain the level of investor protection intended by the treaties." The principle of good faith is the "common guiding beacon" that will orient the understanding and interpretation of the obligations), **CL-122**; *see also Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007), ¶ 297, **CL-148**.

[1374] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile* ("*MTD v. Chile*"), ICSID Case No. ARB/01/7, Award (May 25, 2004), ¶ 113, **CL-149**; Saluka, Partial Award, ¶¶ 297–298, **CL-128**; *Azurix*, Award, ¶ 360, **CL-126**.

[1375] *Waste Management II*, Award, ¶ 98, **CL-36**.

[1376] *Mondev*, Award, ¶ 127, **CL-17**; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* ("*Loewen*"), ICSID Case No. ARB(AF)/98/3, Award (Jun. 26, 2003), ¶ 133 (in reference to *Mondev*), **CL-67**. See also UNCTAD, Fair And Equitable Treatment, 61-83, UNCTAD/DIAE/IA/2011/5 (2012), **CL-150**.

[1377] *See*, e.g., Dolzer & Schreuer at 145-160, **CL-122**; UNCTAD, Fair And Equitable Treatment, 61-83, UNCTAD/DIAE/IA/2011/5 (2012), **CL-150**; Andrew Newcombe & Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment 279 (2009), **CL-151**; Ioana Tudor, The Fair and Equitable Treatment Standard in the International Law of Foreign Investment 156-181 (2008), **CL-152**. For an overview of the contents of the standard in function of arbitral practice, see also Katia Yannaca-Small, Fair and Equitable Treatment Standard: Recent Developments, in STANDARDS OF INVESTMENT PROTECTION 111, 118 et seq. (August Reinisch ed., 2008), **CL-153**.

540. These core elements of the fair and equitable treatment standard are each described in detail below.

a. Obligation To Safeguard Legitimate Expectations

541. A cornerstone of the FET standard is the requirement that States safeguard investors' legitimate expectations, thus according investors a stable and predictable investment environment. The NAFTA Preamble itself states that an underlying resolution of the Treaty was to establish "clear . . . rules" and "ensure a predictable commercial framework for business planning and investment."[1378] As commentators have observed, "there is in fact no single tribunal on record that has steadfastly refused to find that – at least in principle – [the FET] standard encompasses legitimate expectations."[1379] Tribunals have described the obligation as one "to treat foreign investors so as to avoid the frustration of investors' legitimate and reasonable expectations."[1380] The tribunal in *Waste Management II* noted that in applying the FET 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."[1381] The seminal award in *Tecmed v. Mexico,* a case decided under the FET standard "according to international law," offers a clear recitation of the operation of a claimant's legitimate expectations:

> The Arbitral Tribunal considers that this provision of the Agreement [FET], in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. 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 . . . . 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

[1378] NAFTA Preamble, **CL-154**.

[1379] Michele Potesta, Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept 15 (Society of International Economic Law, 3rd Biennial Global Conference, 2013), http://ssrn.com/abstract=2102771, **CL-155**.

[1380] *Saluka,* Partial Award, ¶ 302, **CL-128**.

[1381] *Waste Management II*, Award, ¶ 98, **CL-36**.

> by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.[1382]

542. Consistent with this articulation, the NAFTA tribunal in *Thunderbird v. Mexico* observed that:

> the concept of "legitimate expectations" relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.[1383]

543. An investor may thus legitimately expect that a State will "conduct itself vis-à-vis his investment in a manner that [is] reasonably justifiable and [does] not manifestly violate basic requirements of consistency, transparency, even-handedness and non-discrimination."[1384] At the very least, an investor can have the legitimate expectation that the conduct of the host State will be fair and equitable in the sense that it will not fundamentally contradict basic principles of its own laws and regulations. This includes, as noted by the tribunal in *Alpha v Ukraine*, a legitimate expectation that a State will not act "beyond its authority."[1385]

b. Obligation To Refrain from Unreasonable, Arbitrary and Discriminatory Measures

544. The obligation to treat investments reasonably, non-arbitrarily and in a non-discriminatory fashion is closely tied to the obligation to safeguard the investor's legitimate expectations. In considering this requirement, the *Saluka* tribunal explained that a foreign investor "is entitled to expect that the [host State] will not act in a way that is manifestly

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[1382] *Tecmed*, Award, ¶ 154 (emphasis added), **CL-84**.

[1383] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award (Jan. 26, 2006), ¶ 147, **CL-7**.

[1384] *Ioannis*, Award, ¶ 441, **CL-69**.

[1385] *Alpha Projektholding GmbH v. Ukraine* ("*Alpha Projektholding*"), ICSID Case No ARB/07/16, Award (Nov. 8, 2010), ¶ 422, **CL-156**.

inconsistent, non-transparent, and unreasonable."[1386] The standard of whether State conduct is unreasonable, arbitrary and/or discriminatory is flexible and broad and needs to be determined in light of all the circumstances of the case. In the words of the tribunal in *CME v. Czech Republic*:

> the determination of reasonableness is in its essence a matter for the arbitrator's judgment. That judgment must be exercised within the context of asking what the parties to bilateral investment treaties should jointly anticipate, in advance of a challenged action, to be appropriate behavior in light of the goals of the Treaty.[1387]

545. Under the NAFTA, the obligation to treat investments in a non-discriminatory manner is all the more important because the Treaty encompasses a non-discrimination clause. As the NAFTA tribunal in *Thunderbird v. Mexico* observed:

> Equality between individuals and absence of favouritism – i.e. non-discrimination – plays a role in the assessment of legitimate expectation. That is even more relevant in investment treaties where the prohibition on discrimination in favour of domestic competitors is formally enshrined, as in Art. 1102 of the NAFTA.[1388]

546. Most tribunals agree that unreasonable, arbitrary or discriminatory conduct is *per se* a breach of the FET standard.[1389] For example, the tribunal in *CMS Gas v. Argentina* noted that "[a]ny measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment."[1390]

547. The tribunal's analysis of the government's breach of FET in the *Gold Reserve v. Venezuela* case is also instructive. There, the tribunal found that Venezuela breached the fair and equitable treatment obligation because it made decisions regarding permits and

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[1386] *Saluka*, Partial Award, ¶ 309, **CL-128**.

[1387] *CME*, Partial Award, ¶ 158, **CL-108**.

[1388] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Separate Opinion of Thomas Wälde (Dec. 1, 2005), ¶ 102 (emphasis added), **CL-164**.

[1389] *See*, e.g., UNCTAD, Fair and Equitable Treatment, 37, UNCTAD/ITE/IIT/11 (Vol. III) (1999), **CL-165**

[1390] *CMS*, Award, ¶ 290, **CL-129**.

licenses on the basis of political preferences and not on applicable legal rules.[1391] 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.[1392]

548. From the arbitral jurisprudence, one can discern three general types of arbitrary measures: those (i) that inflict damage on the investor without serving any apparent legitimate purpose; (ii) that are not based on legal standards but on discretion, prejudice, or personal preference; and (iii) that are taken for reasons that are different from those put forward by the decision maker.[1393]

c. Obligation To Refrain from Harassment, Coercion and Abusive Treatment

549. Just as unreasonable, arbitrary and discriminatory conduct *per se* violates the State's FET obligation, harassment, coercion and abuse are also serious and *per se* failures of the State's obligation to provide fair and equitable treatment.[1394] As the *Tokios Tokelés v. Ukraine* tribunal held, a State campaign to punish an investor "must surely be the clearest infringement one could find of the provisions and aims of the Treaty."[1395] In other words, a State may not use its superior power to harass, coerce, or abuse an investor.

550. For example, in finding a violation of FET, the NAFTA tribunal in *Pope & Talbot v. Canada* found that the relevant government organ had launched an aggressive

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[1391] *Gold Reserve*, Award, ¶¶ 564, 580-581, **CL-137**.

[1392] *Id.* at ¶ 591, **CL-137**.

[1393] Dolzer & Schreuer at 193, **CL-122**; see also EDF v. Romania, Award, ¶ 303, **CL-145**; Joseph Charles Lemire v. Ukraine ("*Lemire*"), ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (Jan. 14, 2010), ¶ 262, **CL-166**.

[1394] Campbell McLaughlan, Laurence Shore and Matthew Weiniger, International Investment Arbitration: Substantive Principles 325-326 (2017) ("McLaughlan, Shore & Weiniger"), **CL-167**.

[1395] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award (Jul. 26, 2007), ¶ 123, **CL-168**. In another example, in Vivendi II, the tribunal found that the State, improperly and without justification, had mounted an illegitimate "campaign" against the investment, which constituted a breach of the fair and equitable treatment standard. Vivendi II, Award, ¶¶ 7.4.19-7.4.41, **CL-92**.

"verification review" that was "burdensome and confrontational" and replete with "threats and misrepresentation."[1396] The tribunal explained that the Canadian regulatory authority

> changed its previous relationship with the Investor and the Investment from one of cooperation … to one of threats and misrepresentation. Figuring in this new attitude were assertions of non-existent policy reasons for forcing them to comply with very burdensome demands for documents, refusals to provide them with promised information, threats of reductions and even termination of the Investment's export quotas, serious misrepresentations of fact in memoranda to the Minister concerning the Investor's and the Investment's actions and even suggestions of criminal investigation of the investment's conduct.[1397]

551. In *Tecmed v. Mexico*, Mexico denied a permit's renewal in order to force the investor to relocate to another site, incurring significant costs and risks. Finding that this violated the FET standard in the treaty according to international law, the tribunal noted that:

> Under such circumstances, such pressure involves forms of coercion that may be considered inconsistent with the fair and equitable treatment to be given to international investments under Article 4(1) of the Agreement and objectionable from the perspective of international law.[1398]

552. Finally, in *Desert Line v. Yemen*, the tribunal found that the State imposed a settlement agreement on the claimant under physical and financial duress.[1399] Notably, the tribunal not only found that the State's conduct violated the FET standard, but it also awarded rare moral damages to the claimant.[1400] The tribunal noted that the State's conduct "falls well short of minimum standards of international law and cannot be the result of fair and equitable negotiation."[1401]

[1396] *Pope & Talbot Inc. v. Canada*, UNCITRAL, Award in Respect of Damages (May 31, 2002), ¶¶ 67–69, **CL-169**.

[1397] *Id*. at ¶ 68, **CL-169**.

[1398] *Tecmed*, Award, ¶ 163, **CL-84**.

[1399] *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award (Feb. 6, 2008), ¶¶ 151–194, **CL-170**.

[1400] *Id*. at ¶¶ 194, 290, **CL-170**.

[1401] *Id*. at ¶ 179, **CL-170**.

d. **Obligation To Act in Good Faith**

553. Good faith is one of the foundations of international law in general and of foreign investment law and the FET standard in particular.[1402] As the NAFTA tribunal in *Thunderbird* observed, the concept of "good faith" is explicitly mentioned in Article 31 of the Vienna Convention on the Law of Treaties ("**VCLT**").[1403] As a "general, if not cardinal principle of customary international law,"[1404] good faith is inherent in the concept of FET and minimum standard of treatment.[1405] Although tribunals have noted that the FET standard generally "is an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not,"[1406] tribunals have also confirmed that State conduct carried out with a demonstrable lack of good faith will, of itself, constitute a breach of the obligation to afford FET.[1407]

554. For example, in *Tecmed*, Mexico's regulatory body for environmental issues refused to renew the claimant's permit to operate a landfill, because the site had "become a nuisance due to political reasons relating to the community's opposition."[1408] The tribunal held that such politically-motivated conduct amounted to a breach of the fair and equitable treatment standard.[1409] Similarly, the tribunal in *Azurix* found that Argentina had breached the fair and equitable treatment standard as a result of the arbitrary actions of provincial authorities who

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[1402] *See* Dolzer & Schreuer at 156-58, **CL-122**.

[1403] *International Thunderbird Gaming Corporation v. United Mexican* States ("*Thunderbird v. Mexico*"), UNCITRAL, Arbitral Award (Jan. 26, 2006), ¶ 91 (referring to Article 31 of the VCLT), **CL-7**; see also VCLT, Article 31, **CL-41**.

[1404] *Siag*, Award, ¶ 450 (describing the principle that States must act in good faith as the "general, if not cardinal principle of customary international law"), **CL-68**.

[1405] *See Thunderbird v. Mexico*, Arbitral Award, ¶ 138, **CL-7**; *Siag*, Award, ¶ 450, **CL-68**.

[1406] *Occidental v. Ecuador*, Final Award, ¶ 186, **CL-130**. *See also CMS*, Award, ¶ 280, **CL-129**; *Duke Energy*, Award, ¶ 341, **CL-127**; *Azurix*, Award, ¶ 372, **CL-126**; *Siemens*, Award, ¶¶ 299-300, **CL-212**.

[1407] *See, e.g*., *Rumeli Telekom*, Award, ¶ 609, **CL-113**; Biwater v. Tanzania, ¶ 602, **CL-22**.

[1408] *Tecmed*, Award, ¶ 164, **CL-84**.

[1409] *Id*. at ¶ 166, **CL-84**.

intervened "for political gain" during a tariff dispute with ABA, which provided potable water and sewerage services.[1410]

555. Arbitral practice clearly indicates that the FET standard may be violated even if no *mala fide* is involved.[1411] As the NAFTA tribunal in *Loewen v. United States* clarified, "[n]either State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice."[1412] Similarly, the NAFTA tribunal in *Mondev v. United States* stated, "[t]o the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith."[1413]

556. Nevertheless, while bad faith is certainly not necessary for a violation of FET,[1414] when a State acts in bad faith against the investor, as here, this presents a paradigmatic violation of the standard.[1415] Bad faith can include "the use of legal instruments for purposes other than those for which they were created."[1416] As the tribunal in *Frontier Petroleum v. Czech Republic* held, the concept of "bad faith":

> also includes a conspiracy by state organs to inflict damage upon or to defeat the investment, the termination of the investment for reasons other than the one

[1410] *Azurix*, Award, ¶ 144, **CL-126**.

[1411] *See*, e.g., *Occidental v. Ecuador*, Final Award, ¶ 186 ("this is an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not"), **CL-130**; *CMS*, Award, ¶ 280 ("The Tribunal believes this is an objective requirement unrelated to whether the Respondent has had any deliberate intension or bad faith in adopting the measures in question. Of course, such intention and bad faith can aggravate the situation but are not an essential element of the standard."), **CL-129**; *El Paso v. Argentina*, Award, ¶ 357 ("[A] violation can be found even if there is a mere objective disregard of the rights enjoyed by the investor under the FET standard, and that such a violation does not requires subjective bad faith on the part of the State."), **CL-139**.

[1412] *Loewen*, Award, ¶ 132, **CL-67**.

[1413] *Mondev*, Award, ¶ 116, **CL-17**.

[1414] Dolzer & Schreuer at 157, **CL-122**; McLaughlan, Shore & Weiniger at 326, **CL-167**.

[1415] *Cargill v. Mexico*, Award, ¶ 301, **CL-136**.

[1416] *Frontier Petroleum Services Ltd. v. Czech Republic* ("*Frontier*"), UNCITRAL, Final Award (Nov. 12 2010), ¶ 300, **CL-157**.

> put forth by the government, and expulsion of an investment based on local favoritism.[1417]

557. In *Bayindir v. Pakistan*, the investor claimed that its expulsion was based on local favoritism and bad faith, because the reasons given by the government did not correspond with its actual motivation.[1418] The tribunal found that "unfair motives of expulsion, if proven, are capable of founding a fair and equitable treatment claim under the BIT".[1419]

558. Finally, in yet another example, the tribunal in *Waste Management II* stated:

> The Tribunal has no doubt that a deliberate conspiracy – that is to say, a conscious combination of various agencies of government without justification to defeat the purposes of an investment agreement – would constitute a breach of Article 1105(1). A basic obligation of the State under Article 1105(1) is to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means.[1420]

559. Thus while bad faith is not a necessary condition for an FET violation, it is certainly a sufficient condition. In other words, demonstrated bad faith is significant, if not completely determinative, evidence that a State has committed an FET violation.

e. Obligation To Provide Due Process and Transparency

560. Finally, tied to the obligation of good faith and the obligation to safeguard an investor's legitimate expectations and to refrain from unreasonable, arbitrary and discriminatory measures is the obligation to provide due process and transparency in decision-making.

561. The NAFTA refers to due process multiple times. Article 1110 discusses the importance of due process of law as a necessary requirement of a lawful expropriation and refers to Article 1115.[1421] Article 1115, in turn, notes the establishment of "a mechanism for

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[1417] *Id*. (footnotes omitted) (emphasis added), **CL-157**.

[1418] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (Nov. 14, 2005), ¶¶ 232-243, **CL-23**.

[1419] *Id*. at ¶ 250, **CL-23**.

[1420] *Waste Management II*, Award, ¶ 138, **CL-36**.

[1421] NAFTA Article 1110, **CL-78**.

the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal."[1422]

562. Due process is a fundamental aspect of the rule of law generally, and a key element of fair and equitable treatment.[1423] Transparency is an important aspect of due process. Both are important aspects of procedural propriety.[1424] Serious departures from due process may result in a violation of the related international law concept of denial of justice. Because of the grave due process violations in this case, these are discussed separately under Section V.D in the section involving the denial of justice standard.

f. Conclusion

563. As this review of recent cases reflects, the minimum standard of treatment under customary international law has evolved and, in the context of foreign investment, has converged in substance with the standard of fair and equitable treatment as interpreted by investment treaty tribunals. Specifically, as demonstrated above, it now is axiomatic that a host State has legal obligations under the minimum standard of treatment—and thus under Article 1105 of the NAFTA—to refrain from exercising its powers unreasonably, arbitrarily or in a discriminatory fashion; to provide transparency and due process; to not coerce or harass; to act in good faith and to honor legitimate expectations that arose from conditions that it offered to induce the investor's investment.

4. Mexico Breached the Fair and Equitable Treatment Standard

564. Sections IV.Q and X of this Memorial detailed the various facts that reveal Mexico's numerous breaches of the generally recognized tenets of the FET standard. Specifically, Mexico violated the FET obligation by:

[1422] NAFTA Article 1115 (emphasis added), **CL-78**.

[1423] Dolzer & Schreuer at 154, **CL-122**.

[1424] *Id*. at 154-156, **CL-122**.

(i) Frustrating Claimants' legitimate expectations by revoking E-Games' permit, interfering in the judicial proceedings to ensure that SEGOB's cancellation of Claimants' permit would withstand any judicial scrutiny, and illegally closing the Casinos to only later let some of them be reopened illegally by Claimants' competitors during these proceedings; resulting in the total destruction of Claimants' investments based on improper, political and discriminatory motivations;

(ii) Treating Claimants in an arbitrary and discriminatory manner by interfering with Claimants' Casino operations and refusing to grant Claimants new permits citing pretextual reasons;

(iii) Systematically interfering with Claimants' repeated efforts to mitigate their damages including by refusing to allow Claimants to reopen their Casinos and/or sell their Casino assets to third parties; and,

(iv) Subjecting Claimants to harassment and retaliatory measures by pursuing arbitrary and illegal tax audits and criminal investigations against E-Games and its representatives.

565. We discuss each of the measures below and demonstrate how through this conduct Mexico violated the FET standard in Article 1105.

a. Mexico Frustrated Claimants' Legitimate Expectations and Acted in Bad Faith by Revoking E-Games' Permit, Illegally Closing Their Casinos and Destroying Claimants' Investments Based on Improper, Political, and Discriminatory Motivations

566. Mexico violated its FET obligations under the NAFTA by implementing a series of arbitrary and discriminatory measures that ultimately culminated in the revocation of E-Games' independent gaming permit and the permanent closure of the Casinos. These acts not only amount to an illegal expropriation, as described in Section V.B above, but also frustrated Claimants' legitimate expectations and are also independent violations of Mexico's obligations under the NAFTA to accord FET and refrain from arbitrary and discriminatory measures.

567. First, Claimants had a legitimate expectation that Mexico would respect Claimants' investments, and should Mexico ever act to expropriate their investments, it would only do so for public purpose, in a non-discriminatory and reasonable manner, not without just compensation, and with due process. However, as explained above, Mexico implemented a

series of highly irregular administrative and judicial measures, including the unlawful taking of E-Games' November 2012 permit and SEGOB's illegal closure of the Casinos on April 24, 2014, to destroy Claimants' investments and to drive out Claimants from the Mexican casino industry.

568. Second, as explained above, in improperly revoking E-Games' independent permit and closing down the Casinos, Mexico acted to further an improper political agenda. Soon after the inauguration of President Peña Nieto, the new PRI administration, primarily acting through SEGOB, initiated a devastating campaign against E-Games' permit for reasons unrelated to the legal validity of E-Games' permit.[1425] SEGOB's new director under President Peña Nieto, Mrs. Salas, within days of taking office, declared publicly that Claimants' permit was "illegal" and had been granted under "irregular circumstances" at the end of the Calderon/PAN administration.[1426] How would she even know this just days after taking office? Perhaps these are the instructions she received from the highest levels of President Peña Nieto's administration when she accepted to take on this new charge?

569. As testified by Mr. Ávila Mayo, former Undersecretary of SEGOB, the PRI administration singled out and discriminated against E-Games and Claimants, in part, in order to confer economic benefits to the PRI allied Grupo Caliente and its owners, the Hank Rhon family, and to discredit the previous PAN regime.[1427] Despite the Claimants' repeated efforts to inform and explain the lawful nature of their operations to SEGOB and other relevant authorities, the PRI administration continued its politically-motivated attack against Claimants, which eventually culminated in the cancellation of E-Games' November 2012 permit.

[1425] Gordon Burr Statement, **CWS-50**, ¶ 101; Erin Burr Statement, **CWS-51**, ¶¶ 95-96; *Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón* (Jan. 27, 2013). Retrieved from http://www.jornada.unam.mx/2013/01/27/politica/013n1pol, **C-17**.

[1426] *Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón* (Jan. 27, 2013). Retrieved from http://www.jornada.unam.mx/2013/01/27/politica/013n1pol, **C-17**.

[1427] Black Cube Statement, **CWS-57**, ¶ 48.

570. Mexico's politically-motivated, hostile and discriminatory treatment toward Claimants violated Claimants' legitimate expectations that the Mexican government would behave in a non-arbitrary and non-discriminatory basis and act in good faith in accordance with Mexican and international law. These expectations were reasonable and legitimate, as all investors, including Claimants, are entitled to presume that the host state would "conduct itself vis-à-vis [its] investment in a manner that [is] reasonably justifiable and [does] not manifestly violate basic requirements of consistency, transparency, even-handedness and non-discrimination."[1428] As the *Waste Management II* tribunal noted, one of the "basic obligation[s] of the State under Article 1105(1) is to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means."[1429]

571. Third, SEGOB failed to safeguard Claimants' legitimate and reasonable expectation that E-Games' permit would be revoked only upon the presence of a legitimate cause for revoking a permit-holder's rights under the Gaming Regulation and only pursuant to appropriate legal proceedings provided under Mexican law. This expectation was derived not only from applicable Mexican law, but also from specific representations by the same agency that revoked E-Games' permit. In its resolution of August 15, 2012, SEGOB undoubtedly recognized that (1) E-Games was entitled to the independent use and operation of the Casinos, because it verified that at all times E-Games had complied with every requirement under the Gaming Regulation; (2) E-Games' rights could not be modified, absent the presence of a cause for revoking a permit-holder's rights under the Gaming Regulation; and that (3) E-Games' rights were independent of any previous contractual relationship E-Games may have had with E-Mex or any other entity.[1430] More importantly, in granting E-Games the November 2012

[1428] *Ioannis*, Award, ¶ 441, **CL-69**.

[1429] *Waste Management II*, Award, ¶ 138, **CL-36**.

[1430] SEGOB Resolution No. DGJS/SCEV/0827/2012 (Aug. 15, 2012), **C-254**.

permit, SEGOB analyzed *de novo* E-Games' request for an independent permit and issued a standalone resolution undoubtedly recognizing that (1) E-Games had meticulously complied with all material requirements under the Gaming Regulation to have an independent permit issued to it; and that (2) E-Games' permit was not dependent on the August 15, 2012 Resolution or any prior SEGOB resolutions regarding Claimants' right to operate the Casinos. [1431]

572. However, on August 28, 2013, SEGOB, acting in clear contravention of Mexican law and contradicting what the same executive agency had decided only eight months earlier and what the judge in the ongoing *Amparo* proceeding decided, revoked E-Games' independent permit based on the flawed reasoning and driven by misguided political bias that the November 16, 2012 Resolution was derived from the May 27, 2009 Resolution. [1432] SEGOB's sudden change of position with respect to E-Games' permit was arbitrary and discriminatory and did not have any "justification of an economic, social or other nature."[1433] In fact, the only difference between the prior resolutions and the August 28, 2013 Resolution is that the latter was issued by a SEGOB controlled by the PRI administration, which was now sitting in political judgment of actions taken by its political nemesis, PAN, and looking for a way to compensate the Hank Rhon brothers for the PRI's decision to choose other PRI Gubernatorial candidates.[1434]

573. As the tribunal in *Gold Reserve* noted, the lack of transparency as to the real reasons behind the government's decision to revoke E-Games' permit is tantamount to a lack of good faith,[1435] which, in and of itself, constitutes a breach of Mexico's obligation to afford

[1431] *See* SEGOB Resolution No. DGJS/SCEV/1426/2012 p. 6 (Nov. 16, 2012), **C-16**.

[1432] SEGOB Resolution (Aug. 28, 2013), **C-289**; González Report, **CER-3**, ¶¶ 115–132, 163-175.

[1433] *El Paso v. Argentina*, Award, ¶ 372, **CL-139.**

[1434] Black Cube Statement, **CWS-57**, ¶¶ 44, 45, 48.

[1435] *Gold Reserve*, Award, ¶¶ 581, 591, **CL-137**.

FET.[1436] Decision-making based on political preferences or "pay-backs" similarly displays a lack of good faith.[1437] Even short of bad faith, SEGOB's about face with respect to E-Games' permit was in violation of Claimants' legitimate and justified expectation that Mexico would "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."[1438]

574. Additionally, SEGOB's revocation of E-Games' November 2012 permit amounts to arbitrary treatment and discrimination and therefore is a *per se* violation of FET. As the tribunal in *CMS Gas v. Argentina* held, "[a]ny measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment."[1439] Here, SEGOB revoked E-Games' permit in excess and abuse of authority, pursuant to an impermissible political agenda, and without the presence of a cause for revoking a permit-holder's rights under the Gaming Regulation. More egregiously, as further discussed below at Section V.E, SEGGOB revoked E-Games' permit in a clearly discriminatory manner, as it has allowed other Mexican casino companies and nationals that obtained their permits in similar if not identical circumstances as Claimants, such as Producciones Móviles and Petolof, to retain their permits and remain open.

575. Fourth, Claimants also had a legitimate expectation that in conducting the *Amparo* 1668/2011 proceeding that ultimately rubber-stamped SEGOB's rescission of the November 16, 2012 Resolution, the Mexican judiciary would comply with all other

[1436] *See*, e.g., *Rumeli Telekom*, Award, ¶ 609, **CL-113**; *Biwater v. Tanzania*, ¶ 602, **CL-22**.

[1437] *See*, e.g., *Tecmed*, Award, ¶¶ 164, 166, **CL-84**; *Azurix*, Award, ¶ 144, **CL-126**; *Gold Reserve*, Award, ¶¶ 581, 591, **CL-137**.

[1438] *Tecmed*, Award, ¶ 154, **CL-84**.

[1439] *CMS*, Award, ¶ 290, **CL-129**.

requirements under domestic law and basic principles of due process and procedural fairness. It did not.

576. As discussed in detail in prior sections and in the subsequent section on denial of justice, the *Amparo* 1668/2011 proceeding, among others, was plagued with numerous irregularities and gross violations of Claimants' due process rights, and conspicuously lacked judicial independence.[1440] The evidence submitted with this Memorial presents a clear picture of the executive branch's unlawful, non-transparent and improper intromission in the *Amparo* 1668/2011 proceeding.[1441] Claimants had a legitimate expectation that any judicial proceeding would be conducted in a proper, legal manner, as well as in a non-discriminatory and non-arbitrary manner, free of judicial subservience to political pressure, and all other irregularities and violations of Mexican law and due process that Claimants have assiduously documented in this submission.

577. However, the Mexican judiciary, pressured by the highest levels of the Peña Nieto administration, affirmed SEGOB's illegal and discriminatory rescission of the November 16, 2012 Resolution, without even affording Claimants any meaningful opportunity to be heard. In doing so, the Mexican judiciary also acted in an unreasonable and arbitrary manner. As one such example, in its February 19, 2014 Order, the Collegiate Tribunal concluded, without any explanation, that the *Amparo* judgment (the Sixteenth District Judge's January 31, 2013 Order) ruled the principle of "acquired rights" unconstitutional,[1442] even though the Sixteenth District Judge himself unequivocally stated that this was not his ruling.[1443] This evident contradiction clearly suggests that the Collegiate Tribunal's February 19, 2014 Order

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[1440] *See, e.g.*, Julio Gutiérrez Statement, **CWS-52**, ¶¶ 54-62; *See*, e.g., Guerrero Report, **CER-2**, ¶¶ 94-99, 173-176, 256-258.

[1441] *See*, e.g., Julio Gutiérrez Statement, **CWS-52**, ¶¶ 54-62; Black Cube Statement, **CWS-57**, ¶ 49.

[1442] Order of the Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito (Feb. 19, 2014), **C-290**.

[1443] Order of the Juzgado Decimosexto de Distrito en Materia Administrativa (Oct. 14, 2013), p. 23, **C-24**.

was merely a rubber-stamp of the illegal and unjustified *volte face* by SEGOB, which, in plain disregard of the Sixteenth District Judge's interpretation of its own ruling, rescinded the November 16, 2012 Resolution and insisted before the Collegiate Tribunal that the *Amparo* judgment had struck down as unconstitutional the principle of "acquired rights".[1444]

578. Relatedly, Claimants were entitled to expect that Mexico would give due effect to the judicial decisions that had been in place to protect and safeguard Claimants' investments and Casino operations. In particular, as discussed above, through the First Collegiate Tribunal's October 17, 2013 Order, which was a final ruling with res judicata effects, the Mexican judiciary had already determined that the SEGOB's November 16, 2012 Resolution constituted an implicitly consented act (*acto consentido tácitamente*) by E-Mex.[1445] This meant that under Mexican *amparo* law, E-Mex had exhausted its means to challenge the November 16, 2012 Resolution; and that the effect of the *Amparo* 1668/2011 could not be the rescission of the November 16, 2012 Resolution.[1446]

579. Notwithstanding this ruling in the *Amparo* 1151/2012 proceeding, which the Sixteenth District Judge and the Collegiate Tribunal were legally required to take into account, the Mexican judiciary ignored this binding ruling, and in the *Amparo* 1668/2011 proceeding applied the *Amparo* law to invalidate and allow for the rescission of the November 16, 2012 Resolution, contrary to Mexican *Amparo* law and Claimants' legitimate expectation derived from the *Amparo* 1151/2012 judgment. SEGOB was also fully aware that revoking the November 16, 2012 Resolution was contrary to the First Collegiate Tribunal's October 17, 2013 Order in the *Amparo* 1151/2012 proceeding, and yet, SEGOB acted—contrary to the law—as if such an order had never existed.

[1444] Order of the Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito (Feb. 19, 2014), **C-290**.

[1445] Guerrero Report, **CER-2**, ¶¶ 313, 319, 321; Order of the Primer Tribunal Colegiado en Materia Administrativa del Cuarto Circuito (Oct. 17, 2013), **C-295**.

[1446] Guerrero Report, **CER-2**, ¶ 316, 318.

580. Additionally, SEGOB closed down Claimants' Casinos on April 24, 2014, despite the fact that there was a judicial order that explicitly prevented SEGOB from doing so.[1447] As explained above, on September 2, 2013, E-Games had sought and obtained an injunction barring the Government from impeding or otherwise hindering the Casino operations pending the final resolution of the *Amparo* 1668/2011 proceeding.[1448] However, as it did with respect to the First Collegiate Tribunal's October 17, 2013 Order, SEGOB blatantly ignored the validly-issued court order and shut down all of Claimants' Casinos in a commando-style raid.

581. SEGOB's illegal closure of Claimants' Casinos on April 24, 2014 was a brazen violation of Mexico's FET obligation to refrain from unreasonable, arbitrary and discriminatory measures. The arbitrary and politically-motivated nature of SEGOB's action is further demonstrated by the fact that officials (1) prevented the Casino employees who were working during the closure from contacting counsel;[1449] (2) refused to provide a copy of the closure orders to management;[1450] and (3) proceeded to close down the Casinos even though the closure orders were directed at E-Mex and not at E-Games.[1451] Moreover, SEGOB improperly lifted the Casinos' closure seals and failed to return legal possession of the Casino premises to E-Games, again in violation of the fundamental due process and property rights of Claimants. Additionally, to date, SEGOB has persistently and arbitrarily refused to provide Claimants with copies of E-Games' closure files, despite Claimants' legal entitlement to the files, and payment of substantial sums of money to obtain a copy of the files.[1452]

[1447] Julio Gutiérrez Statement, **CWS-52**, ¶ 70; Injunctive Relief (Sept. 2, 2013), **C-299**.

[1448] Julio Gutiérrez Statement, **CWS-52**, ¶ 70; Injunctive Relief (Sept. 2, 2013), **C-299**.

[1449] Galván Statement, **CWS-56**, ¶ 24; Chávez Statement, **CWS-54**, ¶ 21.

[1450] Galván Statement, **CWS-56**, ¶ 19; Ruiz Statement, **CWS-55**, ¶ 23; Chávez Statement, **CWS-54**, ¶ 18.

[1451] Galván Statement, **CWS-56**, ¶ 20; Ruiz Statement, **CWS-55**, ¶ 18; Chávez Statement, **CWS-54**, ¶ 17; Julio Gutiérrez Statement, **CWS-52**, ¶ 71.

[1452] Julio Gutiérrez Statement, **CWS-52**, ¶¶ 92-93; Gordon Burr Statement, **CWS-50**, ¶ 136.

582. SEGOB's subsequent conduct also shows a paradigmatic example of arbitrary treatment and discrimination. Following the illegal closure of the Casinos, SEGOB's Under Secretary of the Interior unreasonably dismissed E-Games' *recurso de revision* without addressing E-Games' argument that the closure was improper by virtue of E-Games' pending appeal.[1453] In addition, SEGOB violated basic procedural rights of Claimants and E-Games during the administrative review proceedings regarding the closures by unlawfully delaying the proceedings beyond the time-limit set by Mexican law, flouting the notice requirements, and improperly rejecting the evidence E-Games presented in regard to SEGOB's unjustified post-hoc (and false) allegation that Claimants operated slot machines accepting cash or coins.[1454] As further discussed in Section V.D, this failure to provide due process, in and of itself, is a separate breach of FET and also amounts to the international delict known as a denial of justice.

583. SEGOB then systematically thwarted each of the Claimants' attempts to reopen the Casinos and sell the Casino assets to third parties, thereby effectively destroying Claimants' investments.[1455]

584. Adding insult to injury, SEGOB later allowed Claimants' competitors to reopen and operate certain of Claimants' Casinos, and returned possession of the Casinos to other third parties in violation of applicable law.[1456]

585. Taken together, in revoking E-Games' independent permit, illegally closing down Claimants' Casinos, and allowing the Casinos to reopen to be operated by Claimants' competitors, Mexico not only defeated Claimants' legitimate expectations, but also acted

[1453] Julio Gutiérrez Statement, **CWS-52**, ¶¶ 85-86.

[1454] Julio Gutiérrez Statement, **CWS-52**, ¶¶ 87, 89.

[1455] Gordon Burr Statement, **CWS-50**, ¶¶ 112-114; Erin Burr Statement, **CWS-51**, ¶ 119-121; Black Cube Statement, **CWS-57**, ¶ 50; Julio Gutiérrez Statement, **CWS-52**, ¶¶ 108-109.

[1456] Vargas Statement, **CWS-58,** ¶ 4; Julio Gutiérrez Statement, **CWS-52**, ¶¶ 109-112.

arbitrarily and in bad faith, because these measures contravene Mexican law and other validly-issued court orders.

586. Furthermore, the reasons given by the Mexican state organs responsible for these actions, including the judiciary and SEGOB, did not correspond to their actual motivation—that is, to fulfil the political agenda of the PRI administration to retaliate against the PAN regime and confer benefits to its political allies. As explained above, bad faith is not necessary, but, if as here proven, is dispositive for an FET violation.

b. Mexico Violated the FET Standard By Interfering with Claimants' Casino Operations and Refusing to Grant Claimants New Permits Citing Pretextual Reasons

587. As explained above, SEGOB's cancellation of E-Games' November 2012 permit reflected an unreasonable, arbitrary, and discriminatory decision-making process that was guided by political aims and therefore is in and of itself an FET violation. Mexico further breached its FET obligations when it acted arbitrarily and discriminatorily toward Claimants' investments, including through unwarranted interference with the Casino operations, unlawful and discriminatory denial of E-Games' requests for new permits after Claimants' permit was unlawfully revoked.

588. First, as set out in Section IV.Q, Mexico intentionally and repeatedly interfered with Claimants' Casino operations, despite Claimants' scrupulous compliance with all applicable laws and regulations in conducting their business.[1457] Most notoriously, Mexico illegally closed the Mexico City Casino for 34 days in June 2013, alleging that the facility violated a fabricated civil safety regulation that required a particular wire within gaming machine cabinets to be encased in protective tubing.[1458] None of the Claimants' competitors,

[1457] Gordon Burr Statement, **CWS-50**, ¶¶ 92-99; Erin Burr Statement, **CWS-51**, ¶¶ 99-108.

[1458] Gordon Burr Statement, **CWS-50**, ¶ 97; Erin Burr Statement, **CWS-51**, ¶ 107.

who had identical wires in their machine cabinets, were closed for the alleged infraction.[1459] Even after Claimants obtained a judicial decision ruling that the closure was improper, Mexico deliberately obstructed the reopening of the facility, aggravating the damages caused by the pretextual, arbitrary, and discriminatory closure.[1460]

589. Second, SEGOB applied the Gaming Regulation in a discriminatory and arbitrary manner to deny E-Games' requests for new, independent gaming permits. As explained in Section IV.X.3.i, in making the requests for the new permits, E-Games again fully complied with all requirements set forth in the Gaming Regulation, but SEGOB denied E-Games' requests by inventing a new requirement not recognized under the Gaming Regulation, i.e., the requirement that a permit applicant should have open and operating gaming facilities *prior to* the granting of a permit. As discussed in detail in the subsequent section on national treatment, this requirement of open and operating casinos has never been a requirement under the Gaming Regulation for the granting of a gaming permit, and Mexico had granted gaming permits to numerous Mexican-owned companies without open and operating facilities.[1461] Additional rationalizations that SEGOB offered to justify its unlawful denial of E-Games' permit requests were equally specious and arbitrary. As set out in Section IV.3.i above, the alleged flaws in E-Games' certificates of good standing either were incorrect or rested on an insignificant technicality that could have been easily rectified by E-Games, had SEGOB acted in accordance with its Gaming Regulation and treated E-Games fairly and transparently. Again, unreasonable, arbitrary or discriminatory conduct is *per se* a breach of the FET standard.[1462] The above-described acts, both together and insolation, constitute an egregious breach of

[1459] Gordon Burr Statement, **CWS-50**, ¶ 97; Erin Burr Statement, **CWS-51**, ¶ 107.

[1460] Gordon Burr Statement, **CWS-50**, ¶ 98; Erin Burr Statement, **CWS-51**, ¶ 108.

[1461] *See infra* Section V.E; González Report, **CER-3**, ¶ 190; Julio Gutiérrez Statement, **CWS-52**, ¶¶ 76-79.

[1462] *See* UNCTAD, Fair and Equitable Treatment, 37, UNCTAD/ITE/IIT/11 (Vol. III) (1999), **CL-165**.

Mexico's obligation under Article 1105(1) of the NAFTA to provide fair and equitable treatment to Claimants' investments.

c. Mexico Systematically Interfered with Claimants' Repeated Efforts to Salvage their Investments for Arbitrary and Discriminatory Reasons

590. Shortly after Mexico illegally closed the Casinos, Claimants sought to mitigate the damages caused by Mexico's illegal actions, including by continuing in their efforts to convince SEGOB to reopen the Casinos, or, alternatively, to sell the Mexican Enterprises and/or their assets to third parties. Mexico thwarted these efforts at every turn, evidencing that there was a politically-motivated and well-orchestrated scheme to destroy Claimants' investments and expel Claimants from the Mexican casino industry. As noted by the tribunals in *Waste Management II* and *Frontier*, this type of deliberate conspiracy to "inflict damages upon or to defeat the investment" is inherently bad faith and undoubtedly constitutes a breach of the FET standard. [1463]

591. As discussed in further detail above at Section IV.X.3.h, given the Claimants' track record of successful operation of the Casinos for multiple years, numerous gaming companies and individuals expressed strong interests in acquiring the Claimants' Casino assets and/or partnering with Claimants to reopen the Casinos.[1464] Mr. Burr led the negotiations with these companies and individuals, only to realize that the PRI administration would foreclose any chance of such negotiations' coming to fruition.[1465] Over the course of these negotiations, potential partners repeatedly told Mr. Burr that while they would very much like to work

[1463] *Frontier*, Final Award, ¶ 300 (stating that bad faith "[i]ncludes a conspiracy by state organs to inflict damages upon or to defeat the investment, the termination of the investment for reasons other than the one put forth by the government, and expulsion of an investment based on local favoritism"), **CL-157**; *Waste Management II*, Award, ¶ 138 ("[A] deliberate conspiracy—that is to say, a conscious combination of various agencies of government without justification to defeat the purposes of an investment agreement—would constitute a breach of Article 1105(1)."), **CL-36**.

[1464] Gordon Burr Statement, **CWS-50**, ¶¶ 110-115; Erin Burr Statement, **CWS-51**, ¶¶ 117-122.

[1465] Gordon Burr Statement, **CWS-50**, ¶ 115; Erin Burr Statement, **CWS-51**, ¶¶ 116, 122.

together, the Mexican government would not let Claimants' business survive in Mexico,[1466] or that the government was not going to accept any foreign investment in the casino industry. [1467] SEGOB doubled down on those words by refusing to approve any transaction that might lead to the reopening of the Casinos and/or sale of the Casino assets, including the deal with Messrs. Chow and Pelchat, which was rebuffed in no uncertain terms by Ms. Salas and her successor, Mr. Cangas on the basis that SEGOB would not allow the Casinos to reopen as long as the U.S. shareholders were involved. [1468] Mr. Rosenberg, in his meeting with Black Cube, also confirmed that SEGOB adamantly blocked the sale of Claimants' Casinos to Televisa's PlayCity.[1469]

592. Again, Mexico's systematic and persistent refusal to let Claimants mitigate the damages caused by Mexico's illegal actions strongly demonstrates that Mexico acted with a political and discriminatory agenda to undermine and ultimately destroy Claimants' investments. As discussed in the following section, various Mexican state organs, in addition to SEGOB and the Mexican judiciary, also partook in this deliberate scheme to vitiate Claimants' investments.

d. Mexico Subjected Claimants to Harassment and Retaliatory Measures by Pursing Arbitrary and Illegal Tax Audits and Criminal Investigations against E-Games and Its Representatives

593. The PRI administration's relentless attack on Claimants was not limited to the total annihilation of their Casino operations, but also included a pattern of harassment and retaliatory measures that are also violative of the State's obligation under the FET standard to refrain from harassment, coercion and abusive treatment.

[1466] Gordon Burr Statement, **CWS-50**, ¶ 110; Erin Burr Statement, **CWS-51**, ¶ 117.

[1467] Gordon Burr Statement, **CWS-50**, ¶ 112.

[1468] Gordon Burr Statement, **CWS-50**, ¶ 114; Erin Burr Statement, **CWS-51**, ¶ 121; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶¶ 7-8.

[1469] Black Cube Statement, **CWS-57**, ¶ 50.

594. As noted above, "a deliberate conspiracy—that is to say, a conscious combination of various agencies of government without justification to defeat the purposes of an investment agreement—would constitute a breach of" the FET standard.[1470] Similarly, the *Tokios Tokelés v. Ukraine* tribunal stated that a State campaign to punish an investor "must surely be the clearest infringement" of the FET standard.[1471]

595. More specifically, on February 28, 2014, the SAT issued a resolution finding that E-Games had not complied with its reporting obligations and ordered E-Games to pay MXN170,475,625.02 (which on said date amounted to approximately USD 12,796,600) in back taxes. As explained above, the SAT's February 28, 2014 Resolution cannot be explained outside the context of the PRI administration's relentless campaign to harass Claimants and their investments. The tax returns at issue date back to 2009, and in preparing its returns, E-Games followed the exact same method and steps that were vindicated by the SAT under the PAN administration.[1472] Furthermore, this resolution followed a 2012 audit in which the SAT carried out a tax audit on E-Games' Casino operations for 2011 and determined that E-Games was in compliance with all applicable tax legislation and, as such, had no observations on its tax returns.[1473] And yet, the PRI-controlled SAT used E-Games' tax returns for 2009 to further harass and retaliate against Claimants, with the likely aim to claw back illegally any damages awarded against Mexico in the present proceedings. On April 4, 2018, the Mexican Supreme Court rejected E-Games challenge to the SAT's February 28, 2014 Resolution, upholding the resolution, and again demonstrating its hands-off approach to the "politically charged" case.[1474]

[1470] *Waste Management II*, Award, ¶138, **CL-36**.

[1471] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award (Jul. 26, 2007), ¶ 123, **CL-168**.

[1472] Julio Gutiérrez Statement, **CWS-52**, ¶ 106; Gordon Burr Statement, **CWS-50**, ¶¶ 132-133; Erin Burr Statement, **CWS-51**, ¶ 139.

[1473] Julio Gutiérrez Statement, **CWS-52**, ¶ 106; Gordon Burr Statement, **CWS-50**, ¶ 133; Erin Burr Statement, **CWS-51**, ¶ 139.

[1474] Julio Gutiérrez Statement, **CWS-52**, ¶ 107; Gordon Burr Statement, **CWS-50**, ¶ 133; Erin Burr Statement, **CWS-51**, ¶ 139.

596. Shortly following Mexico's receipt of the Claimants' Notice of Intent, Mexico, through the PGR, embarked on vindictive criminal investigations that resulted in the filing of the formal criminal complaint against E-Games' representatives. [1475] Even worse, the PGR has since refused to provide Claimants and their representatives with case files, further violating their due process rights and aggravating the fear of criminal punishment.[1476]

597. Although, as noted above, bad faith is not required for an FET violation, Mexico's bad faith is sharply evidenced here. The SAT's tax audits on E-Games were politically motivated, arbitrary and retaliatory; the PGR's criminal investigations and prosecution against E-Games' representatives was Mexico's roundabout way of intimidating and retaliating against Claimants for their recourse to the dispute settlement mechanism provided under the NAFTA. Through these actions, Mexico has demonstrated its unwavering determination to completely drive Claimants out from the Mexican gaming industry, and thereby committed serious violations of its FET obligations.

e. **Conclusion**

598. As demonstrated above, Mexico had a deliberate scheme to undermine and ultimately destroy Claimants' investments. By implementing a series of administrative and judicial measures that fell far short of the FET standard, Mexico eventually achieved this goal. Acting through the SAT and the PGR, Mexico continued to subject Claimants to abusive and retaliatory treatment.

599. Mexico violated Claimants' legitimate expectations that the State would "conduct itself vis-à-vis his investment in a manner that [is] reasonably justifiable and [would] not manifestly violate basic requirements of consistency, transparency, even-handedness and

[1475] Julio Gutiérrez Statement, **CWS-52**, ¶ 104; Gordon Burr Statement, **CWS-50**, ¶¶ 134-135; Erin Burr Statement, **CWS-51**, ¶ 140.

[1476] Julio Gutiérrez Statement, **CWS-52**, ¶ 104; Gordon Burr Statement, **CWS-50**, ¶ 135; Erin Burr Statement, **CWS-51**, ¶ 140.

non-discrimination."[1477] Mexico fundamentally disregarded the rule of law, acted "beyond its authority,"[1478] violated Claimants' due process and adopted all three types of arbitrary measures: those (i) that inflict damage on the investor without serving any apparent legitimate purpose; (ii) that are not based on legal standards but on discretion, prejudice, or personal preference; and (iii) that are taken for reasons that are different from those put forward by the decision maker.[1479]

600. Mexico's various unreasonable, arbitrary, discriminatory acts and omissions both together and in isolation constitute an egregious breach of Mexico's obligation under Article 1105 of the Treaty to provide fair and equitable treatment to Claimants' investments.

D. Mexico Violated NAFTA Article 1105(1) and Customary International Law by Failing to Accord the Claimants Due Process Thereby Committing a Denial of Justice

1. Fair and Equitable Treatment Requires the Host State to Accord Due Process in Administrative Proceedings

601. Due process is a fundamental aspect of the rule of law, and thus makes up a part of customary international law.[1480] Hence, arbitral tribunals have consistently recognized due process as one of the core elements of the FET obligation, along with the protection of investor's legitimate expectations and the prohibitions against arbitrary, discriminatory and unreasonable measures.[1481]

[1477] *Ioannis*, Award, ¶ 441, **CL-69**; *see also Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (Jul. 28, 2015), ¶ 546 (agreeing with and quoting Claimants' submission, noting that "[a] State is thus expected to behave . . . in a 'consistent, even handed, unambiguous, transparent, candid' manner"), **CL-59**.

[1478] *Alpha Projektholding*, Award, ¶ 422, **CL-156**.

[1479] *EDF v. Romania*, Award, ¶ 303, **CL-243**; *Lemire*, Decision on Jurisdiction and Liability, ¶ 262, **CL-166**; *CME*, Partial Award, ¶ 158 ("[T]he determination of reasonableness is in its essence a matter for the arbitrator's judgment. That judgment must be exercised within the context of asking what the parties to bilateral investment treaties should jointly anticipate, in advance of a challenged action, to be appropriate behavior in light of the goals of the Treaty."), **CL-108**.

[1480] Dolzer & Schreuer at 154, **CL-122**; McLaughlan, Shore & Weiniger at 296-307, **CL-167**.

[1481] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (Nov. 13, 2000), ¶ 134 ("Article 1105 imports into the NAFTA the international law requirement[] of due process."), **CL-30**; Waste Management Waste Management II, Award, ¶ 98 ("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 . . . [inter alia] involves a lack of due

602. The due process guarantees of the FET standard extend to all forms of government-decision making, including administrative and judicial proceedings.[1482] In judicial proceedings, breach of fundamental due process rights may also constitute a denial of justice. Interconnected and overlapping with the concept of due process is the international delict of denial of justice, which is another "central concept of the international minimum standard of customary international law."[1483]

603. NAFTA tribunals have also consistently held that Article 1105(1)—which incorporates the customary international law standard into the Treaty—encompasses the standard of protections contemplated by the principle of a denial of justice.[1484]

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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."), **CL-36**; *Rumeli Telekom*, Award, ¶ 609 ("The parties rightly agree that the fair and equitable treatment standard encompasses inter alia the following principles: the State must act in a transparent manner; the State is obliged to act in good faith; the State's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process; the State must respect procedural propriety and due process. The case law also confirms that to comply with the standard, the State must respect the investor's reasonable and legitimate expectations."), **CL-113**. *See also Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* ("*Bayindir v. Pakistan*"), ICSID Case No. ARB/03/29, Award (Aug. 27 2009), ¶ 178 ("The Tribunal agrees with Bayindir when it identifies the different factors which emerge from decisions of investment tribunals as forming part of the FET standard. These comprise the obligation to act transparently and grant due process, to refrain from taking arbitrary or discriminatory measures, from exercising coercion or from frustrating the investor's reasonable expectations with respect to the legal framework affecting the investment."), **CL-171**; *Siag*, Award, ¶ 450 ("While its precise ambit is not easily articulated, a number of categories of frequent application may be observed from past cases. These include such notions as transparency, protection of legitimate expectations, due process, freedom from discrimination and freedom from coercion and harassment."), **CL-68**; *Frontier*, Final Award, ¶ 289 (observing that "in a number of cases, tribunals have held that an absence of a fair procedure or a finding of serious procedural shortcomings was an important element for a breach of fair and equitable treatment"), **CL-157**.

[1482] Dolzer & Schreuer at 156, **CL-122**. *See* also Patrick Dumberry, Denial of Justice under NAFTA Article 1105: A Review of 20 years of Case Law, ASA Bulletin (2014) 32(2) at 249-250 (stating that under customary international law and NAFTA Article 1105, the host state is obligated to ensure due process in "all forms of government-decision making, including measures taken by the government (both the executive and legislative branches) and the administration"), **CL-172**; UNCTAD, Fair And Equitable Treatment, 81, UNCTAD/DIAE/IA/2011/5 (2012) ("[T]he majority of modern-day FET claims relate to measures taken by the executive, and sometimes legislative, branches of a government. The fundamental requirements of due process are applicable there too."), **CL-150**.

[1483] M. Sornarajah, The International Law on Foreign Investment 357(3d ed. 2010), **CL-173**; *see also Apotex Holdings Inc. and Apotex Inc. v. United States of America* ("*Apotex III*"), ICSID Case No. ARB(AF)/12/1, Award (Aug. 25, 2014), ¶ 9.16 (stating that the "prohibition on denial of justice has acquired the status of customary international law and is among the protections embraced within the required minimum standard of treatment of aliens."), **CL-174**.

[1484] *See Mondev*, Award, ¶ 96, **CL-17**; *Loewen*, Award, ¶ 129, **CL-67**; *Apotex III*, Award, ¶ 9.16, **CL-174**; *Waste Management II*, Award, ¶ 118, **CL-36**; *Thunderbird v. Mexico*, Arbitral Award, ¶ 194, **CL-7**.

604. One such standard is due process protection. In general, fair and equitable treatment under the minimum standard of treatment requires that host states provide "a fair and efficient system of justice."[1485] A dearth of fair procedure in judicial proceedings, including the lack of due process, amounts to a denial of justice and a breach of the host state's obligation to accord fair and equitable treatment under the international minimum standard.[1486]

605. As explained further below at Section V.D, in addition to the failure to accord due process, the host state may fail to provide the minimally adequate system of justice in many other ways, including, among others, "refusal of access to court to defend legal rights, refusal to decide, unconscionable delay, manifest discrimination, corruption or subservience to executive pressure."[1487] Section V.D below discusses these instances of denials of justice in further details.

606. The scope of the international delict of denial of justice had traditionally been limited to domestic court proceedings. As Sornarajah described, "[t]he customary law of state responsibility recognized that the actions of the judicial organs of the state could engage the state in liability if they so exceeded the norms of proper judicial conduct or showed such prejudice as would shock the conscience of the outside world."[1488] The United Nations Conference on Trade and Development ("**UNCTAD**") similarly observed: "Denial of justice

[1485] *Loewen*, Award, ¶ 153, **CL-67**.

[1486] *See*, e.g., *Siag*, Award, ¶ 452 ("The concepts of 'due process' and 'denial of justice' are closely linked. A failure to allow a party due process will often result in a denial of justice."), **CL-68**; *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005, Final Award (Sept. 12, 2010), ¶ 279 (stating that the host state can be held liable for denial of justice if the claimant can prove that "the court system fundamentally failed" as in the cases of "major procedural errors such as lack of due process"), **CL-175**; *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V 064/2008, Partial Award on Jurisdiction and Liability (Sept. 2, 2009), ¶ 221 (noting that the prohibition against a denial of justice under the FET standard includes, among others, the "obligation to notify an investor of hearings and not to decide about claim in his absence or in gross violation of procedural rules"), **CL-176**.

[1487] Jan Paulsson, Denial of Justice in International Law 204-205 (2005) ("Paulsson"), **CL-177**.

[1488] M. Sornarajah, The International Law on Foreign Investment 357(3d ed. 2010) (emphasis added), **CL-173**.

is traditionally defined as any gross misadministration of justice by domestic courts resulting from the ill-functioning of the state's judicial system."[1489]

607. However, it has been increasingly recognized that other branches of government, including in administrative proceedings, especially when they are acting in an adjudicatory capacity, may commit a denial of justice and thus be held accountable under international law.[1490] The tribunal in *ECE v. Czech Republic* declared that "denial of justice is not limited to judicial proceedings but may equally occur in administrative proceedings".[1491] The tribunal in *Amco Asia v. Indonesia* also found a denial of justice committed by an Indonesian administrative body, explaining that there was "no provision of international law that makes impossible a denial of justice by an administrative body."[1492]

608. Departing from the more traditional and narrower understanding of the breadth of the denial of justice standard, the recent treaty practice also explicitly stipulates that the due process element under the prohibition against a denial of justice extends to administrative proceedings. For instance, Article 9.6(2)(a) of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("**CPTPP**") to which Mexico is a party provides that "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."[1493]

[1489] UNCTAD, Fair And Equitable Treatment, 80, UNCTAD/DIAE/IA/2011/5 (2012) (emphasis added), **CL-150**.

[1490] Dolzer & Schreuer at 156 ("Denial of justice is traditionally associated with the administration of justice by domestic courts but investment tribunals have accepted that the procedural guarantees inherent in the FET standard extend to the activities of the host state's administrative authorities,"); 178 ("Generally, the principle of denial of justice applies to actions of all branches of a government"), **CL-122**.

[1491] *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co v. The Czech Republic*, PCA Case No. 2010-5, Award (Sept. 19, 2013), ¶ 4.742, **CL-178**.

[1492] *Amco Asia Corp and Others. v. Republic of Indonesia* , ICSID Case No. ARB/81/1, Award in Resubmitted Proceedings (Mar. 31, 1990), ¶ 137, **CL-179**.

[1493] CPTPP, Article 9.6, **CL-180**; see also CAFTA-Mexico, Article 11.3(2) ("(a)'trato justo y equitativo' incluye, pero no está limitado a, la obligación de no denegar justicia en procedimientos penales, civiles o contencioso administrativos, de conformidad con el principio de debido proceso incorporado en los principales sistemas

609. Reflecting this tendency, the NAFTA tribunal in *Thunderbird* also assessed claims of deprivation of due process in administrative proceedings under the rubric of denial of justice, recognizing that such claims are capable of establishing a breach of NAFTA 1105(1) for what the tribunal called "administrative denial of justice".[1494]

610. Hence, fair and equitable treatment under the minimum standards of international law requires the host state to accord basic due process in its administrative and judicial proceedings, both under the overarching requirement of due process and the prohibition against a denial of justice.

2. **Minimum Requirements of Administrative Due Process**

611. In the administrative context, due process guarantees act as procedural constraints on the exercise of the administration's discretionary power, thereby ensuring fairness in administrative decision-making and preventing it from degrading into arbitrariness. For sure, not every procedural irregularity constitutes a breach of due process requirement. As the tribunal in *Apotex III* observed, "whatever process may be due depends on the particular context or circumstances of the claim."[1495] In *Thunderbird*, the tribunal suggested that the standard for administrative due process is different from the one of judicial due process, stating:

> [Administrative] proceedings should be tested against the standards of due process and procedural fairness applicable to administrative officials. The administrative due process requirement is lower than that of a judicial process.[1496]

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legales del mundo"), **CL-181**; Mexico-Panama FTA, 10.5(2), **CL-182**; Pacific Alliance Additional Protocol, Article 10.6(2), **CL-183**.

[1494] *Thunderbird v. Mexico*, Arbitral Award, ¶¶ 85, 197, **CL-7**. *See also David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award (Sept. 18, 2018), ¶ 356 (noting that the "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 . . . ."), **CL-184**.

[1495] *Apotex III*, Award, ¶ 9.48, **CL-174**.

[1496] *Thunderbird v. Mexico*, Arbitral Award, ¶ 200, **CL-7**.

612. In other words, according to the *Thunderbird* tribunal, administrative procedure tolerates some deficiencies that would not be allowed in a judicial context.

613. Nonetheless, arbitral tribunals have found that at a minimum basic due process requires administrative decisions be preceded by notice and an opportunity to be heard. Tribunals have further required administrative decisions be adequately reasoned and taken in accordance with the legal requirements contained in domestic law. As noted by a comparative administrative law scholar, the failure to extend any of these basic due process rights in the administrative context is considered a violation of due process rights in any principal legal system of the world. [1497] And as explained further below, such deficiencies could engage the state in liability under the international minimum standard of customary international law and thus could constitute a breach of the FET standard under NAFTA Article 1105(1).

a. **Fair Notice and Opportunity To Be Heard**

614. Cases dealing with the requirement of due process in the administrative context have concerned whether the foreign investor was given the opportunity to present its views before the administrative body arrived at its decision. A clear example is provided by *Metalclad v. Mexico*, where the tribunal found a breach of NAFTA Article 1105 because the investor was not properly involved in the municipal construction permit process.[1498]

615. In *Metalclad*, the claimant successfully obtained federal and state permits to construct a hazardous waste landfill. However, the municipality where the landfill was located ordered cessation of all construction due to the absence of a municipal construction permit. Thus the claimant submitted an application for a municipal construction permit, which was

[1497] Giacinto Della Cananea, Minimum Standards of Procedural Justice, in ADMINISTRATIVE ADJUDICATION IN INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 70 (Schill ed. 2010) (finding that OECD countries, "[r]egardless of the diversity of national legal institutions," largely share the following principles in their domestic administrative proceedings: "the right to be heard and, as a consequence, that to present factual evidence; the duty, imposed on the administration, to take such evidence into account when taking a decision; and the duty to provide (adequate) grounds for such a decision"), **CL-185**.

[1498] *Metalclad*, Award, ¶¶ 90-101, **CL-79**.

denied thirteen months later. In the award, the *Metalclad* tribunal criticized various procedural deficiencies in connection with the municipal permit process, particularly the lack of notice and opportunity for claimant to participate in the town council meeting where the permit application was discussed and rejected.[1499]

616. Similarly, in *Tecmed v. Mexico*, the dispute arose from the non-prolongation of an operating permit for a hazardous waste landfill and involved the FET provision in the Mexico-Spain BIT that should be interpreted in accordance with international law.[1500] There, the claimant ran a hazardous waste landfill, for which it was issued a permit by a federal Mexican agency. This permit was renewed each year until the Mexican agency issued a new resolution refusing to renew the permit and sought to have the landfill closed.

617. The *Tecmed* tribunal found a breach of fair and equitable treatment, because, *inter alia*, the claimant had not been granted an adequate opportunity to express its position with regard to certain infringements of the domestic regulations raised by the Mexican agency.[1501] More importantly, the claimant had not been made aware of the potential consequences of such infringements for the non-renewal of its operating permit. According to the tribunal, the agency's lack of fair notice had "a material adverse effect on [the claimant's] ability to get to know clearly the real circumstances on which the maintenance or validity of the Permit depended,"[1502] thereby depriving the claimant of its opportunity to "adopt a behavior to prevent the non-renewal of the Permit, or that might at least guarantee the continuity of the permit for the period required to relocate to a new site."[1503]

[1499] *Metalclad*, Award, ¶¶ 91, 101, **CL-79**.

[1500] *Tecmed*, Award, ¶¶ 152, 153, **CL-84**.

[1501] *Tecmed*, Award, ¶ 162, **CL-84**.

[1502] *Tecmed*, Award, ¶ 165, **CL-84**.

[1503] *Tecmed*, Award, ¶ 162, **CL-84**.

618. The right to be heard also played a key role in *Middle East Cement Shipping*.[1504] The case involved the administrative seizure and auctioning of the claimant's vessel, and the key question presented was whether the government had given sufficient notice of the seizure to claimant. Under Egyptian law, if the debtor cannot be found onboard the vessel, the notice requirement can be satisfied by attaching a copy of a distraint report to the vessel, and the state agency precisely followed this "absent" procedure.[1505] Nevertheless, the tribunal still found a breach of the FET standard on due process grounds, because the state agency could have easily notified the claimant directly at his local address, which was well known to the state agency from its prior contacts with the claimant.[1506] The tribunal reasoned that a "matter as important as the seizure and auctioning of a ship . . . should have been notified by direct communication" even in the absence of a legal duty to do so."[1507] This award supports the notion that complying with domestic law and procedure may not be sufficient when it runs afoul of public international law expectations for due process. As the tribunal in *Alex Genin v. Estonia* noted, the fair and equitable standard provides "a basic and general standard which is detached from the host State's domestic law."[1508]

b. **Duty to Provide Adequate Reasons for Administrative Decisions**

619. In addition to the requirements of notification and an opportunity to be heard, tribunals have considered whether administrative authorities have provided adequate grounds and explanations for their decisions. Due process, as a fundamental aspect of the rule of law, requires government decisions to be taken in accordance with the law. To demonstrate

[1504] *Middle East Cement Shipping*, Award, ¶¶ 141-143, **CL-80**.

[1505] *Id*. at ¶¶ 141-142, **CL-80**.

[1506] *Id*. at ¶ 143, **CL-80**.

[1507] *Id*., **CL-80** (emphasis added).

[1508] *Alex Genin, Eastern Credit Ltd., Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award (June 25, 2001), ¶ 367 (quoting R. Dolzer and M. Stevens, Bilateral Investment Treaties 58 (1995)), **CL-186**.

compliance with this elementary requirement, the decision-maker should provide the reasons for her determination.

620. Against this background, the tribunal in *TECO v. Guatemala* held that the Guatemalan regulatory body's failure to give reasons for its decision to disregard an Expert Commission's advice in setting electricity tariffs amounted to a violation of FET.[1509] In the *TECO* case, the claimant owned shares in a newly-privatized electricity distributor, EEGSA. Tariff rates for EEGSA were to be set every five years by a state regulator, CNEE, according to a process provided by Guatemalan law. In August 2008, the CNEE set new tariffs, to which EEGSA objected. These rates were finalized in disregard of the opinion of a neutral "Expert Commission" authorized to resolve disputes whenever the Guatemalan regulator and distributor were at odds about tariff setting. The *TECO* tribunal ruled that "it would be entirely inconsistent to provide for an expert determination mechanism while at the same time allowing the regulator to disregard the Expert Commission's conclusions without any reasons."[1510] In its view: "A lack of reasons may be relevant to assess whether a given decision was arbitrary and whether there was lack of due process in administrative proceedings. . . . [I]f State officials can demonstrate that the decision was actually made in an objective and rational (i.e., reasoned) manner, they will defeat any claim made under the [FET] standard. If they cannot, the arbitrary conduct must be remedied."[1511]

621. Notably, in the *TECO* case, the claimant first resorted to domestic judicial proceedings (*amparo* proceedings) to challenge the due process violations in the tariff review process. As a result, the Constitutional Court of Guatemala had rendered two decisions which purportedly established the lawfulness of CNEE's conduct under domestic law. The first

[1509] *TECO Guatemala Holdings, LLC v. Republic of Guatemala* ("*TECO v. Guatemala*"), ICSID Case No. ARB/10/17, Award (Dec. 19, 2013), ¶ 458, **CL-133**.

[1510] *TECO v. Guatemala*, Award, ¶ 584, **CL-133** (emphasis added).

[1511] *TECO v. Guatemala*, Award, ¶ 587 (emphasis original), **CL-133**.

decision held that the Expert Commission's recommendation is not binding upon the CNEE. The second decision held that the CNEE was entitled to disband the Expert Commission.[1512] Guatemala contended that these decisions by the Constitutional Court either deprived the arbitral tribunal of its jurisdiction or limited the claimant to making a claim for denial of justice.[1513]

622. In rejecting these contentions, the tribunal opined that the tribunal's "task is fundamentally to assess the legal relevance of the facts under customary international law"[1514] and "it is up to an international arbitral tribunal to sanction decisions that amount to an abuse of power, are arbitrary, or are taken in manifest disregard of the applicable legal rules and in breach of due process in regulatory matters."[1515] The tribunal thus held that in light of the due process obligation under the international minimum standard, CNEE's failure to provide reasons for departing from the Expert Commission's report constituted a breach of fair and equitable treatment.[1516] The tribunal also noted that "there is no need for the Claimant to establish a denial of justice in order to find the State" in breach of the FET standard, because the loss suffered by the claimant derived "primarily from the actions taken by the CNEE, rather than from the decisions made by the Guatemalan judiciary".[1517] According to the tribunal, "a total lack of reasoning" in the context of administrative proceedings constitutes an independent breach of the minimum standard.[1518] Thus, there was no need for the claimant to plead a denial of justice regarding domestic court proceedings.

[1512] *TECO v. Guatemala*, Award, ¶¶ 233–235, **CL-133**.

[1513] *TECO v. Guatemala*, Award, ¶ 259, **CL-133**.

[1514] *TECO v. Guatemala*, Award, ¶ 475, **CL-133**.

[1515] *TECO v. Guatemala*, Award, ¶ 493, **CL-133**.

[1516] *TECO v. Guatemala*, Award, ¶ 664, **CL-133**.

[1517] *TECO v. Guatemala*, Award, ¶ 484, **CL-133**.

[1518] *TECO v. Guatemala*, Award, ¶ 458, **CL-133**.

623. In *Lemire v. Ukraine*, the licensing body's failure to state reasons was central to the tribunal's decision that the administrative procedures relating to the award of radio frequencies under tender were unfair.[1519] In that case, politically well-connected individuals were issued frequencies, notwithstanding that the claimant had better-satisfied the tender evaluation criteria. Under Ukraine law, the licensing body, National Council, was not required to provide explanation for its decisions,[1520] and yet, the tribunal still found a breach of FET based on "the utter absence of any reasoning" justifying the National Council's decision to deny the claimant's request to be awarded the frequency. [1521]

624. As explained above, the duty to provide reasons is a procedural requirement designed to restrict administrative discretion and secure decisions that are taken in accordance with law. "The absence of reasoning of the decision", the *Lemire* tribunal explained, "jeopardizes the possibilities of public scrutiny" and "*de facto* reduces the causes of judicial review to procedural irregularities" in administrative proceedings.[1522]

625. In some cases, administrative and regulatory authorities *did* provide some reasoning for their decisions, but not adequate enough to meet the principles of legality and due process. For instance, in *Metalclad v. Mexico*, the town council denied the construction permit request by the claimant on the grounds of environmental concerns and local opposition. After undertaking a substantive review of the permit process, the tribunal determined that the municipality had no authority, under domestic Mexican law, to consider such factors.[1523] Accordingly, the tribunal held that denial of a permit based on reasons that are unrelated to

[1519] *Lemire*, Decision on Jurisdiction and Liability, ¶ 371, **CL-166**.

[1520] *Lemire*, Decision on Jurisdiction and Liability, ¶¶ 304-305, **CL-166**.

[1521] *Lemire*, Decision on Jurisdiction and Liability, ¶ 371, **CL-166**.

[1522] *Lemire*, Decision on Jurisdiction and Liability, ¶ 311, **CL-166**.

[1523] *Metalclad*, Award, ¶¶ 86, 92, **CL-79**.

specific existing requirements for issuing that permit violates due process under the FET standard of NAFTA Article 1105.[1524]

626. In a similar vein, another NAFTA tribunal in *Bilcon v. Canada* held that Canada breached Article 1105 when it denied a claimant's application for a construction project in disregard of applicable legal criteria.[1525] Without legal authority or fair notice to the claimant, the review panel conducting the environmental impact assessment of the claimant's project created and applied a new standard of assessment rather than fully carrying out the mandate defined by Canadian laws.[1526] For the *Bilcon* tribunal, the panel's use of the "unprecedented approach" that the claimant had no reason to expect was both procedurally and substantively improper because the claimant was "denied a fair opportunity to know the case it had to meet" and the new standard of assessment "effectively preclude[d] any real possibility that an application could succeed."[1527]

627. In sum, arbitral tribunals have established that the requirement of administrative due process contains at least three elements: fair notice, opportunity to be heard, and reasoned decision-making process that requires domestic administration to give reasons for their decisions and base them on existing legal criteria under domestic law. As the *Middle East Cement* and *TECO* tribunals make clear, foreign investors—such as the Claimants in the present proceedings—are entitled to these fundamental procedural safeguards as a matter of international law; an administrative decision made in disregard of one or more of such safeguards constitutes a breach of fair and equitable treatment, independent of its procedural propriety under domestic law.

[1524] *Metalclad*, Award, ¶ 101, **CL-79**.

[1525] *William Ralph Clayton and others v. Government of Canada* ("*Bilcon v. Canada*"), PCA Case No. 2009-04, Award on Jurisdiction and Liability (Mar. 17, 2015), ¶¶ 588-604, **CL-159**.

[1526] *Bilcon v. Canada*, Award on Jurisdiction and Liability, ¶ 591, **CL-159**.

[1527] *Bilcon v. Canada*, Award on Jurisdiction and Liability, ¶ 590, **CL-159**.

3. Improper Administration of Justice by the Host State Gives Rise to A Denial of Justice

628. Not only administrative agencies and officers but also the judicial organs of the host state may breach the FET standard and customary international law. As noted above, international tribunals have repeatedly recognized that a serious shortcoming or failure by a national judiciary can constitute a denial of justice and a breach of the host state's obligation to accord fair and equitable treatment under the international minimum standard.[1528]

629. The NAFTA tribunal in *Mondev v. United States* has set forth a well-accepted "test" for finding a breach of denial of justice:

> The test is . . . whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome . . . . In the end the question is whether, at the international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.[1529]

630. Admittedly, this is a somewhat "open-ended standard."[1530] However, the *Mondev* tribunal counseled against adopting a more rigid, bright-line approach to the denial of justice inquiry, reasoning that the "more precise formula" would fail to cover the diverse "range of possibilities" in which a national system of justice may fall short of international standards.[1531] Similarly, Paulsson has observed, while noting the futility of adopting an

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[1528] *See, e.g.*, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* ("*Jan de Nul v. Egypt*"), ICSID Case No. ARB/04/13, Award (Nov. 6, 2008), ¶ 188 ("[T]he fair and equitable treatment standard encompasses the notion of denial of justice."), **CL-187**; *Victor Pey Casado and President Allende Foundation v. Republic of Chile* ("*Pey Casado v. Chile*"), ICSID Case No. ARB/98/2, Award (May 8, 2008), ¶ 656 ("No obstante, está claro que, entre las distintas obligaciones cubiertas por la necesidad de garantizar a la inversión un tratamiento justo y equitativo, figura, sin lugar a dudas, la de no cometer una denegación de justicia."), **CL-188**; *Apotex III*, Award, ¶ 9.16 ("[P]rohibition on denial of justice has acquired the status of customary international law and is among the protections embraced within the required minimum standard of treatment of aliens."), **CL-174**; *Mr. Franck Charles Arif v. Republic of Moldova* ("*Arif v. Moldova*"), ICSID Case No. ARB/11/23, Award (Apr. 8, 2013), ¶ 445 (holding that "the State can be held responsible for an unfair and inequitable treatment of a foreign indirect investor if and when the judiciary breached the standard by fundamentally unfair proceedings and outrageously wrong, final and binding decisions"), **CL-189**.

[1529] *Mondev*, Award, ¶ 127, **CL-17**; *Waste Management II*, Award, ¶ 95 (adopting the Mondev standard), **CL-36**.

[1530] *Mondev*, Award, ¶ 127, **CL-36**.

[1531] *Id.*, **CL-36**.

enumerative definition of the concept of denial of justice, "No definitive list of instances [of denials of justice] could be presented, for it would soon be invalidated by new fact patterns, untested forms of organisation of systems of justice, and the boundless capacities of human invention."[1532]

631. Instead, the evaluation of a denial of justice requires a particularized and holistic inquiry into whether the judicial organs of the state have acted in an unacceptable manner that would "shock or surprise" an impartial observer and consequently raise "justified concerns as to the judicial propriety of the outcome" of the case.[1533] To note, as the NAFTA tribunal in *Loewen* explained, the *Mondev* standard is an objective one: neither "bad faith" nor "malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice."[1534] "Denial of justice may occur irrespective of any trace of discrimination or maliciousness, if the judgment at stake shocks a sense of judicial propriety."[1535]

632. Quite apart from the indefinite and context-dependent nature of the standard on a denial of justice, tribunals and scholars, including in the NAFTA context, have largely agreed that the following inadequacies in the state's judicial system are very much likely to constitute a denial of justice, including:

i. Denial of access to courts and unreasonable delays in proceedings;

[1532] Paulsson at 205, **CL-177**.

[1533] *Mondev*, Award, ¶ 127, **CL-17**. *See* also M. Sornarajah, The International Law on Foreign Investment 357 (3d ed. 2010) (explaining that a denial of justice takes place when the "actions of the judicial organs of the state . . . exceeded the norms of proper judicial conduct or showed such prejudice as would shock the conscience of the outside world"), **CL-173**.

[1534] *Loewen*, Award, ¶¶ 132-133 (endorsing the *Mondev* standard), **CL-67**; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador* ("*Chevron I*"), UNCITRAL, PCA Case No. 2007-02/AA277, Partial Award on the Merits (Mar. 30, 2010), ¶ 244 ("While the [denial of justice] standard is objective and does not require an overt showing of bad faith, it nevertheless requires the demonstration of a 'particularly serious shortcoming' and egregious conduct that 'shocks, or at least surprises, a sense of judicial propriety'."), **CL-190**; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* ("*Philip Morris v. Uruguay*"), ICSID Case No. ARB/10/7, Award (Jul. 8, 2016), ¶ 502 ("The requirement of bad faith has been excluded by other tribunals."), **CL-191**.

[1535] *Jan de Nul v. Egypt*, Award, ¶ 193, **CL-187**.

ii. Breach of fundamental due process guarantees and serious procedural errors;

iii. Lack of judicial independence and impartiality; and,

iv. Clear and malicious misapplication of the law.[1536]

633. These commonly-recognized forms of denials of justice are described below in turn.

a. The Host State Must Provide Meaningful Protection to the Right of Access to Courts

634. The most obvious form of a denial of justice occurs where the host state literally shuts the doors to the courts and thus to justice itself.[1537] As Paulsson has described, "The right of access to courts is fundamental and uncontroversial . . . [because] [l]egal rights would be

[1536] *See*, e.g., *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States* ("Azinian v. Mexico"), ICSID Case No. ARB(AF)/97/2, Award (Nov. 1, 1999), ¶¶ 102-103 ("A denial of justice could be pleaded [1] if the relevant courts refuse to entertain a suit, [2] if they subject it to undue delay, or [3] if they administer justice in a seriously inadequate way. . . . There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law."), **CL-192**; *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V 064/2008, Partial Award on Jurisdiction and Liability (Sept. 2, 2009), ¶ 221 (noting that a denial of justice may occur if fundamental due process guarantees are breached, "if the procedure is delayed, if the Government influences administrative or court procedures, or if the composition of courts responsible for a certain procedure is altered"), **CL-176**; Paulsson at 205 ("Recurring instances [of denials of justice] are unreasonable delay, politically dictated judgments, corruption, intimation, fundamental breaches of due process, and decisions so outrageous as to be inexplicable otherwise than as expressions of arbitrariness or gross incompetence . . . ."), **CL-177**; UNCTAD, Fair And Equitable Treatment, 80, UNCTAD/DIAE/IA/2011/5 (2012) ("[T]he following are likely to be considered a denial of justice: (a) Denial of access to justice and the refusal of courts to decide; (b) unreasonable delay in proceedings; (c) Lack of a court's independence from the legislative and the executive branches of the State; (d) Failure to execute final judgments or arbitral awards; (e) Corruption of a judge; (f) Discrimination against the foreign litigant; (g) Breach of fundamental due process guarantees, such as a failure to give notice of the proceedings and failure to provide an opportunity to be heard.") (citations omitted), **CL-150**; *Barcelona Traction, Light and Power Co., Ltd.* (Belgium v. Spain), 1970 I.C.J. 3, 144 (Separate Opinion of Judge Tanaka) (explaining that "denial of justice occurs in the case of such acts as 'corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it . . . .'") (citations omitted), **CL-193**; Edwin M. Borchard, The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, art. 9, 23 AM. J. INT'L L. SPEC. SUPP. 131, 175 (1929) ("[D]enial of free access to the courts, failure to render a decision or undue delay in rendering judgment, corruption in the judicial proceedings, discrimination or ill-will against the alien as such, or as a national of a particular state, the refusal in bad faith to apply the local law, executive or legislative interference with the freedom or impartiality of the judicial process, failure to execute the judgment, denial of an appeal where local law ordinarily permits it . . . have all been deemed, under particular circumstances, instances of 'denial of justice.'"), **CL-194**.

[1537] *See*, e.g., *Azinian v. Mexico*, Award, ¶ 102 (stating that "denial of justice could be pleaded if the relevant courts refuse to entertain a suit"),**CL-192**; *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award (Mar. 26, 2008), ¶ 75 (stating that the concept of denial of justice include both judicial failure and also legislative failures relating to the administration of justice and noting that "denying access to the courts" are one of such failures), **CL-195**.

illusory if there were no entitlement to a procedural mechanism to give them effect."[1538] Hence, granting the foreign investor with a right of access to the courts is the most elementary element of the host state's obligation not to commit a denial of justice.

635. Besides, the right of access to the courts would become a mere formality if courts fail to address "material aspects" of the submitted claim, "such that they can be said not to have decided the claim at all."[1539] As noted by the tribunal in *Philip Morris v. Uruguay*, courts are not obliged to "deal with every argument presented in order to reach a conclusion,"[1540] but the claims must nonetheless be "fairly determined" on a substantive level.[1541] Otherwise, a denial of justice may result.[1542]

636. Relatedly, as it is often the case, justice delayed is justice denied. If legal redress is not forthcoming in a timely fashion, it is effectively the same as having no redress at all. Thus, arbitral tribunals have repeatedly found that an excessive and unreasonable delay is one of the classic forms of denial of justice.[1543] The tribunal in *Pey Casado v. Chile* stated, "delays may be even more ruinous than absolute refusal to access to justice, because in the latter situation the claimant knows where he stands and take action accordingly, whether by seeking diplomatic intervention or exploring avenues of direct legal action."[1544]

[1538] Paulsson at 134, **CL-177**.

[1539] *Philip Morris v. Uruguay*, Award, ¶ 557, **CL-191**.

[1540] *Id*., **CL-191**.

[1541] *Id*. at ¶ 576, **CL-191**.

[1542] *Id*. at ¶ 557 ("[T]he refusal of courts to address a claim can clearly amount to a denial of justice."), **CL-191**.

[1543] *Pey Casado v. Chile*, Award, ¶ 659 (finding a denial of justice in relation to a local court's seven-year delay in rendering a decision), **CL-188**; *Chevron I*, Partial Award on the Merits, ¶¶ 253-254 (the local court kept the simple and straightforward proceedings for at least thirteen years and the tribunal found a denial of justice), **CL-190**; *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (Sept. 11, 2009), ¶ 163 (identifying several factors that need to be assessed when determining a denial of justice claim on the basis of unreasonable delay in court proceedings, namely "the complexity of the matter", "the need for celerity of decision" and "the diligence of claimant in prosecuting its case"), **CL-196**.

[1544] *Pey Casado v. Chile*, Award, ¶ 660 (quoting Jan Paulsson, Denial of Justice in International Law 177 (2005)), **CL-188**.

b. Breach of Due Process and Serious Procedural Defects in Judicial Proceedings Amount to A Denial of Justice

637. A denial of justice can also result from the host state's failure to provide fundamental due process rights in judicial proceedings. Under the overarching requirement of due process under the FET standard, the host state must extend certain due process rights to all forms of a government-decision making process. Particularly with respect to courts, as well as administrative authorities acting in an adjudicatory capacity, the failure to accord basic due process constitutes a denial of justice under minimum standards of treatment.

638. In its comprehensive analysis of international investment law, UNCTAD observed that the "[c]ompliance with the most basic due process requirement is necessary to avoid a denial of justice."[1545] Similarly, the tribunal in *Loewen v. United States* stated that a denial of justice may occur if there is "[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety."[1546] Numerous other tribunals have also repeatedly noted that a failure to accord due process in judicial proceedings will result in a denial of justice.[1547]

639. As in the administrative context, domestic court proceedings must afford a litigant with proper notification and an opportunity to be heard.[1548] In addition, a local court

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[1545] UNCTAD, Fair And Equitable Treatment, 80, UNCTAD/DIAE/IA/2011/5 (2012), **CL-150**.

[1546] *Loewen*, Award, ¶ 132, **CL-67**.

[1547] *See*, e.g., *Waste Management II*, Award, ¶ 98 ("[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 . . . involves a lack of due process leading to an outcome which offends judicial propriety . . . ."), **CL-36**; *Siag*, Award, ¶ 452 ("The concepts of 'due process' and 'denial of justice' are closely linked. A failure to allow a party due process will often result in a denial of justice."), **CL-68**; *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005, Final Award, ¶ 279 (stating that the host state can be held liable for denial of justice if the claimant can prove that "the court system fundamentally failed" as in the cases of "major procedural errors such as lack of due process"), **CL-175**.

[1548] *See*, e.g., *Frontier*, Final Award, ¶ 366 ("in order to constitute a breach of fair and equitable treatment on the grounds of procedural impropriety and a lack of due process or bad faith, other tribunals have considered factors including a failure to hear the investor, lack of proper notification, persistent appeals to local favouritism, and denial of access to the courts."), **CL-157**; *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V 064/2008, Partial Award on Jurisdiction and Liability (Sept. 2, 2009), ¶ 221 (noting that the prohibition against a denial of justice under the FET standard includes, among others, the "obligation to notify an investor of hearings and not to decide about claim in his absence or in gross violation of procedural rules"), **CL-176**; UNCTAD, Fair And Equitable Treatment, 80, UNCTAD/DIAE/IA/2011/5 (2012) (stating that "[b]reach of

must provide adequate grounds and reasoning for its decisions. For instance, in *Flughafen Zürich v. Venezuela*, the tribunal found a denial of justice in the Venezuelan Supreme Tribunal of Justice's decision that failed to refer to its supporting law and thus lacked adequate legal grounds and reasoning.[1549]

640. In addition to its obligation to accord basic due process, the national judiciary must respect procedural propriety.[1550] As the *Thunderbird* tribunal explained, in comparison to administrative proceedings, judicial process requires a higher standard of due process and procedural fairness.[1551] Tribunals have thus found denials of justice in cases involving major procedural defects and irregularities that have "tainted the proceedings irrevocably."[1552]

641. One example of such grave procedural errors that can produce a denial of justice is the court's refusal to follow procedures required under domestic law. In *Dan Cake v. Hungary*, the tribunal found a denial of justice in the Hungarian court's refusal to convene a mandatory composition hearing during the bankruptcy proceedings.[1553] Under the Hungarian Bankruptcy Act, the domestic court is required to convene a composition hearing where the debtor can potentially enter into a settlement agreement with creditors, should the debtor make the request for such a hearing with the submission of three required documents.[1554] The claimant's subsidiary, Danestia, made such a request before the Metropolitan Court of Budapest, sitting as a bankruptcy court, to prevent the sale of its assets and with all three

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fundamental due process guarantees, such as a failure to give notice of the proceedings and failure to provide an opportunity to be heard," is considered a denial of justice), **CL-150**.

[1549] *See Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award (Nov. 18, 2014), ¶ 692, **CL-103**.

[1550] Dolzer & Schreuer at 154, **CL-122**.

[1551] *Thunderbird v. Mexico*, Arbitral Award, ¶ 200, **CL-7**.

[1552] *Amco Asia Corp. and Others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award in Resubmitted Proceeding (Mar. 31, 1990), ¶ 138, **CL-179**.

[1553] *Dan Cake (Portugal) S.A. v. Hungary* ("*Dan Cake v. Hungary*"), ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability (Aug. 24, 2015), ¶ 142, **CL-197**.

[1554] *Dan Cake v. Hungary*, Decision on Jurisdiction and Liability, ¶ 94, **CL-197**.

required documents. And yet, the Court still ordered Danestia to submit supplementary filings to complete its request for a hearing and refused to convene a hearing until its order had been complied with.[1555]

642. The *Dan Cake* tribunal acknowledged that the local court had inherent power to require the submission of additional documents or information, not specifically mentioned in the statute.[1556] Nevertheless, after carefully reviewing the facts presented before it, the tribunal found that the supplemental filing requirements imposed by the bankruptcy court were "obviously unnecessary or impossible to satisfy, or in breach of a fundamental right."[1557] Given these circumstances, the tribunal concluded that "the Court simply did not want, for whatever reason, to do what was mandatory."[1558]

643. Accordingly, the *Dan Cake* tribunal found a denial of justice in the Hungarian court's refusal to convene the composition hearing, stating that:

> Arbitral Tribunals have used, in order to characterize judicial decisions as denials of justice, various expressions which all perfectly fit the Metropolitan Court of Budapest's 22 April 2008 decision: 'administer[ing] justice in a seriously inadequate way,' 'clearly improper and discreditable,' '[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety….' The International Court of Justice defined denial of justice as 'a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.' The decision of the Metropolitan Court of Budapest does shock a sense of judicial propriety.[1559]

644. An *ultra petita* decision may also generate a denial of justice. Meaning "not beyond the request" in Latin, the principle of *non ultra petita* prevents the court from deciding more than it has been asked to. In *Arif v. Moldova*, the claimant's competitor filed suit against claimant in connection with a tender competition for duty-free business. The claimant won the

[1555] *Dan Cake v. Hungary*, Decision on Jurisdiction and Liability, ¶ 84, **CL-197**.

[1556] *Dan Cake v. Hungary*, Decision on Jurisdiction and Liability, ¶ 113, **CL-197**.

[1557] *Dan Cake v. Hungary*, Decision on Jurisdiction and Liability, ¶¶ 117, 142, **CL-197**.

[1558] *Dan Cake v. Hungary*, Decision on Jurisdiction and Liability, ¶ 142 (emphasis original), **CL-197**.

[1559] *Dan Cake v. Hungary*, Decision on Jurisdiction and Liability, ¶ 146 (citations omitted), **CL-197**.

tender, but the competitor alleged that the claimant had not fulfilled the requirements of the tender's specifications.[1560] The competitor asked for the tender results to be declared illegal. The local court, however, went beyond the form of order sought by the competitor and declared the competitor as the outright winner of the tender because the competitor was the only other participant in the competition.[1561]

645. The *Arif* tribunal concluded that the local court "did decide *ultra petita* by substituting a formal request by its logical deduction" and noted that this error remained uncorrected despite the claimant's appeal before the Supreme Court of Moldova.[1562] However, the *Arif* tribunal still found no denial of justice, since the local court's decision was "wrong" but did not have "negative impact" on the claimant's position and business.[1563] Despite the court's decision, the claimant was able to continue to operate its duty free stores, "side by side with the winning competitor," because Moldova had "already invalidated the exclusivity right to open and operate border shops for reasons of competitive law."[1564]

646. Nonetheless, the *Arif* tribunal still suggested that it could have found a denial of justice if the exclusive status of duty-free business had been maintained in Moldova and the claimant had been disadvantaged as a result of the court's "unwarranted declaration of another winner."[1565] Similarly, in *Pantechniki v. Albania*, the tribunal recognized that a *ultra petita* decision is a "clear violation of fair procedure" that can engage the state in liability under the heading of a denial of justice.[1566] There, a local court declared *sua sponte* the invalidity of a

[1560] *Arif v. Moldova*, Award, ¶ 457, **CL-189**.

[1561] *Arif v. Moldova*, Award, ¶ 468, **CL-189**.

[1562] *Arif v. Moldova*, Award, ¶ 469, **CL-189**.

[1563] *Arif v. Moldova*, Award, ¶ 470, **CL-189**.

[1564] *Arif v. Moldova*, Award, ¶ 470, **CL-189**.

[1565] *Arif v. Moldova*, Award, ¶ 470, **CL-189**.

[1566] *Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of* Albania ("*Pantechniki v. Albania*"), ICSID Case No. ARB/07/21, Award (Jul. 30, 2009), ¶ 100, **CL-198**.

contractual provision which had never been invoked by the litigating parties without giving the claimant an opportunity to address it.[1567] The tribunal viewed this as a "serious matter" that could have amounted to a denial of justice but for the claimant's failure to pursue an appeal on this matter.[1568] On the other hand, in *Flughafen Zürich v. Venezuela, the tribunal easily found a denial of justice in the Venezuelan highest court's decision that was made sua sponte in the absence of a petition by any of the parties.*[1569]

647. In sum, not only fundamental due process denials, but other procedural errors and irregularities, such as the court's refusal to apply mandatory procedural rules and *ultra petita* decisions, can result in a denial of justice, if they "lead[] . . . to justified concerns as to the judicial propriety of the outcome."[1570] As the *Dan Cake* tribunal clarified, whether the judicial outcome would have been different but for procedural defects is irrelevant for purposes of finding a denial of justice.[1571] Rather, the fact that the impugned decision was "tainted by unfairness" as a consequence of the domestic court's failure to respect procedural propriety is enough to constitute a denial of justice.[1572] Similarly, the tribunal in *Philip Morris* stated that "[a] procedural impropriety can occur notwithstanding that the court could (and probably would) still have reached the same result absent the impropriety."[1573]

c. Lack of Judicial Independence and Impartiality Results In A Denial of Justice

648. A national system of justice may also fall short of international standards if the judicial action is affected by political influence from other branches of the government, or

[1567] *Pantechniki v. Albania*, Award, ¶¶ 99-100, **CL-198**.

[1568] *Pantechniki v. Albania*, Award, ¶ 100, **CL-198**.

[1569] Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/19, Award (Nov. 18, 2014), ¶ 694, **CL-103**.

[1570] *Mondev*, Award, ¶ 127, **CL-17**.

[1571] *Dan Cake v. Hungary*, Decision on Jurisdiction and Liability, ¶ 142, C**L-197**.

[1572] *Dan Cake v. Hungary*, Decision on Jurisdiction and Liability, ¶ 157, C**L-197**.

[1573] *Philip Morris v. Uruguay*, Award, ¶ 575, C**L-191**.

shows a partiality for one of the parties as a result of bias, discrimination, collusion and corruption.

649. The tribunal in *Rupert Joseph Binder v. Czech Republic* explained:

> An important part of fair and equitable treatment is the investor's access to independent and impartial courts in order to vindicate his rights and protect his investment. If the courts are unable to give effect to the law in an impartial and fair manner, the investor may find himself in a situation of denial of justice which is clearly incompatible with the notion of fair and equitable treatment.[1574]

650. The tribunal in *Chevron II* also stated that the lack of judicial independence or impartiality falls below the "minimum standards for judicial conduct long recognized under international law,"[1575] noting:

> Article 10 of the Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December 1948, provides: 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and any criminal charges against him'. Article 14 of the International Covenant on Civil and Political Rights, adopted by the UN General Assembly on 16 December 1966 (in force from 23 March 1976) . . . [to which Mexico is a party[1576]], provides, in material part: 'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.'[1577]

651. One important aspect of the duty to observe and respect judicial independence and impartiality is related to discrimination against foreign investors. Hence, the *Loewen* tribunal stated that international law requires a State to "provide a fair trial of a case to which a foreign investor is a party," and, specifically, to "ensure that litigation is free from

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[1574] *Rupert Joseph Binder v. Czech Republic*, UNCITRAL, Final Award (Redacted) (Jul. 15, 2011), ¶ 448, **CL-144** (emphasis added).

[1575] *Chevron Corp. and Texaco Petroleum Corp. v. The Republic of Ecuador* ("*Chevron II*"), UNCITRAL, PCA Case No. 2009-23, Second Partial Award on Track II (Aug. 30, 2018), ¶ 8.56, **CL-199**.

[1576] *See* Depository, United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (last visited Feb. 3, 2020), **CL-200**.

[1577] *Chevron II*, Second Partial Award on Track II, ¶ 8.57, **CL-199**.

discrimination against a foreign litigant and that the foreign litigant should not become the victim of sectional or local prejudice."[1578]

652. Importantly, a denial of justice may occur irrespective of any trace of "bad faith" or "malicious intention" on the part of judges since, as explained earlier, the legal standard rests on an objective, rather than subjective, test.[1579] Thus, even when the local court is not acting with the discriminatory motive, it can still deny a justice to foreign investors by failing to take affirmative steps to prevent the judicial proceedings from being tainted by nationality or race-based bias and prejudice.

653. One of the seminal awards in this regard is *Loewen v. United States*. There, a trial judge in Mississippi permitted opposing counsel to incite anti-foreign sentiment against the Canadian claimant company.[1580] Although arguments based on race and nationality were used persistently throughout the trial proceedings,[1581] the judge nevertheless rejected a proposed jury instruction cautioning against the use of bias and prejudice.[1582] The *Loewen* tribunal concluded that the resulting damages award—the largest ever awarded in Mississippi—was procured from a jury swayed by persistent appeals to local favoritisms against the foreign claimant, and that the "whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment."[1583]

[1578] *Loewen*, Award, ¶ 123, **CL-67**. *See* also *Waste Management II,* Award, ¶ 130 (a denial of justice may result from judicial discrimination on account of foreign ownership of claimant companies), **CL-36**; *Pey Casado v. Chile*, Award, ¶ 674 (holding that inconsistent and discriminatory judicial decisions constitute a denial of justice), **CL-188** (emphasis added).

[1579] *Loewen*, Award, ¶ 132, **CL-67**; *Jan de Nul v. Egypt*, Award, ¶ 193, **CL-187**.

[1580] *Loewen*, Award, ¶ 56, **CL-67**.

[1581] *Id*. at ¶¶ 65-66, **CL-187**.

[1582] *Id*. at ¶¶ 82, 85, **CL-187**.

[1583] *Id*. at ¶ 137, **CL-187**.

654. Collusion between court and litigant is another clear manifestation of denial of justice. Collusion frequently occurs in tandem with judicial bribery; which, according to one tribunal, "must rank as one of the more serious cases of corruption, striking directly at the rule of law, access to justice and public confidence in the legal system."[1584] Hence, collusion and judicial bribery often are concomitant threats to the integrity and independence of the national judiciary.

655. Accordingly, the tribunal in *Chevron II* unanimously held that a $ 9.5 billion USD judgment rendered against Chevron in Lago Agrio, Ecuador amounted to a denial of juice because the Ecuadorian judge, who purported to have drafted the multibillion dollar judgment, did not in fact draft the judgment but rather, "in return for his promised reward [i.e., US $ 500,000], allowed certain of the Lago Agrio Plaintiffs' representatives, corruptly, to 'ghostwrite' at least material parts of the Lago Agrio Judgment."[1585] The tribunal explained the instance of "ghostwriting" is enough to meet the legal test for denial of justice because:

> The evidence pointing to the corrupt conduct of Judge Zambrano in regard to the 'ghost writing' of the Lago Agrio Judgment in collusion with certain of the Lago Agrio Plaintiff's representatives justifies the very gravest concerns as to the judicial propriety in regard to the Lago Agrio Judgment . . . . [The judicial conduct at issue] was grossly improper by any moral, professional and legal standards; and it directly impacted, adversely, the rights of Chevron . . . .[1586]

656. Judicial independence may also be affected by political influence from the executive branch of the host state.[1587] As enshrined in the UN Basic Principles on the Independence of the Judiciary, the judiciary must "decide all matters before them impartially,

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[1584] *Chevron II*, Second Partial Award on Track II, ¶ 9.16 (emphasis added), **CL-199**.

[1585] *Chevron II*, Second Partial Award on Track II, ¶ 5.231, **CL-199**.

[1586] *Chevron II*, Second Partial Award on Track II, ¶ 8.59, **CL-199**.

[1587] *See*, e.g., *Italian Republic v. Republic of Cuba*, Ad Hoc State-State Arbitration, Final Award (Jan. 1, 2008), ¶ 49 ("L'acces a la justice s'est souvent revele inadequat et inefficace en l'absence d'impartialite et d'independance de la justice par rapport au pouvoir executif."), **CL-201**; *Petrobart Ltd. v. The Kyrgyz Republic* ("*Petrobart v. Kyrgyzstan*"), SCC Case No. 126/2003, Arbitral Award (Mar. 29, 2005), pp. 75-77 (finding that interference by the state in court proceedings violate the standard of fair and equitable treatment), **CL-202**; UNCTAD, Fair And Equitable Treatment, 80, UNCTAD/DIAE/IA/2011/5 (2012) ("Lack of a court's independence from the legislative and executive branches of the State" is one clear manifestation of a denial of justice), **CL-150**.

on the basis of facts and in accordance with law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."[1588] As a corollary, it is the duty of "all governmental and other institutions"—not just courts and judges—"to respect and observe the independence of the judiciary."[1589] Thus, the judicial subservience to executive pressure, or, conversely, the executive interference with the judicial process, undermines the judicial independence and generates the international delinquency under the heading of denial of justice. Paulsson also observed that "politically dictated judgments, corruption [and] intimidation" are among recurring instances of denials of justice.[1590]

657. For instance, in *Petrobart v. Kyrgyzstan*, the Vice Prime Minister sent a letter to the court requesting the postponement of the execution of a judgment entitling the claimant to money from the state joint stock company KGM.[1591] Five days later and influenced by this letter, the court granted a three months stay of execution, and before the stay ended, KGM declared bankruptcy by transferring assets away from it, thereby leaving Petrobart with no recovery at all.[1592] The tribunal condemned this letter as "an attempt by the Government to influence a judicial decision to the detriment of Petrobart."[1593] According to the tribunal, "such Government intervention in judicial proceedings is not in conformity with the rule of law in a democratic society", amounting to a violation of the host state's obligation under the FET standard.[1594]

[1588] United Nations, Basic Principles on the Independence of the Judiciary, art. 2, UN Doc. A/CONF.121/22/Rev.1 59 (1985) (emphasis added), **CL-203**.

[1589] United Nations, Basic Principles on the Independence of the Judiciary, art. 1, UN Doc. A/CONF.121/22/Rev.1 59 (1985), **CL-203**.

[1590] Paulsson at 205, **CL-177**.

[1591] *Petrobart v. Kyrgyzstan*, Arbitral Award, p. 75, **CL-202**.

[1592] *Id*. at pp. 21, 75, **CL-202**.

[1593] *Id*. at p. 75, **CL-202**.

[1594] *Id*. at pp. 75-77 (emphasis added), **CL-202**.

658. The principle of judicial independence further requires that judicial decisions, once rendered, are respected by members of the executive branch of the host state. As a preliminary matter, this entails the obligation of the executive branch to comply voluntarily with judicial decisions that concern its conduct or policy. Moreover, the executive branch, which is vested with the enforcement power, including the power to coerce compliance with a judicial decision, must be willing to use this power if compliance is not forthcoming. In this regard, the failures by the executive authorities to comply with or to enforce court judgments are "sufficiently closely related to the administration of justice" that they are considered a denial of justice under international law even in the absence of the appearance of collusion between the judiciary and the executive branch as in the case of *Petrobart*.[1595]

659. Thus, in *Siag v. Egypt*, the tribunal found "an egregious denial of justice" in the Egyptian government's stubborn refusal to comply with court rulings.[1596] There, the Egyptian government ignored multiple decisions from local courts holding that the resolution issued by the Ministry of Tourism purporting to cancel the contract and expropriate the claimants' property was illegal under Egyptian law. Despite that there were "no fewer than eight rulings in Claimants' favor", no steps were taken by the Egyptian government to return the property to the claimants.[1597]

660. Taken together, the requirement of judicial independence and impartiality takes many forms. First, as the tribunal in *Loewen* explained, the judiciary has the "paramount duty" to ensure that the court proceedings be free from bias and discrimination against foreign litigants.[1598] Second, the judiciary must be independent from improper influence in the forms of political pressure and economic bribery; evidence pointing to collusion between the judge

[1595] Paulsson at 205-206, **CL-177**.

[1596] *Siag*, Award, ¶ 455, **CL-68**.

[1597] *Siag*, Award, ¶ 454, **CL-68**.

[1598] *Loewen*, Award, ¶ 138, **CL-67**.

and the litigant, or between the court and other government authorities, offends a sense of judicial propriety, leading to finding of a denial of justice. Finally, the independence of the judiciary often hinges on the proper compliance with and enforcement of judicial decisions by other branches of the government; their failure to do so necessarily results in the maladministration of justice, giving rise to a denial of justice.

d. Clear and Malicious Misapplication of the Domestic Law Results in A Denial of Justice

661. It is a well-established principle of international law that a denial of justice may be founded upon the substantive and manifest incorrectness of a domestic's court decision, separate and apart from serious defects in procedure. As observed by the tribunal in *Flughafen Zürich v. Venezuela*, a denial of justice can occur in the event of a decision which has been rendered after "profoundly flawed" process, or which is otherwise "manifestly inadmissible and illegal".[1599]

662. In *Azinian v. Mexico*, the first NAFTA award to address denial of justice, the tribunal famously stated: "A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way. There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law." [1600]

663. The *Azinian* tribunal further explained that this "fourth type of denial of justice . . . doubtlessly overlap with the notion of 'pretence of form,'" because by demonstrating the national court's "clear and malicious misapplication of the law," the claimant can show that

[1599] *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, ¶ 636 (counsel translation), **CL-103**

[1600] *Azinian*, Award, ¶¶ 102, 103 (emphasis added), **CL-**192; *see also Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, ¶ 640 (citing *Azinian*), **CL-103**; *Mondev*, Award, ¶ 126 (citing *Azinian*), **CL-17**; *Pey Casado v. Chile*, Award, ¶ 659 (citing *Azinian*), **CL-188**.

the challenged decision was merely a "'pretence of form' to mask a violation of international law."[1601]

664. Echoing the *Azinian* tribunal, the tribunal in *Pantechniki v. Albania* stated:

> The general rule is that 'mere error in the interpretation of the national law does not per se involve responsibility.' Wrongful application of the law may nonetheless provide 'elements of proof of a denial of justice' . . . [when the error is of] a kind which no 'competent judge could reasonably have made.' Such a finding would mean that the state had not provided even a minimally adequate justice system.[1602]

665. As noted earlier, the *Pantechniki* case involved the local court's *ultra petita* decision declaring the nullity of a contract provision. The contractual provision at issue was a standard liability clause "which appears in myriad international construction contracts" and "based on well known FIDIC Conditions of Contract."[1603] However, the local court still invalidated this clause, for reasons that it "could violate Albanian public policy."[1604] Besides noting the procedural defect, the tribunal also found that this decision raised a "prima facie suggestion of an extreme misapplication of law."[1605] Since the claimant didn't not pursue an appeal on this issue, the tribunal eventually dismissed the claim of denial of justice. And yet, as observed by the tribunal in *Arif v. Moldova*, the state can certainly be held liable under international law "if and when" its judiciary makes "outrageously wrong, final and binding decisions."[1606]

666. In sum, a domestic court's decision resulting from the "clear and malicious misapplication of law"[1607] or that was "so bereft of a basis in law that [it] was in effect arbitrary

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[1601] *Azinian*, Award, ¶¶ 99, 103, **CL-192**.

[1602] *Pantechniki v. Albania*, Award, ¶ 94, **CL-198**.

[1603] *Pantechniki v. Albania*, Award, ¶ 95, **CL-198**.

[1604] *Pantechniki v. Albania*, Award, ¶ 95, **CL-198**.

[1605] *Pantechniki v. Albania*, Award, ¶ 96, **CL-198**.

[1606] *Arif v. Moldova*, Award, ¶ 445, **CL-189**.

[1607] *Azinian*, Award, ¶ 103, **CL-192**.

or malicious,"[1608] can lead to a finding of a denial of justice, even if such a decision did not suffer from serious procedural defects or the lack of judicial independence.

4. Evaluation of a Denial of Justice Involves a Consideration of the Cumulative Effects of the State's Actions In Regard to the Administration of Justice

667. As noted above, the evaluation of a denial of justice is highly case-specific and tribunals have been hesitant in declaring that certain act or omission in the administration of justice *ipso facto* constitutes a denial of justice. And yet, as explained above, some forms of denials of justice are readily recognized, including the refusal of access to courts, excessive delays, lack of due process and procedural propriety, and lack of judicial independence and impartiality, including through political influence and bribery.

668. In addition, as with a breach of the FET standard, a denial of justice may become apparent when considering the cumulative effects of the treatment of an investor by national courts. Accordingly, "an investor may complain . . . that its treatment in various proceedings cumulatively meets the standard of a denial of justice."[1609]

5. Mexico Breached its Obligations to Accord Due Process and Not to Commit a Denial of Justice

669. As discussed in Section IV.X, the actions of the Mexican judiciary in the *Amparo* 1668/2011 proceeding constituted an outrageous failure of the judicial system involving grave due process violations and egregious and malicious misapplications of Mexican law. Moreover, the *Amparo* 1668/2011 proceeding conspicuously lacked judicial

[1608] *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award (Apr. 23, 2012), ¶, **CL-158**; *see also Rumeli Telekom*, Award ¶ 653 (a denial of justice can result from "the decision [that] is so patently arbitrary, unjust or idiosyncratic that it demonstrates bad faith"), **CL-113**; Paulsson at 205 (Recurring instances of denials of justice include "decisions so outrageous as to be inexplicable otherwise than as expressions of arbitrariness or gross incompetence"), **CL-177**.

[1609] *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award (Mar. 26, 2008), ¶ 78 ("The treatment of an investor by national courts should be examined in its entirety to determine whether or not there has been a denial of justice."), **CL-195**.

independence and impartiality, which, in and of itself, amounts to a denial of justice under the NAFTA and customary international law.

670. In addition to the judiciary, SEGOB also committed serious due process violations and denied justice to Claimants in its administrative decision making process that led to its rescission of the November 16, 2012 Resolution in the enforcement stage of the *Amparo* 1668/201 proceeding; the permanent and illegal closure of the Claimants' Casinos; and the arbitrary and illegal denial of E-Games' requests for further permits based on new, invented requirements not enshrined in the Gaming Regulation.

671. These judicial and administrative irregularities, violations of Claimants' due process rights, and gross and malicious misapplications of law, which at first appear unexplainable, are really only understood when one sees the pressure exerted on SEGOB and the judiciary by the Peña Nieto administration as well as the bribery of the courts by E-Mex, as discussed in prior sections of this Memorial and also again below.

a. **The *Amparo* 1668/2011 Proceeding Before the Sixteenth District Judge, the Collegiate Tribunal, and the Mexican Supreme Court Proceedings Were Plagued with Irregularities, Gross Misapplications of Mexican Law and Egregious Violations of Claimants' Due Process Rights That Constituted Manifest Injustice That "Shock the Conscience"**

672. The Mexican judiciary denied justice to Claimants in violation of Article 1105 of NAFTA in the *Amparo* 1668/2011 proceeding that resulted in the revocation of the SEGOB's November 16, 2012 Resolution and consequently of E-Games' hard earned permit to operate the Casinos. As noted above,[1610] the *Amparo* 1668/2011 proceeding was plagued with innumerable irregularities, gross and irregular misapplications of law, and egregious violations of Claimants' due process rights that, both together and in isolation, constituted

[1610] *See supra* Section IV.X.

manifest injustice that "would shock the conscience of the outside world,"[1611] including among others:

> (i) The Sixteenth District Judge and Collegiate Tribunal's failure to dismiss E-Mex's Third Amendment with respect to SEGOB's May 27, 2009 Resolution, notwithstanding that there was undeniable evidence in the *Amparo* 1668/2011 case file demonstrating that E-Mex's Third Amendment was filed in an untimely manner and thus required to be immediately dismissed.[1612] This failure constitutes a clear and gross misapplication of Mexican *Amparo* law.[1613] Moreover, in failing to dismiss the Third Amendment, the Sixteenth District Judge and Collegiate Tribunal failed "to do what was mandatory."[1614] Under Mexican *Amparo law*, the judge must perform an *ex officio* review of the admissibility of an *amparo* proceeding;[1615]
>
> (ii) The Collegiate Tribunal's failure to examine *ex officio* E-Games' argument that E-Mex's Third Amendment was inadmissible because the effects of SEGOB's May 27, 2009 Resolution had ceased by virtue of SEGOB's November 16, 2012 Resolution—E-Games no longer needed to be an operator under E-Mex's permit as it was by then already operating under its own permit. Again, the Collegiate Tribunal did not follow the legally required procedure or the applicable law, despite that E-Games' argument involved an additional ground for the inadmissibility of E-Mex's Third Amendment.[1616] This procedural error, together with the aforementioned failure of the Sixteenth District Judge and Collegiate Tribunal to dismiss the Third Amendment for its untimeliness, "tainted the [*Amparo* 1668/2011] proceedings irrevocably," because the dismissal of E-Mex's Third Amendment, as required under law, would have ended the entire proceeding that ultimately led to the rescission of

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[1611] M. Sornarajah, The International Law on Foreign Investment 357(3d ed. 2010) (emphasis added), **CL-173**.

[1612] Guerrero Report, **CER-2**, 24.

[1613] Guerrero Report, **CER-2**, 24.

[1614] *Dan Cake v. Hungary*, Decision on Jurisdiction and Liability, ¶ 142, **CL-197**.

[1615] Guerrero Report, **CER-2**, ¶ 55.

[1616] Guerrero Report, **CER-2**, ¶¶ 121, 175, 183-185, 144.

the November 2012 Resolution and the resulting cancellation of E-Games' gaming permit;[1617]

(iii)The Sixteenth District Judge's failure to notify E-Games of SEGOB's July 19, 2013 Resolution that rescinded the May 27, 2009 Resolution pursuant to the Sixteenth District Judge's January 31, 2013 Order. This was in violation of Mexican law and of E-Games' due process right to be heard and prevented E-Games from responding on the merits to the July 19 Resolution and judicially challenging the same;[1618]

(iv)The Sixteenth District Judge's failure to require SEGOB to issue new resolutions answering E-Games' initial requests, while ordering SEGOB to rescind all resolutions based on or derived from the May 27, 2009 Resolution (the August 26, 2013 Order).[1619] This failure effectively deprived E-Games and Claimants of any appellate recourse against SEGOB's rescission of all resolutions issued in favor of E-Games, including the November 16, 2012 Resolution, because SEGOB, per the Sixteenth District Judge's order, did not issue new resolutions that E-Games could have directly challenged. As explained above, "the right of access to courts" is one of the most "fundamental" protections contemplated by the principle of a denial justice because "[l]egal rights would be illusory if there were no entitlement to a procedural mechanism to give them effect." [1620] Therefore, the Sixteenth District Judge's order amounts to an outright denial of the access to justice;

(v) The Collegiate Tribunal's *ultra petita* decision that *Incidente de Inejecución* 82/2013 was unsubstantiated (*infundado*) and that SEGOB had not exceeded its authority in fulfilling the Sixteenth District Judge's January 31, 2013 Order by rescinding the November 16, 2012 Resolution (the February 19, 2014

[1617] Guerrero Report, **CER-2**, ¶¶ 24; *Amco Asia Corp. and Others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award in Resubmitted Proceeding (Mar. 31, 1990), ¶ 138, **CL-179**.

[1618] Guerrero Report, **CER-2**, ¶ 298.

[1619] Guerrero Report, **CER-2**, ¶ 190; Order of the Juzgado Decimosexto de Distrito en Materia Administrativa (Aug. 26, 2013), **C-23**.

[1620] Paulsson at 134, **CL-177**.

Order).[1621] As explained above, the Collegiate Tribunal's review of the legality and constitutionality of the November 16, 2012 Resolution should not have occurred at all since E-Mex already had consented to this administrative act in the *Amparo* 1151/2012 proceeding and, even if it could still be judicially challenged, had to be challenged in a separate and independent judicial proceeding that afforded E-Games all of the due process rights and not in the enforcement stage of the *Amparo* 1668/2011 proceeding where such a challenge was not allowed under the *Amparo* law and where E-Games was not afforded due process rights to defend the legality of the November 2012 resolution.[1622] Thus, the Collegiate Tribunal's *ultra petita* decision was made in clear violation of Mexican law, had devastating consequences for Claimants and their investments, and was left unaddressed by the Mexican Supreme Court, clearly distinguishing Claimants from investors in *Arif* and *Pantechniki*.[1623] Moreover, the February 19, 2014 Order deprived E-Games and Claimants of their rights stemming from the November 16, 2012 Resolution, without affording basic due process guarantees, such as the opportunity to present evidence or formulate allegations to defend the legality of the resolution;

(vi) The Collegiate Tribunal's failure to give reasons for its conclusion that the Sixteenth District Judge's January 31, 2013 Order ruled the principle of "acquired rights" unconstitutional.[1624] The Sixteenth District Judge unequivocally stated that his January 31, 2013 Order did <u>not</u> strike down as unconstitutional the principle of "acquired rights".[1625] However, ignoring and directly contradicting the Sixteenth District Judge's interpretation of its own ruling and in order to justify its unlawful rescission of the November 16, 2012 Resolution, SEGOB argued before the Collegiate Tribunal that the principle of "acquired rights" had in fact been held unconstitutional.[1626] In its February 19,

[1621] Guerrero Report, **CER-2**, ¶¶ 253, 258-260, 205; Order of the Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito (Feb. 19, 2014), **C-290**.

[1622] Guerrero Report, **CER-2**, ¶¶ 308-320.

[1623] *Arif v. Moldova*, Award, ¶ 470, **CL-189**; *Pantechniki v. Albania*, Award, ¶ 100, C**L-198**.

[1624] Order of the Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito (Feb. 19, 2014), **C-290**.

[1625] Order of the Juzgado Decimosexto de Distrito en Materia Administrativa (Oct. 14, 2013), p. 23, **C-24**.

[1626] SEGOB Resolution (Aug. 28, 2013), **C-289**.

2014 Order, the Collegiate Tribunal unexplainably sided with SEGOB, but did not provide any explanation for its conclusion that was in direct contradiction to what the Sixteenth District Judge explicitly said, simply saying instead that the Sixteenth District Judge issued a ruling of unconstitutionality as to the principle that the judge said clearly he did not issue.[1627] As explained above, the giving of the reasoned judgments is central to due process and the Collegiate Tribunal's conclusion devoid of any reasoning amounts to a denial of justice.[1628]

(vii) The Sixteenth District Judge and the Collegiate Tribunal's failure to consider the final and binding ruling in the *Amparo* 1151/2012 proceeding (the October 17, 2013 Order), which determined that the November 16, 2012 Resolution constituted an implicitly consented to administrative act by E-Mex, meaning that E-Mex could no longer challenge that act in any other *amparo* proceedings.[1629] Given the October 17, 2013 Order, the November 16, 2012 Resolution was beyond the reach of the *Amparo* 1668/2011 proceeding, and thus could not be rescinded as a result of *Amparo* 1668/2011.[1630] However, even though both the Sixteenth District Judge and the Collegiate Tribunal were legally required to take into account the October 17, 2013 Order, they didn't do so and unlawfully affirmed SEGOB's rescission of the November 16, 2012 Resolution, thereby committing a gross miscarriage of justice;[1631]

(viii) The Mexican Supreme Court's refusal to hear E-Games' *recurso de inconformidad* on the merits. As noted above, the Supreme Court's dismissal of the *recurso de inconformidad* on procedural grounds—after having accepted to hear the case on the merits and considering it on the merits for several months—effectively and practically denied an appeal of the Collegiate Tribunal's February 19, 2014 Order because, upon dismissal, the case was remanded to the Collegiate Tribunal, allowing the same appellate court to

[1627] Order of the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (Feb. 19, 2014), **C-290**.

[1628] E.g., *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award (Nov. 18, 2014), ¶ 692, **CL-103**.

[1629] Guerrero Report, **CER-2**, ¶ 208-220.

[1630] Guerrero Report, **CER-2**, ¶ 321-335.

[1631] Guerrero Report, **CER-2**, ¶ 327.

review the merits of E-Games' appeal of its own decision.[1632] This is a clear violation of Mexican law,[1633] the American Convention on Human Rights, [1634] and the NAFTA, all of which protect the right to an effective recourse before the competent judicial authorities.

673. In addition to the above, the Mexican judiciary, in conducting the *Amparo* 1668/2011 proceeding, was continuously subject to and affected by political influences from the executive branch, and specifically, President Peña Nieto's advisors. The evidence also points to likely collusion and corruption between the judiciary and E-Mex, the moving litigant in the *Amparo* 1668/2011.[1635] As noted, the judiciary must "decide all matters before them impartially, on the basis of facts and in accordance with law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."[1636] The judiciary's failure to do so necessarily results in a denial of justice because any improper collusion between the judiciary and the executive branches, or between the judiciary and one of the litigants, undermines the essential fairness of the judicial proceeding and "leads . . . to justified concerns as to the judicial propriety of the outcome."[1637]

674. The evidence submitted with this Memorial demonstrating the lack of judicial independence and impartiality in the *Amparo* 1668/2011 proceeding includes at least the following:

(i) One of E-Mex's principals—Mr. Francisco Salazar, Mr. Rojas Cardona's lawyer—informed Mr. Burr that "they controlled" the Sixteenth District

[1632] *See* Order of the Suprema Corte de Justicia de la Nación (Sep. 3, 2014), **C-26**; Julio Gutiérrez Statement, **CWS-52**, ¶ 101; Guerrero Report, **CER-2**, ¶¶ 290.

[1633] Guerrero Report, **CER-2**, ¶¶ 295-299.

[1634] Guerrero Report, **CER-2**, ¶¶ 293-294; Article 25 of the American Convention on Human Rights, **CL-76**.

[1635] Gordon Burr Statement, **CWS-50**, ¶¶ 118-119; Erin Burr Statement **CWS-51**, ¶¶ 126-127.

[1636] United Nations, Basic Principles on the Independence of the Judiciary, art. 2, UN Doc. A/CONF.121/22/Rev.1 59 (1985), C**L-203**.

[1637] *Mondev*, Award, ¶ 127, **CL-17**.

Judge.[1638] This representation was made a few days after E-Mex filed its motion asking the Sixteenth District Judge to rescind not only the May 27, 2009 Resolution, but all other orders/resolutions that flowed from this Resolution.[1639] In apparent support for E-Mex's threat, the Sixteenth District Judge granted the E-Mex's motion (the August 26, 2013 Order), without affording E-Games the adequate opportunity to object or raise arguments against E-Mex's motion to include other, as of yet not at issue, SEGOB resolutions within the ambit of its January 31, 2013 Order;

(ii)Instead of clarifying the scope of the *amparo* or the terms of compliance,[1640] and ordering SEGOB to reinstate the November 16, 2012 Resolution (as he should have done)[1641], the Sixteenth District Judge initiated an *incidente de inejecución* against SEGOB and sent the matter directly to the appellate court so that he could wash his hands of the politically-charged case;

(iii)Hon. Adela Domínguez—who served as the judge responsible for delivering the combined opinion of the Collegiate Tribunal in respect to *Incidente de Inejecución* 82/2013—told the Juegos Companies and E-Games' Legal Director that the court would under no circumstances allow operators to become permit holders because that would cause instability in the gaming industry in Mexico despite SEGOB having allowed other operators to become permit holders;[1642]

(iv)Notwithstanding that the Mexican Supreme Court, over the course of four months, had given every indication that the it would decide E-Games' *recurso de inconformidad* on the merits, including regularly reviewing the merits of the case with Claimants' counsel, the Supreme Court suddenly changed its course after the President Peña Nieto's lawyer visited the presiding judge to discuss the case, dismissed the case on procedural grounds, and remanded it to the same

[1638] Gordon Burr Statement, **CWS-50**, ¶¶ 118-119; Erin Burr Statement **CWS-51**, ¶¶ 126-127; Julio Gutiérrez Statement, **CWS-52**, ¶¶ 54, 56.

[1639] Gordon Burr Statement, **CWS-50**, ¶¶ 118-119; Erin Burr Statement **CWS-51**, ¶¶ 126.-.

[1640] *See* Guerrero Report, **CER-2**, ¶¶ 305-307.

[1641] *See* Guerrero Report, **CER-2**, ¶¶ 305-307.

[1642] Julio Gutiérrez Statement, **CWS-52**, ¶ 65.

appellate court that had already decided against E-Games.[1643] Black Cube findings suggest that President Peña Nieto's administration, upon learning that the Supreme Court might rule in favor of Claimants and thus overturn its rescission of E-Games' permit, lobbied the Mexican Supreme Court to decline jurisdiction, which is consistent with the personal observations of Mr. Gutierrez seeing Mr. Castillejos in the presiding judge's chambers to discuss the case just one week before the Supreme Court's astonishing reversal;[1644]

(v)Additionally, President Peña Nieto's head lawyer, Mr. Castillejos, was spotted at the chambers of Justice Pérez Dayán, the Supreme Court judge in charge of reviewing E-Games' *recurso de inconformidad*, just a week before the Supreme Court dismissed E-Games' appeal.[1645] Following the meeting with Mr. Castillejos, Justice Pérez Dayán appeared unusually anxious and avoided discussing the substance of E-Games' *recurso de inconformidad* with Claimants' counsel, foreboding a dramatic reversal of fortune for E-Games' *recurso de inconformidad*;[1646]

(vi)Hon. José Luis Caballero, one of the appellate judges in charge of the case on remand, informed Claimants' counsel that he feared for the safety of his job within the appellate court given the politically-charged nature of the case involving E-Games' permit.[1647] A few days later, Judge Caballero was transferred to a different court. Judge Caballero was soon replaced by an interim clerk.[1648] This incident demonstrates the intensity of the executive pressure in the *Amparo* 1668/2011 proceeding.

675. Taken together, the *Amparo* 1668/2011 proceeding was plagued with egregious due process violations, judicial irregularities and undue and political and other influence into

[1643] Julio Gutiérrez Statement, **CWS-52**, ¶ 97.

[1644] Black Cube Statement, **CWS-57**, ¶ 49.

[1645] Julio Gutiérrez Statement, **CWS-52**, ¶ 100.

[1646] Julio Gutiérrez Statement, **CWS-52**, ¶ 100.

[1647] Julio Gutiérrez Statement, **CWS-52**, ¶ 102.

[1648] Julio Gutiérrez Statement, **CWS-52**, ¶ 102.

the judiciary's independence that ultimately led to the rescission of the November 16, 2012 Resolution and consequently the cancellation of E-Games' independent permit.

676. The above-described actions of Mexico throughout the *Amparo* 1668/2011 proceeding, both together and in isolation, violated basic principles of due process and natural justice, and constituted a gross miscarriage of justice amounting to a denial of justice vis à vis the Claimants and their protected investments.

b. SEGOB's Rescission of the November 16, 2012 Resolution in the Enforcement Stage of the *Amparo* 1668/2011 Proceeding

677. In addition to the judiciary, SEGOB denied justice to Claimants by unlawfully introducing and rescinding the November 16, 2012 Resolution at the enforcement stage of the *Amparo* 1668/2011 proceeding and by so doing effectively cancelling Claimant's 25-year permit without affording them due process. As previously discussed, SEGOB's revocation of E-Games' independent permit was done in an arbitrary and discriminatory manner devoid of due process.[1649]

678. In addition, SEGOB's August 28, 2013 Resolution that rescinded its November 16, 2012 Resolution suffered from egregious procedural irregularities, and failed to reflect a reasoned decision-making process. To cite a few examples:

(i) SEGOB failed to provide any reasons to justify its decision to contradict the same agency's prior conclusion that the November 16, 2012 Resolution was unrelated to and separate from the May 27, 2009 Resolution;

(ii) SEGOB incorrectly and unreasonably argued that the *Amparo* judgment (the January 31, 2013 Order) had in fact struck down as unconstitutional the principle of "acquired rights", something the Sixteenth District Judge expressly said that he did not do;[1650]

[1649] *See supra* Section IV.X.3.

[1650] SEGOB Resolution (Aug. 28, 2013), **C-289**.

(iii)SEGOB never initiated any of the legally prescribed proceedings to deprive a gaming permit holder of its legal effects[1651] and instead unlawfully revoked E-Games' independent permit in the *Amparo* 1668/2011 proceeding by engaging in further unlawful acts as described in the prior section.

c. SEGOB's Illegal Closure of the Casinos and Subsequent Administrative Review Proceedings

679. Claimants were again denied justice when SEGOB unlawfully closed down the Casinos and failed to provide basic due process rights to Claimants during the administrative proceedings that followed the closure, the Closure Administrative Review Proceedings.

680. As explained above,[1652] SEGOB shut down Claimants' Casinos on April 24, 2014, in spite of a judicial order that prevented SEGOB from doing so. Claimants' representatives at each of the Casinos actually presented this court order to SEGOB officials who came to conduct pretextual and perfunctory inspections; and yet, SEGOB officials either refused to see or blatantly ignored the order and proceeded to close down the Casinos.[1653] As noted by the tribunal in *Siag v. Egypt*, the executive branch's failure to comply with the court ruling amounts to "an egregious denial of justice"[1654]

681. Additionally, during these alleged inspection proceedings (*diligencias*), SEGOB prevented Casino employees from contacting attorneys; refused to provide Casino employees with a copy of the closure orders despite numerous requests to see it; and proceeded to close down the Casinos even though the closure orders themselves were directed at E-Mex's locales, not those of E-Games—all in clear violation of Claimants' right of defense.[1655]

[1651] González Report, **CER-3**, ¶ 136; 151-152.

[1652] *See supra* Section IV.X.3.d.

[1653] Chávez Statement, **CWS-54**, ¶ 23-24; Ruiz Statement, **CWS-55**, ¶ 22; Galván Statement, **CWS-56**, ¶ 27.

[1654] *Siag*, Award, ¶ 455, C**L-68**.

[1655] *See supra* Section IV.X.3.d.

682. Following the closure, E-Games filed a *recurso de revision* against the orders issued by SEGOB authorizing the inspection visits to the Casinos (*órdenes de verificación*) and against SEGOB's closure of Claimants' Casinos.[1656] In the *recurso de revision*, E-Games clearly and correctly argued that the Casinos could not be closed down because E-Games' *recurso de inconformidad* before the Mexican Supreme Court was pending.[1657] Nevertheless, SEGOB's Undersecretary of the Interior irrationally dismissed E-Games' *recurso de revision* without even addressing E-Games' argument.[1658] As noted above, the basic principles of due process and natural justice require administrative authorities to provide adequate reasons for their decisions.[1659] But SEGOB's Undersecretary of the Interior failed to do so.

683. Adding further insult to injury, SEGOB egregiously violated Mexican law and Claimants' basic procedural rights during the Closure Administrative Review Proceedings. SEGOB unjustifiably paralyzed and delayed these proceedings beyond the 30-day time limit specified under Mexican law.[1660] This delay—which shows SEGOB's clear intention to deprive Claimants of the opportunity to challenge the unlawful closure—caused the expiration of the Closure Administrative Review Proceedings and consequently of the closure of Claimants' Casinos. And yet, when E-Games filed a writ to challenge the Closure Administrative Review Proceedings, SEGOB unlawfully rejected E-games' filing, alleging that SEGOB had already issued, albeit still outside the 30-day time limit and without notifying E-Games, the resolutions to initiate the second phase of the Closure Administrative Review

[1656] Julio Gutiérrez Statement, **CWS-52**, ¶ 85.

[1657] Julio Gutiérrez Statement, **CWS-52**, ¶ 85.

[1658] Julio Gutiérrez Statement, **CWS-52**, ¶ 86.

[1659] *See, e.g.*, *TECO v. Guatemala*, Award, ¶ 587, **CL-133**; *Lemire*, Decision on Jurisdiction and Liability, ¶ 371, **CL-166**.

[1660] Julio Gutiérrez Statement, **CWS-52**, ¶ 87.

Proceedings, in which E-Games would be afforded to be heard with respect to SEGOB's actions in closing down the Casinos (the July 7, 2014 Resolutions).[1661]

684. As noted, the July 7, 2014 Resolutions only confirm that SEGOB's closure of the Casinos was based on its misguided, politically-motivated belief that E-Games' permit should be rescinded, and that SEGOB intended to close down the Casinos, regardless of the validity of E-Games' permit. In the July 7, 2014 Resolutions, SEGOB indicated that E-Games *probably* did not have a permit to operate the gaming facilities, and that E-Games was not authorized to operate slot machines that accept cash or coins.[1662] Again, at the time of the closure, E-Games' *Recurso de Inconformidad* 406/2012—and consequently SEGOB's rescission of the November 16, 2012 Resolution in the enforcement stage of the *Amparo* 1668/2011 proceeding—was under review by the Mexican Supreme Court. E-Games did have a valid permit to operate each of the Casinos at that time. SEGOB's post hoc rationalization for the closure—that is, Claimants' Casinos had slot machines that accepted coins or cash—was contrived and plainly false, and SEGOB knew this because no such slot machines existed in Claimants' locations and hence none were found during SEGOB's pretextual inspection visits to Claimants' Casinos on April 24, 2014.[1663] However, SEGOB still prepared this false excuse in an attempt to justify the illegal closure—and then unjustifiably rejected the evidence E-Games presented to show the absence of cash-accepting slot machines in its Casinos—in the unlikely event that the Supreme Court ruled in favor of E-Games and Claimants.[1664] As noted,

[1661] Julio Gutiérrez Statement, **CWS-52**, ¶ 87.

[1662] Julio Gutiérrez Statement, **CWS-52**, ¶ 88.

[1663] Julio Gutiérrez Statement, **CWS-52**, ¶ 88; Certificate of Inspection Mexico City casino (Apr. 24, 2014), **C-300**; Certificate of Inspection Cuernavaca casino (Apr. 24, 2014), **C-301**; Certificate of Inspection Puebla casino (Apr. 24, 2014), **C-302**; Certificate of Inspection Naucalpan casino (Apr. 24, 2014), **C-303**; Certificate of Inspection Villahermosa casino (Apr. 24, 2014), **C-304**.

[1664] Julio Gutiérrez Statement, **CWS-52**, ¶ 88.

to prevent this result, SEGOB and the President's lawyer lobbied the Supreme Court to decline jurisdiction over E-Games' *Recurso de Inconformidad* 406/2012.[1665]

685. SEGOB further committed a denial of justice and violated the FET standard when it lifted the closure seals on Claimants' Casinos and deprived Claimants of their property located within the Casinos without providing Claimants with notice and the opportunity to be heard.[1666] It later lifted the closure seals without notifying Claimants or affording them any right to be heard to allow Claimants' competitors to operate some of the Casinos, and Claimants' property to be pilfered from the Casinos, during the pendency of these proceedings and then returned possession of the Casinos to other third parties in yet another flagrant violation of Claimants' due process rights and applicable law.[1667] As reflected in the *Middle East Cement Shipping* and *Metalcald* awards, fair notice and the opportunity to be heard are one of the most basic due process guarantees.[1668] SEGOB egregiously failed to afford Claimants these rights here as well.

d. SEGOB's Denial of E-Games' Requests for New Permits

686. SEGOB's denial of E-Games' requests for new permits also amounts to a denial of justice, as well as violations of the FET and national treatment standards. As discussed in Section IV.X.3.i, in denying E-Games' requests, SEGOB maliciously and discriminatorily misapplied Article 22 of the Gaming Regulation, and denied E-Games' new permit application, reasoning that the locations where the Casinos would operate were closed (under orders of SEGOB itself). Yet this requirement to have an "open" location is found nowhere in the Gaming Regulation, in order to be granted a new permit.[1669] In addition to being a flawed and

[1665] Black Cube Statement, **CWS-57**, ¶ 49.

[1666] Julio Gutiérrez Statement, **CWS-52**, ¶ 108.

[1667] Julio Gutiérrez Statement, **CWS-52**, ¶ 109-112.

[1668] *Middle East Cement Shipping*, Award, ¶ 143, **CL-80**; *Metalclad*, Award, ¶ 91, **CL-79**.

[1669] 2004 Gaming Regulation, **CL-72**; Julio Gutiérrez Statement, **CWS-52**, ¶ 76.

circular argument, SEGOB's reasoning fell far short of the principle of legality and due process. Denial of a permit based on reasons or criteria that are unrelated to specific existing requirements for issuing that permit violates Article 1105(1) of the NAFTA and amounts to a denial of justice under customary international law.[1670]

687. For all of these reasons, Mexico's measures constituted a denial of justice under Article 1105(1) of the NAFTA that resulted in the complete evisceration of Claimants' investments and rights, for which Mexico must be held internationally responsible.

E. Mexico Violated Its Obligation to Accord National Treatment Under Article 1102 of the NAFTA

1. The National Treatment Standard

688. As the tribunal in *Corn Products Inc. v. United Mexican States* observed, the national treatment standard "embodies a principle of fundamental importance, both in international trade law and the international law of investment, that of non-discrimination."[1671] UNCTAD also stated that "[t]he national treatment standard is perhaps the single most important standard of treatment embodied in international investment agreements."[1672]

689. Article 102(1) of the NAFTA specifically mentions "national treatment" as an example of the "principles and rules" that "elaborate[]" the objectives of NAFTA.[1673] Mexico breached this "fundamental obligation" of NAFTA,[1674] as fully explained below.

[1670] *Metalclad*, Award, ¶ 101, **CL-79**; *Bilcon v. Canada*, Award on Jurisdiction and Liability, ¶¶ 590-591, **CL-159**.

[1671] *Corn Products International Inc. v. United Mexican States* ("*Corn Products*"), ICSID Case No. ARB(AF)/04/1, Decision on Responsibility (Redacted) (Jan. 15, 2008), ¶ 109, **CL-204**.

[1672] UNCTAD, National Treatment, 1, UNCTAD/ITE/IIT/11 (Vol. IV) (1999), **CL-205**.

[1673] Such objectives include, among others, to " (a) eliminate barrier to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties; (b) promote conditions of fair competition in the free trade area; [and] (c) increase substantially investment opportunities in the territories of the Parties." NAFTA Article 102, **CL-206**.

[1674] *Marvin Roy Feldman Karpa v. United Mexican States* ("*Feldman*"), ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002), ¶ 165, **CL-96**.

690. Specifically, under Article 1102 of the NAFTA, Mexico is obligated to treat Claimants and their investments in a manner no less favorable than the treatment Mexico accords to its own investors and investments in like circumstances. Article 1102, entitled "National Treatment," states:

> 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.[1675]

691. As is apparent from the text of Article 1102, the beneficiaries of the national treatment standard under the NAFTA are both investors and their investments. Claimants are "investors" entitled to the national treatment protections, as they are each "national[s]" or "enterprise[s]" of the United States. The Mexican Enterprises, E-Games' permit and the Casinos are in turn "investments" of the Claimants, as they are encompassed within the definition of "investments" in Article 1139 of the NAFTA. Article 1102 further provides a list of activities to which the national treatment standard applies, indicating the extensive reach of Article 1102 and the breadth of its application. The tribunal in *ADF v. United States* noted the provision's scope by stating:

> Article 1102 entitles an investor of another Party and its investment to equal (in the sense of 'no less favorable') treatment, in like circumstances, with a Party's domestic investors and their investments, from the time of entry and 'establishment' or 'acquisition' of the investment in the territory of that Party, through the 'management,' 'conduct' and 'operation' and 'expansion' of that investment, and up to the final 'sale or other disposition' of the same investment.[1676]

[1675] NAFTA Article 1102 (emphasis added), **CL-78**.

[1676] *ADF*, Award, ¶ 153, **CL-18**.

The tribunal in *Merrill v. Canada* also noted that Article 1102 covers "almost any conceivable measure that can be with respect to the beginning, development, management and end of an investor's business activity."[1677]

692. Under Annex II of the NAFTA, each Party is allowed to make reservations with respect to specific industries. In other words, in particular industries, each of the NAFTA Parties may adopt more restrictive measures. For instance, Mexico has made specific reservations to its Article 1102 obligations with respect to social services and certain energy, communications, and transportation sectors.[1678] However, Claimants' investments in this case do not fall into any of the sectors for which Mexico has made reservations in Annex II of the NAFTA. Hence, Claimants and their investments are entitled to fully benefit from the national treatment standard in Article 1102. As such, Mexico violated its obligation to accord national treatment to Claimants and their investments by discriminating against them, cancelling their gaming permit, and illegally closing down their Casinos, even though it did not afford that mistreatment to Mexican casino operators in like circumstances.

2. Any Difference in Treatment Between Local and Foreign Investors in Like Circumstances Breaches the National Treatment Standard Absent a Legitimate Justification

693. National treatment is a relative concept in that the standard lacks a content defined *a priori*.[1679] In other words, the national treatment standard does not impose on the host country an obligation to provide foreign investors with an absolute or minimum level of treatment no matter how the host country treats domestic investors. Instead, a determination of its content depends on the host country's treatment offered to domestic investors.[1680] If

[1677] *Merrill*, Award, ¶ 79, **CL-124** .

[1678] NAFTA Annex II, Schedule of Mexico, **CL-207**.

[1679] UNCTAD, National Treatment, 7, UNCTAD/ITE/IIT/11 (Vol. IV) (1999), **CL-205**.

[1680] *Archer Daniels*, Award, ¶ 197 ("[T]he application of the national treatment standard involves a comparative measure."), **CL-86**.

foreign investors or investments have received less favorable treatment than that the host country accorded to domestic investors or investments, such differential treatment in comparison can give rise to a breach of the standard.

694. In order to establish a breach of Article 1102, the foreign investor, according to the tribunal in *UPS v. Canada,* must establish that:

> 1. The Party State has accorded to the foreign investor or its investment treatment with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments;
>
> 2. The foreign investor or investment is in like circumstances with local investors or investments; and
>
> 3. The Party State has treated the foreign investor or investment less favorably than it treats the local investors or investments.[1681]

695. This three-part test for Article 1102, formulated by the tribunal in *UPS*, has been endorsed and applied repeatedly in subsequent NAFTA cases.[1682] The foreign investor has the "affirmative burden" of proving these three elements of the test,[1683] but there is no separate requirement in the test for a demonstration of discriminatory intent. The *Feldman* tribunal explained:

> It is clear that the concept of national treatment as embodied in NAFTA and similar agreements are designed to prevent discrimination on the basis of nationality, or 'by reason of nationality.' However, it is not self-evident, as the Respondent argues 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.
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> […]
>
> [R]equiring a foreign investor to prove that discrimination is based on his nationality could be an insurmountable burden to the Claimant, as that

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[1681] *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits (May 24, 2007), ¶ 83, **CL-53**.

[1682] *See*, e.g., *Corn Products, Decision on Responsibility* (Redacted), ¶ 117, **CL-204**; *Bilcon v. Canada*, Award on Jurisdiction and Liability, ¶¶ 717-718, **CL-159**; *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award (Mar. 6, 2018), ¶ 7.6, **CL-208**.

[1683] *Bilcon v. Canada*, Award on Jurisdiction and Liability, ¶ 718, **CL-159**.

> information may only be available to the government. It would be virtually impossible for any claimant to meet the burden of demonstrating that a government's motivation for discrimination is nationality rather than some other reason. [1684]

696. Similarly in *Thunderbird v. Mexico*, the tribunal found that "[i]t is not expected from Thunderbird that it show separately that the less favourable treatment was motivated because of nationality. The text of Article 1102 of the NAFTA does not require such showing. Rather, the text contemplates case where a foreign investor is treated less favourably than a national investor."[1685] In addressing the national treatment standards included in various investment treaties, non-NAFTA tribunals have reached the same conclusion: there is no requirement of subjective intent to discriminate on account of nationality; rather, "a showing of discrimination of an investor who happens to be a foreigner is sufficient" to find a breach of the national treatment guarantee.[1686]

697. In sum, the national treatment standard in Article 1102 requires a difference of nationality and treatment between a more favorably treated local investor or investment (in like circumstances to the foreign investor or its investment) and the claimant investor or its investment. But it contains no requirement of intentional nationality-based discrimination. The fact of a less favorable treatment, as demonstrated through the *UPS* three-step test of comparison, is sufficient to establish a breach of Article 1102.

698. After the claimant has established each element of the *UPS* three-part test, the onus now shifts to the host state to negate or justify the discrimination. As the tribunal in *Feldman* noted:

[1684] *Feldman*, Award, ¶¶ 181, 183 (citations omitted), **CL-96**.

[1685] *Thunderbird v. Mexico*, Arbitral Award, ¶ 177 (emphasis original), **CL-7**.

[1686] *Bayindir v. Pakistan*, Award, ¶ 390 (citing *Feldman*), **CL-171**. *See* also *Occidental v. Ecuador*, Final Award, ¶177 (stating that the claimant received less favorable treatment than that accorded to national companies, even if this is not done with the intent of discriminating against foreign-owned companies), **CL-130**; *Cargill, Inc. v. Republic of Poland (II)*, UNCITRAL, Award (Mar. 5, 2008), ¶¶ 343-344 (stating that the national treatment is an "objective" standard), **CL-209**.

> On the question of burden of proof, the majority finds the following statement of the international law standard helpful, as stated by the Appellate Body of the WTO:
>
> > '… various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or respondent, is responsible for providing proof thereof. Also, it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.'
>
> Here, the Claimant in our view has established a presumption and a prima facie case that the Claimant has been treated in a different and less favorable manner than several Mexican owned cigarette resellers, and the Respondent has failed to introduce any credible evidence into the record to rebut that presumption.[1687]

699. The *Feldman* case involved a U.S. claimant who operated a cigarette exporting/reselling business in Mexico. Feldman alleged that Mexico had denied his company tax rebates that were enjoyed by domestic investors whose investments were operating in like circumstances. Feldman also claimed that his company had been subjected to audits at a time when domestic investors were not.[1688] The tribunal found that although none of the domestic cigarettes reseller-exporters in like circumstances could legally have qualified for tax rebates, the rebates were in fact granted to them.[1689] In addition, the tribunal noted that throughout the arbitral proceedings, Mexico had failed to present evidence showing that the Mexican companies had <u>not</u> been treated in a more favorable fashion than the claimant with regard to receiving tax rebates, from which the tribunal drew a negative "inference" on the issue of discrimination.[1690] With respect to the targeted audit against the claimant, the *Feldman* tribunal also concluded that such a practice is in itself evidence of discrimination, even though Mexican

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[1687] *Feldman*, Award, ¶ 177 (emphasis original), **CL-96**.

[1688] *Feldman*, Award, ¶¶ 173-174, **CL-96**.

[1689] *Feldman*, Award, ¶ 176, **CL-96**.

[1690] *Feldman*, Award, ¶ 178, **CL-96**.

authorities had the power to audit any taxpayer.[1691] Again, Mexico failed to produce sufficient evidence to establish that it had been auditing or intended to audit other domestic cigarettes reseller/exporters in similar situations to the claimant.[1692]

700. Under the burden-shifting approach, once the investor has established a *prima facie* case of differential treatment between similarly situated entities of their investments, the government may also attempt to justify the discrimination by reference to rational government policies. In *Pope & Talbot*, the tribunal stated:

> Differences in treatment will presumptively violate Article 1102(2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or de facto, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA.[1693]

701. In *Bilcon v. Canada*, the tribunal wrote:

> The approach taken in *Pope & Talbot*, would seem to provide legally appropriate latitude for host states, even in the absence of an equivalent of Article XX of the GATT, to pursue reasonable and non-discriminatory domestic policy objectives through appropriate measures even when there is an incidental and reasonably unavoidable burden on foreign enterprises. Consistently with the approach taken in the *Feldman* case, however, the present Tribunal is also of the view that once a *prima facie* case is made out under the three-part *UPS* test, the onus is on the host state to show that a measure is still sustainable within the terms of Article 1102. It is the host state that is in a position to identify and substantiate the case, in terms of its own laws, policies and circumstances, that an apparently discriminatory measure is in fact compliant with the "national treatment" norm set out in Article 1102.[1694]

702. Notwithstanding that this burden shifting approach permits the consideration of public policy concerns, tribunals have applied the exacting standard when the host states attempt to justify the discrimination by reference to legitimate government policies. In *Bilcon*, the tribunal rejected Canada's proffered justification because it was not consistent with

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[1691] *Feldman*, Award, ¶ 174, **CL-96**.

[1692] *Feldman*, Award, ¶ 174, **CL-96**.

[1693] *Pope & Talbot Inc. v. Government of Canada* ("*Pope & Talbot*"), UNCITRAL, Award on the Merits of Phase 2 (Apr. 10, 2001), ¶ 78, **CL-210**.

[1694] *Bilcon v. Canada*, Award on Jurisdiction and Liability, ¶ 723, **CL-159** (emphasis added).

Canada's own law and policy.[1695] The case arose from the rejection of a project to develop and operate a quarry in Nova Scotia. The proposed project underwent a lengthy environmental assessment, and Canada ultimately rejected the project on the grounds that it would have a significant and adverse environmental effect on the "community core values."[1696] The tribunal found that similar mining projects by Canadian investors were not evaluated in terms of "community core values" and thus received more favorable treatment.[1697] The tribunal further stated that it "is unable to discern any justification for the differential and adverse treatment accorded to Bilcon that would satisfy the *Pope & Talbot* test", because, *inter alia*, the "community core values" standard was "at odds" with the Canadian Environmental Assessment Act and thus could not be a "rational government policy."[1698]

703. In *S.D. Myers v. Canada*, the tribunal rejected Canada's environmental policy justification for its export ban on PCB wastes, which made it impossible for S.D. Myers to transport PCB waste to Ohio for remediation there.[1699] Canada claimed that "there was no discrimination" because under its ban, no one was permitted to export PCBs.[1700] The tribunal rejected Canada's contention, finding that the "practical effect" of Canada's facially neutral measures was that S.D. Myers and its investment "were prevented from carrying out the business they planned to undertake, which was a clear disadvantage in comparison to its Canadian competitors."[1701] While acknowledging that protecting and promoting the Canadian PCB remediation industry is a "legitimate goal, consistent with the policy objective of the Basel

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[1695] *Bilcon v. Canada*, Award on Jurisdiction and Liability, ¶¶ 724-725, **CL-159**.

[1696] *Id*. at ¶¶ 20-21, **CL-159**.

[1697] *Id.* at ¶ 696, **CL-159**.

[1698] *Id.* at ¶ 724, **CL-159**.

[1699] *S.D. Myers, Inc. v. Government of Canada* ("*S.D. Myers*"), UNCITRAL, Partial Award (Nov. 13, 2000), ¶¶ 193-195, **CL-30**.

[1700] *Id.* at ¶ 241, **CL-30**.

[1701] *Id*. at ¶ 193, **CL-30**.

Convention" (an international treaty that was designed to reduce the movements of hazardous waste between nations), the tribunal still found Canada liable, because it could have achieved its goal using alternative measures that would have been equally effective but had less restrictive impact on the foreign investor.[1702] Using the words of the *Bilcon* tribunal, the burden that Canada's export ban on PCB wastes imposed on S.D. Myers were far from being "incidental and reasonably unavoidable."[1703] Put differently, where the government has the option to achieve its policy objectives through less-discriminatory means, the choice not to do so violates NAFTA Article 1102.

704. In sum, the alleged public policy justification for a state's differential treatment between local and foreign investors in like circumstances must be based on the host state's own laws and policies. Furthermore, the adopted measure, even though not discriminatory on its face, shall not produce undue adverse consequences on foreign investors or their investments and must be truly necessary to the pursuit of the stated policy objectives. As discussed below, Mexico treated Mexican-owned casino companies more favorably than Claimants and their investments and no legitimate justification exists in light of the nature and purpose of Mexico's discriminatory measures.

3. Three-Fold Test of Comparison

a. Treatment

705. Under the first prong of the *UPS* test, the foreign investor or investment must be subject to 'treatment' by the host state. The NAFTA does not define the term 'treatment,' and the VCLT requires a treaty to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[1704] According to the Cambridge English Dictionary, the word "treatment" means

[1702] *Id.* at ¶ 255, **CL-30**.

[1703] *Bilcon v. Canada*, Award on Jurisdiction on Liability, ¶ 723, **CL-159**.

[1704] VCLT, Article 31.1, **CL-41**.

"the way . . . [someone] deal[s] with or behave[s] toward someone or something."[1705] The tribunal in *Siemens* also stated that "treatment" ordinarily means "behavior in respect of an entity or a person."[1706] The only qualifier attached to the term "treatment" is "not less favorable," prohibiting any unequal treatment among investments in like circumstances.

706. Furthermore, as noted above, Article 1102 of the NAFTA provides a broad scope of application of the national treatment standard, by requiring that a NAFTA Party "accord to the investors of another Party and their investments treatment no less favorable than that it accords to its domestic investors and their investments in like circumstances not only with respect to the 'establishment' of investments, but also with respect to the 'acquisition' of additional investments, the 'expansion' of already established investments, the 'management,' 'conduct' and 'operation' of investments once established or acquired and the 'sale or other disposition' of investments, e.g., liquidation of assets and repatriation of net proceeds."[1707] Hence, any conduct or behavior undertaken by the host state that are "related to" the investor's pre- and post-establishment investment and business activities properly falls within the scope of NAFTA Article 1102.[1708]

707. Consistent with this understanding, tribunals have recognized that the national treatment standard covers both *de jure* and *de facto* treatment. As McLaughlan, Shore, and Weiniger observed in their study of international investment treaties, "[t]his point has important implications" because:

> It means that the host State's responsibility may be engaged for a failure to accord national treatment on the basis that either (a) the letter of its regulatory measures fail to accord equal treatment to a foreign investor; or (b) the

[1705] Cambridge Academic Content Dictionary, Cambridge University Press, https://dictionary.cambridge.org/us/dictionary/english/treatment (last visited Feb. 7, 2020), **CL-211**.

[1706] *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (Aug. 3, 2004), ¶ 85, **CL-212**.

[1707] *ADF*, Award, ¶ 153, **CL-18**.

[1708] *Apotex III*, Award, ¶ 8.14 (The fact that the government measure is "related to" the investor or investment means that such a measure "qualifies as 'treatment' for the purposes of NAFTA Articles 1102 and 1103"), **CL-174**.

> legislative regime itself draws no such distinction, but the manner in which the State operates in practice does.[1709]

708. For instance, in *Bayindir v. Pakistan*, the tribunal rejected the respondent's claim that the scope of the national treatment protections is limited to "regulatory treatment," explaining:

> The mere fact that the Bayindir [the claimant] had always been subject to exactly the same legal and regulatory framework as everybody else in Pakistan [the respondent] does not necessarily mean that it was actually treated in the same way as local (or third countries) investors. [1710]

709. In *Bayindir*, the claimant alleged, *inter alia*, that a local contractor had been treated more favorably in relation to the contractual terms that Pakistan granted in a construction contract. Although the tribunal held that the national treatment standard was not infringed because the differential contractual terms were the result of the state's exercise of its ordinary freedom to negotiate and conclude contracts, the tribunal noted that the manner in which a State concludes or applies an investment contract is covered under the national treatment standard.[1711]

710. In *Feldman*, one of the discriminatory measures complained of was the denial of tax rebates. Under the governing Mexican law called the IEPS law, cigarette exporters were able to obtain rebates for taxes on exported cigarettes only upon the condition that they produced the necessary invoices stating the tax amounts separately. Neither the claimant nor the Mexican competitors were able to meet this condition, but the Mexican Ministry of Finance and Public Credit (SHCP) granted tax rebates to the Mexican competitors. The SCHP did not

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[1709] McLaughlan, Shore & Weiniger at 338, **CL-167**. *See* also *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (Sept. 11, 2007), ¶ 368 ("Discrimination involves either issues of law, such as legislation affording different treatments in function of citizenship, or issues of fact where a State unduly treats differently investors who are in similar circumstances."), **CL-162**.

[1710] *Bayindir v. Pakistan*, Decision on Jurisdiction, ¶ 206, **CL-23**.

[1711] *Bayindir v. Pakistan*, Decision on Jurisdiction, ¶ 223 (The claimant's allegations "in respect of the selective tender, and that the expulsion was due to Pakistan's decision to favor a local contractor, and that the local contractor was awarded longer completion time-limits, if proven, are clearly capable of founding" national treatment and most-favored nation claims), **CL-23**.

grant the rebates to the claimant. Viewing this as a case of "*de facto* discrimination", the tribunal stated:

> [I]t does not matter for purposes of Article 1102 whether in fact Mexican law authorizes SHCP to provide IEPS rebates to persons who are not formally IEPS taxpayers and do not have invoices setting out the tax amounts separately, as has been required by the IEPS law consistently since at least 1987 and perhaps earlier. The question, rather, is whether rebates have in fact been provided for domestically owned cigarette exporters while denied to a foreign re-seller, CEMSA. Mexico is of course entitled to strictly enforce its laws, but it must do so in a non-discriminatory manner, as between foreign investors and domestic investors. Thus, if the IEPS Article 4 invoice requirement is ignored or waived for domestic cigarette reseller/exporters, but not for foreign owned cigarette reseller/exporters, that de facto difference in treatment is sufficient to establish a denial of national treatment under Article 1102. [1712]

711. Taken together, not only legislative and regulatory measures, but any other government actions, including the conduct in fact of the executive (or any other governmental actor), toward foreign investors or investments can set in motion the operation of the national treatment standard.

712. The conduct of the judiciary also falls within the scope of NAFTA Article 1102. The NAFTA tribunal in *Loewen* stated that the "effect" of NAFTA Article 1102:

> is that a Mississippi court shall not conduct itself less favourably to Loewen, by reason of its Canadian nationality, than it would to an investor involved in similar activities and in a similar lawsuit from another state in the United States or from another location in Mississippi itself.[1713]

b. **Like Circumstances**

713. As explained above, the national treatment standard is a relative concept, whose application necessarily involves a comparison between the treatment afforded to the foreign investors or investments and the domestic counterparts in *like circumstances*. Hence under the 'like circumstances' prong of the *UPS* test, the claimant is required to identify appropriate comparators who are in 'like circumstances.' However, as the *Feldman* tribunal noted, the

[1712] *Feldman*, Award, ¶ 169 (emphasis added), **CL-96**.

[1713] *Loewen*, Award, ¶ 139, **CL-67**.

class of comparators can be very small. In fact, in *Feldman*, the evidence showed that there was only one domestic investor who had been treated more favorably, but the tribunal still found Mexico liable because preferential treatment accorded to that domestic investor was not extended to the claimant.[1714]

714. Tribunals have understood that the inquiry into like circumstances is fact specific, as the *Archer Daniels* tribunal put it,

> [A]ll 'circumstances' in which the treatment was accorded are to be taken into account in order to identify the appropriate comparator. The dictionary meaning of the word 'circumstance' refers to a condition, fact, or event accompanying, conditioning, or determining another, or the logical surroundings of an action.[1715]

That said, tribunals have generally focused on three factors to determine whether the claimant and the proposed comparators are in like circumstances: (i) whether they are in the same business or economic sector; (ii) whether they are in a competitive relationship; and (iii) whether they are subject to a comparable legal regime or requirements.[1716]

i. The Same Business or Economic Sector

715. In *Pope & Talbot*, the tribunal concluded that "as a first step, the treatment accorded a foreign owned investment . . . should be compared with that accorded domestic investment in the same business or economic sector."[1717] In support of this proposition, the tribunal cited to the OECD *Declaration on National Treatment for Foreign-Controlled Enterprises*, which provides:

> As regards the expression 'in like situations,' the comparison between foreign-controlled enterprises established in a Member country and domestic enterprises

[1714] *Feldman*, Award, ¶ 181, **CL-96**.

[1715] *Archer Daniels*, Award, ¶ 197, **CL-86**. *See* also *Corn Products*, Decision on Responsibility (Redacted), ¶ 118 (stating that in conducting a comparative analysis, the tribunal must be "sensitive to particular circumstances of each case with the analysis focusing on the specific nature of the measure under challenge"), **CL-204**; Pope & Talbot, Award on the Merits of Phase 2, ¶ 75 ("By their very nature, 'circumstances' are context dependent and have no unalterable meaning across the spectrum of fact situations."), **CL-210**.

[1716] *Apotex III*, Award, ¶ 8.15, **CL-174**.

[1717] *Pope & Talbot*, Award on the Merits of Phase 2, ¶ 78, **CL-210**.

> in that member country is valid only if it is made between firms operating in the same sector. [1718]

716. The tribunal in *S.D. Myers* further explained that "the word 'sector' has a wide connation."[1719] In that case, the tribunal found that S.D. Myers and Canadian PCB waste disposal companies were in the same sector and thus in like circumstances over the objections of Canada, which argued that S.D. Myers was more in the brokerage business, arranging for the import of PCB waste to the U.S. for disposal, but not seeking to dispose of PCB waste in Canada. The tribunal rejected this argument in stating:

> From the business perspective, it is clear that SDMI and Myers Canada were in 'like circumstances' with Canadian operators such as Chem-Security and Cintec. They all were engaged in providing PCB waste remediation services. SDMI was in a position to attract customers that might otherwise have gone to the Canadian operators because it could offer more favourable prices and because it had extensive experience and credibility. It was precisely because SDMI was in a position to take business away from its Canadian competitors that Chem-Security and Cintec lobbied the Minister of the Environment to ban exports when the U.S. authorities opened the border.[1720]

ii. Competitive Relationship

717. As the tribunal in *S.D. Myers* suggests, the existence of a competitive relationship can point to a finding of 'like circumstances' even though the non-national claimant and identified local comparators are not operating in the exact same fashion.[1721]

718. For instance, in *Archer Daniels v. Mexico,* the claimants, who were foreign manufacturers and distributors of high-fructose corn syrup (HFCS), alleged that they received less favorable treatment in comparison to domestic cane sugar producers due to Mexico's 20%

[1718] *Pope & Talbot*, Award on the Merits of Phase 2, ¶ 78, n. 73 (citing OECD, National Treatment for Foreign-Controlled Enterprises 22(1993)), **CL-210**.

[1719] *S.D. Myers*, Partial Award, ¶ 250, **CL-30.**

[1720] *S.D. Myers*, Partial Award, ¶ 251, **CL-30**.

[1721] *Apotex III*, Award, ¶ 8.15 ("[I]t is appropriate in the identification of comparators which are in 'like circumstances' to look at, inter alia, whether those which are said to be comparators . . . have invested in, or are businesses that compete with the investor or its investments in terms of goods or services."), **CL-174**.

excise tax on all soft drinks and syrups using sweeteners not made from cane sugar.[1722] Notwithstanding the fact that foreign HFCS producers and domestic sugar producers are not identical comparators, it was "the Tribunal's view that when no identical comparators exist, the foreign investor may be compared with less like comparators, if the overall circumstances of the case suggest that they are in like circumstances."[1723] The tribunal went on to find:

> The evidence on the record does not show that there were identical Mexican-owned HFCS producers when the Tax was adopted. Only U.S. investors – including ALMEX and CPI– manufactured and distributed HFCS in Mexico. Therefore, the firms they can be compared with are the domestic sugar producers with which, at the time the Tax was in force, shared the market, competing directly in supplying sweeteners to soft drink bottlers and processed food firms in Mexico.[1724]

719. In another Mexican sugar case, *Corn Products v. Mexico*, the tribunal came to the same conclusion:

> When it came to supplying sweeteners to the soft drinks industry, their products (HFCS and cane sugar) were in direct competition with one another, treated both by customers and by Mexican law as being interchangeable. The purpose of the HFCS tax was avowedly to alter the terms of competition between them.[1725]

iii. Regulatory Regime

720. A third factor in identifying the comparator is the identity of the legal and regulatory regime applicable to the investors being compared. Especially when there is a particular regulatory issue at play, the tribunals "have assigned important weight to 'like legal requirements' in determining whether there were 'like circumstances.'"[1726] For instance, the tribunal in *Merrill* concluded that the claimant timber producer, operating on federal lands and

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[1722] *Archer Daniels*, Award, ¶¶ 2-3, **CL-86**.

[1723] *Id*. at ¶ 202, **CL-86**.

[1724] *Id.* at ¶ 203, **CL-86**.

[1725] *Corn Products*, Decision on Responsibility (Redacted), ¶ 120, **CL-204**.

[1726] *Grand River Enterprises Six Nations, Ltd., et. al. v. United States of America* ("*Grand River*"), UNCITRAL, Award (Jan. 12, 2011), ¶¶ 166-167 (concluding after surveying several NAFTA cases that "the identity of legal regime(s) applicable to a claimant and its purported comparators" was "a compelling factor" in assessing like circumstances in those NAFTA cases), **CL-213**.

thus subject to the logging regulations of the national government, are not in "like circumstances" with those only subject to provincial regulations. [1727] According to the tribunal, the "proper comparison is between investors which are subject to the same measures under the same jurisdictional authority."[1728] The claimant in *Merrill* was thus compared to other timber producers subject to the same federal regulations and not to producers operating under provincial regulations. Under this comparison, the tribunal found that "the treatment the Investor is accorded is identical to that accorded to domestic investors in the same category" and dismissed the claims under NAFTA Article 1102.[1729]

721. In *Bilcon*, as explained above, the dispute involved Canada's environmental assessment procedures. There, a joint federal-provincial review panel rejected the proposed quarry and marine terminal project using the "community core values" standard, a more stringent criteria that cannot be found in the Canadian Environmental Assessment Act (CEAA). Under the CEAA, the joint review panel was also mandated to assess possible mitigation measures, but it failed to do so. In identifying Canadian comparators, Bilcon pointed to several projects involving quarries and marine terminals in ecologically sensitive zones where the project was evaluated on a more favorable basis than Bilcon's.[1730] Canada, on the other hand, argued that potential comparators should be limited to those projects where there was a joint federal-provincial review panel and the panel had to deal with significant opposition within a local community.[1731]

722. The *Bilcon* tribunal found Canada's reading of 'like circumstances' unduly restrictive, given the language of Article 1102 of the NAFTA:

[1727] *Merrill*, Award, ¶¶ 81-82, **CL-124**.

[1728] *Id.* at ¶ 89, **CL-124**.

[1729] *Id.* at ¶ 93, **CL-124**.

[1730] *Bilcon v. Canada*, Award on Jurisdiction and Liability, ¶ 687, **CL-159**.

[1731] *Id.* at ¶ 690, **CL-159**.

> Article 1102 refers to situations where investors or investments find themselves in 'like circumstances'. The language is not restricted as it is in some other trade-liberalizing agreements, such as those that refer to 'like products'. Article 1102 refers to the way in which either the investor or investment is treated, rather than confining concerns over discrimination to comparisons between similar articles of trade. Moreover, the operative word in Article 1102 is 'similar', not 'identical'. In addition to giving the reasonably broad language of Article 1102 its due, a Tribunal must also 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.'[1732]

723. The tribunal further found that Bilcon had identified at least three Canadian-owned projects that were "'sufficiently' similar to sustain an Article 1102 comparison."[1733] Those three projects "involved assessments that included the marine terminal component of a project that was connected to a quarry and took place in an ecologically sensitive coastal area."[1734] None of these projects were subject to an environmental assessment conducted by a joint federal-provincial review panel, but the tribunal deemed this distinction to be irrelevant given the governing regulatory context, i.e., the CEAA. The tribunal stated:

> A 'likely significant adverse effects [after mitigation] analysis' under the CEAA must be at least part of the analysis carried out by an environmental assessment, regardless of whether the mode of review is a screening, a comprehensive study, a federal Canada review panel, or a joint review panel. [1735]

724. In addition, these projects, unlike the Bilcon's, did not produce strong local community opposition. However, the tribunal again rejected this point of distinction because:

> The distinction does not, however, under the laws of federal Canada, warrant an environmental assessment that fails to properly carry out, as at least a component, 'a likely significant adverse effects after mitigation' analysis. [1736]

[1732] *Id.* at ¶ 692 (emphasis added), **CL-159**.

[1733] *Id.* at ¶ 695, **CL-159**.

[1734] *Id.* at ¶ 696, **CL-159**.

[1735] *Id.* at ¶ 701, **CL-159**.

[1736] *Id.* at ¶ 704, **CL-159**.

725. For the tribunal, what is of critical importance was that Canada applied a less favorable evaluative standard to the Bilcon project in deviation from the CEAA. The tribunal thus rejected Canada's final point of distinction that particular facts of each project could still have legitimately produced different outcomes, even if the same evaluative standard had been applied. According to the tribunal, "[i]t is not the particular outcome on the facts . . . that is the basis for a finding in this Award of less favorable treatment for Bilcon's project; it is the fact that . . . [the reviews of other projects] followed the legally required standard in carrying out and reporting its assessment."[1737]

c. **No Less Favorable Treatment**

726. The final element of the *UPS* three-fold test requires the claimant to demonstrate that the host state treated the claimant or its investment less favorably than it treated the local comparators identified at step 2 of the *UPS* test. As the *Pope & Talbot* tribunal explained, the right to treatment "no less favourable" in Article 1102 means "the right to treatment equivalent to the 'best' treatment accorded to domestic investors or investments in like circumstances."[1738] Similarly, the *Archer Daniels* tribunal stated that, "Claimants and their investments are entitled to the best level of treatment available to any other domestic investor or investment operating in like circumstances . . . ."[1739]

727. As noted above, the national treatment standard under NAFTA Article 1102 does not require a showing of intentional discrimination. To be sure, several NAFTA tribunals have relied upon evidence of intent in finding the 'less favourable treatment.'[1740] Such

[1737] *Id.* at ¶ 708, **CL-159**.

[1738] *Pope & Talbot,* Award on the Merits of Phase 2, ¶ 42, **CL-210**.

[1739] *Archer Daniels,* Award, ¶ 205 (emphasis added), **CL-86**.

[1740] *S.D. Myers,* Partial Award, ¶ 254 (noting that an intent on the part of the host government to favour nationals over non-nationals can be "important" for finding a breach of the national treatment standard), **CL-30**; *Archer Daniels*, Award, ¶ 209 ("In establishing whether the Tax affords 'less favorable treatment' to the Claimants, previous Tribunals have relied on the measure's adverse effects on the relevant investors and their investments

evidence is certainly relevant, and indeed, as the *Corn Products* tribunal wrote, "[w]hile the existence of an intention to discriminate is not a requirement for a breach of Article 1102 . . . where such an intention is shown, that is sufficient to satisfy the [less favorable treatment] requirement."[1741]

728. And yet again, what matters for purposes of the national treatment standard is the "practical impact" of the measures in question, rather than the aim or intent of the government imposing them.[1742] Accordingly, the focus of the 'less favorable treatment' analysis has also been on the relatively simple question: whether the claimant or its investment were treated any "worse than" than their identified comparator.[1743] As discussed above, the examples of less favorable treatment include, among others, the selective provision of tax rebates and targeted audits (*Feldman*) and the application of a harsher standard in environment assessment processes (*Bilcon*).

729. In an award involving the BIT between Cyprus and Libya, Cypriot company Olin Holdings Limited alleged that Libya had treated its dairy and juice factory less favorably than it treated two local competitors through its expropriation order in 2006 and other measures following the order.[1744] The two local factories –which were "operat[ing] in the same business sector" and "closely situated on the map of Tripoli, in the same industrial zone" as Olin's

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rather than on the intent of the Respondent State. In the present case, both the intent and effects of the Tax show the discriminatory nature of the measure."), **CL-86**.

[1741] *Corn Products*, Decision on Responsibility (Redacted), ¶ 138, **CL-204**.

[1742] *S.D. Myers*, Partial Award, ¶ 254 ("The word 'treatment' suggests that practical impact is required to produce a breach of Article 1102."), **CL-30**.

[1743] *Apotex III*, Award, ¶ 8.21, **CL-174**. *See also Pope & Talbot*, Award on the Merits of Phase 2, ¶ 42 (rejecting an argument raised by Canada that it was necessary to establish some disproportionate disadvantage to the foreign investors), **CL-210**; *S.D. Myers Partial Award*, ¶ 193 (observing that Canada's export ban on PCB wastes "prevented [the claimant] from carrying out the business they planned to undertake, which was a clear disadvantage in comparison to its Canadian competitors"), **CL-30**; Andrew Newcombe & Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment 183 (2009) ("Treatment is more or less favourable where the effect on the investment or investor is to impose advantages or burdens."), **CL-151**.

[1744] *Olin Holdings Ltd v. Libya*, ICC Case No. 20355/MCP, Final Award (May 25, 2018), ¶¶ 182-187, **CL-214**.

factory[1745]–were granted a formal exemption from the 2006 expropriation order, while Olin was not. However, since the Libyan authorities never actually demolished Olin's factory, and the Libyan court ultimately annulled the 2006 expropriation order in 2010, Libya claimed that Olin's plant had been exempted *de facto* from expropriation and therefore not been subject to the treatment less favorable than that accorded to the local comparators. The tribunal rejected this contention, explaining:

> However, this was following four years and half of uncertainty, during which a number of correspondence with the Libyan authorities were exchanged, notices of evacuation were received, and court proceedings had to be engaged. The evidence on record further shows that Libya revived the threat of the Expropriation Order, by opening court proceedings against Olin on 5 December 2016 to challenge the Libyan Court's decision cancelling the Expropriation Order.[1746]

730. Accordingly, the tribunal concluded that Libya treated Olin less favorably than its two national competitors who, unlike Olin, did receive "a formal and definitive exemption from demolition and interference."[1747]

4. Mexico Breached the Article 1102 "National Treatment" Standard

731. Application of the three-part *UPS* test is simple and straightforward under the facts of the present case. In comparison to the treatment accorded to Claimants and their investments, Mexico provided significantly more favorable treatment to Mexican-owned companies and their investments in the Mexican casino business.

732. No legitimate justification exists for the preferential treatment afforded to these domestic investors and their investments. In fact, the evidence establishes that a series of discriminatory measures that Mexico undertook regarding Claimants and their investments were not only inconsistent with Mexico's own Gaming Regulation, but also driven by an intent to drive U.S. investors out of the casino business precisely to benefit local competitors and one

[1745] *Id.* at ¶¶ 205, 206, **CL-214.**

[1746] *Id.* at ¶ 213, **CL-214**.

[1747] *Id.* at ¶ 215, **CL-214**.

in particular—the gaming business of the Hank Rhon family, Grupo Caliente. It also benefitted other gaming businesses in like circumstances, like Producciones Móviles and Petolof. As noted by the *Corn Products* tribunal, such a showing of discriminatory intent is sufficient to establish the less favorable treatment.[1748] Further, Mexico cannot claim its discriminatory agenda to drive U.S. investors out of the Mexican gaming industry forms the part of its national policy.

a. Mexico Accorded Claimants and their Investments Less Favorable Treatment than Producciones Móviles and its Investment

733. As explained above, Mexico illegally revoked/cancelled E-Games' validly granted November 16, 2012 permit and permanently shut down all of Claimants' Casinos. Yet, Mexico allowed Producciones Móviles, a Mexican-owned company[1749] that obtained its casino permit under identical circumstances to E-Games, to continue to operate its Casinos.[1750] The principal of Producciones Móviles is Mr. Guillermo Santillán-Ortega, a former SEGOB official and E-Mex's counsel.[1751]

734. Producciones Móviles is in like circumstances with E-Games in every pertinent respect. First, Producciones Móviles and E-Games operate in precisely the same economic and business sector. Like E-Games, Producciones Móviles is a casino permit holder, which currently operates 14 registered gaming facilities, each with remote gambling centers and lottery number rooms, throughout Mexico, including in the Federal District (Mexico City) and

[1748] *Corn Products*, Decision on Responsibility (Redacted), ¶ 138, **CL-204**.

[1749] Letter from Producciones Móviles to SEGOB, dated Feb. 21, 2012 (noting that Producciones Móviles is "100% Mexicana, con socios e inversion mexicana"), **C-370**.

[1750] SEGOB Información sobre el Permisionario**,** Producciones Móviles, S.A. de C.V. (showing that Producciones Móviles currently has 14 registered casino establishments under Permit No. GAJS/SCEVF/P-06/2005-TER 14, which was issued under identical circumstances as E-Games' November 16, 2012 permit). Retrieved from https://sijscasinos.segob.gob.mx/consultaWebCasinos/AppDGTI/consultaWeb/receiver.php?do=Consulta&action=200&id=218, **C-371**. *See* also Julio Gutiérrez Statement, **CWS-52**, ¶ 41; González Report, **CER-3**, ¶ 83-90.

[1751] Julio Gutiérrez Statement, **CWS-**52, ¶ 41.

Puebla, two locations where Claimants' Casinos were also located.[1752] Additionally, as with E-Games, Producciones Móviles is authorized to host an online gambling site that would receive bets within Mexico.[1753] Second, they were in a competitive relationship in terms of provision of casino services. As noted above, had Claimants' Casinos not been closed, E-Games and Producciones Móviles would have competed in some of the same geographic areas. Third, Producciones Móviles and E-Games, both as independent permit holders, were subject to the same legal and regulatory requirements, principally the Gaming Regulation.

735. The discriminatory nature of Mexico's revocation of E-Games' permit (and not Producciones Móviles') becomes more apparent when considering the virtually identical circumstances under which both companies sought and obtained their respective permits.

736. As explained in Section IV.X.3.j, both Producciones Móviles and E-Games were operating under the same E-Mex permit (DGAJS/SCEVF/P-06/2005) as operators. Then, once E-Mex was on the brink of losing its gaming permit due to its imminent insolvency, E-Games and Producciones Móviles each separately requested that SEGOB grant them their own autonomous permits to open, operate, and install the casinos that they had been exploiting as operators under E-Mex's permit.[1754] E-Games made this request on February 22, 2011;[1755] Producciones Móviles' request followed on December 27, 2011.[1756]

737. In its Resolution DGAJS/SCEV/546/2011 of November 18, 2011, SEGOB informed E-Games that although E-Games had complied with all the requirements under Mexican law, SEGOB still had to wait until E-Mex was formally declared insolvent by a court

[1752] SEGOB Información sobre el Permisionario**,** Producciones Móviles, S.A. de C.V. Retrieved from https://sijscasinos.segob.gob.mx/consultaWebCasinos/AppDGTI/consultaWeb/receiver.php?do=Consulta&action=200&id=218, **C-371**.

[1753] SEGOB Información sobre el Permisionario**,** Producciones Móviles, S.A. de C.V., **C-371**.

[1754] Julio Gutiérrez Statement, **CWS-52**, ¶ 40; González Report, **CER-3**, ¶¶ 83 - 88.

[1755] SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16**.

[1756] SEGOB Resolution No. DGJS/SCEV/1458/2012 (Nov. 22, 2012), **C-327**.

before it could proceed to change E-Games' status and grant it an independent permit to operate its Casinos.[1757] Subsequently and specifically invoking SEGOB's November 18, 2011 Resolution, Producciones Móviles requested that SEGOB apply the same administrative criteria it had applied in considering E-Games' change of status petition, because both were operators of the same permit of E-Mex.[1758]

738. Following the Mexican court's formal declaration of E-Mex's insolvency, SEGOB, on August 15, 2012, issued Resolution DGJS/SCEV/827/2012, recognizing E-Games as entitled to the independent use and operation of the Casinos as established by E-Mex's permit.[1759] On the same day, SEGOB also issued Resolution DGJS/SCEV/869/2012, recognizing Producciones Móviles' independent rights and obligations under E-Mex's permit.[1760] As explained above, E-Games further requested that SEGOB make certain corrections to the August 15, 2012 Resolution and for the agency to issue it an independent gaming permit as it had requested, which in turn resulted in the issuance of Resolution DGJS/SCEV/1426/2012 on November 16, 2012, granting E-Games its own autonomous permit with its distinct permit number, DGJS/SCEVF/P-06/2005-BIS. A few days later on November 22, 2012, SEGOB also granted Producciones Móviles its own autonomous permit with the permit number DGJS/SCEVF/P-06/2005-TER.[1761] In doing so, SEGOB specifically acknowledged that Producciones Móviles' petition for its independent permit was considered under the same criteria that applied to E-Games' petition because those two companies were situated in the same position.[1762] While the permits were issued within days of each other under

[1757] Julio Gutiérrez Statement, **CWS-52**, ¶ 33.

[1758] Letter from Producciones Móviles to SEGOB (Feb. 21, 2012), **C-370**.

[1759] SEGOB Resolution DGJS/SCEV/827/2012 (Aug. 15, 2012), **C-254**.

[1760] SEGOB Resolution DGJS/SCEV/869/2012 (Aug. 15, 2012), **C-254**.

[1761] SEGOB Resolution DGJS/SCEV/1458/2012 (Nov. 22, 2012), **C-327**.

[1762] SEGOB Resolution DGJS/SCEV/1458/2012 (Nov. 22, 2012), **C-327**.

virtually identical circumstances and subject to the same conditions and obligations as E-Mex's permit and its modifications,[1763] SEGOB has invalidated E-Games' November 16, 2012 permit and yet allowed Producciones Móviles to remain in business to date.[1764]

739. Even the new PRI administration recognized the similarities between E-Games and Producciones Móviles. In her inaccurate and politically motivated statement to the Mexican newspaper *La Jornada*, Ms. Salas grouped together E-Games' and Producciones Móviles' permits by alleging that they were both granted illegally at the 11th hour of President Calderon's six-year term.[1765] Even assuming that SEGOB and Ms. Salas had sincerely believed that both permits were illegal, SEGOB expressly chose not to revoke both. Indeed, given that Producciones Móviles' permit was for 80 gaming establishments (40 remote gambling centers and 40 lottery number rooms),[1766] whereas E-Games' was just for 14 establishments, SEGOB clearly had bigger fish to fry. But while SEGOB has invalidated E-Games' November 16, 2012 permit, Mexico did not take action to cancel Producciones Móviles' permit and instead has allowed it—and its Mexican owner—to continue operating its casinos.[1767] This differential treatment clearly evinces that the alleged illegality was merely a pretext.

740. As explained above, SEGOB purports to have rescinded and cancelled E-Games' November 16, 2012 permit in response to the Sixteenth District Judge's August 26, 2013 Order that required SEGOB to rescind all resolutions based on or derived from the May

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[1763] González Report, **CER-3**, ¶ 83 - 88; Julio Gutiérrez Statement, **CWS-52**, ¶ 33; SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16**; SEGOB Resolution No. DGJS/SCEV/1458/2012 (Nov. 22, 2012), **C-327**.

[1764] González Report, **CER-3**, ¶ 89; Julio Gutiérrez Statement, **CWS-52**, ¶ 33; SEGOB Información sobre el Permisionario**,** Producciones Móviles, S.A. de C.V., **C-371**.

[1765] *Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón* (Jan. 27, 2013). Retrieved from http://www.jornada.unam.mx/2013/01/27/politica/013n1pol, **C-17**; Gordon Burr Statement, **CWS-50**, ¶ 101; Erin Burr Statement, **CWS-51**, ¶¶ 95-96.

[1766] SEGOB Resolution DGJS/SCEV/1458/2012 (Nov. 22, 2012), **C-327**.

[1767] González Report, **CER-3**, ¶ 89-91; SEGOB Información sobre el Permisionario**,** Producciones Móviles, S.A. de C.V., **C-371**.

27, 2009 Resolution (although SEGOB had previously highlighted that the November 16, 2012 Resolution was entirely independent from the May 27, 2009 Resolution).[1768] But we know this is not true, because SEGOB in its own internal memorandum admits that cancelled Claimants' permit because it has been issued "under irregular circumstances" at the end of the Calderon PAN administration.[1769] Moreover, we know that Mexico actually cancelled Claimants' permit to retaliate against the previous PAN regime and reward the Hank Rhon family for its political favors to President Peña Nieto.[1770]

741. This is textbook discrimination against a foreign investor while not subjecting the local competitors in like circumstances to the same mistreatment, precisely because Mexico's conduct was designed to benefit the local competitors at the expense of destroying Claimants' gaming business.

742. SEGOB's other discriminatory conduct directed at Claimants and their protected investments further demonstrates that SEGOB's discriminatory treatment and pre-meditated decision to eliminate Claimants from the Mexican gaming industry. As noted in Section IV.X.3, SEGOB unlawfully shut down Claimants' Casinos; irrationally dismissed E-Games' *recurso de revision* against the closure; violated Claimants' procedural rights during the Closure Administrative Review Proceedings; arbitrarily denied E-Games' requests for new permits; systematically interfered with Claimants' efforts to mitigate the damages caused by SEGOB's illegal actions; and deprived Claimants of the legal possession of the Casino premises and assets therein in violation of their fundamental due process rights only to reopen them for the benefit of Claimants' competitors and other Mexican third parties.

[1768] *See* Order of the Juzgado Decimosexto de Distrito en Materia Administrativa (Aug. 26, 2013), **C-23**; SEGOB Resolution (Aug. 28, 2013), **C-289**; SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C**-16.

[1769] E-Games Memo ("*La DGJS [Dirección General de Juegos y Sorteos de la SEGOB] nos comunicó que el Permiso Bis fue cancelado debido a que el mismo era un permiso que habia sido otorgado al final de la administración anterior de manera irregular*."), **C-261**.

[1770] *See* Black Cube Statement, **CWS-57**, ¶¶ 44, 45, 48 ; *see also supra* Section IV.V.

743. All of these actions clearly indicate that the Sixteenth District Judge's August 26, 2013 Order was a mere excuse/opportunity, which SEGOB seized upon to do what it had intended to do anyway. The *Amparo* 1668/2011 proceeding, with all of its irregularities and unlawful State conduct, was in reality but another manifestation of the PRI administration's politically-motivated and discriminatory campaign against Claimants.

744. Mexico, through SEGOB (as well as the Mexican judiciary), has left essentially undisturbed the casino operations of Producciones Móviles, who obtained its permit under the same circumstances as E-Games.[1771]

745. As such, Claimants have established a *prima facie*, textbook case of differential treatment between domestic and foreign investors in like circumstances in violation of Mexico's obligations under Article 1102. Mexico cannot meet its burden to rebut or justify this preferential treatment accorded to Producciones Móviles.

746. As NAFTA tribunals have repeatedly noted, the executive branch's law enforcement discretion is not unfettered. In *Apotex III*, the tribunal observed that although NAFTA does not bar "a change of policy in regulatory practice" under a new political administration, such a change needs to be "made in good faith and in a non-arbitrary manner."[1772] In a similar vein, the *Feldman* tribunal emphasized that NAFTA Article 1102 requires the host state to enforce its laws "in a non-discriminatory manner, as between foreign investors and domestic investors."[1773]

747. However, as explained above, SEGOB's about-face with respect to E-Games' permit did not stem from any reasoned, good-faith policy change. Rather, the PRI-controlled SEGOB arbitrarily ignored what the same agency had decided less than a year earlier, attacked

[1771] González Report, **CER-3**, ¶ 83-90; Julio Gutiérrez Statement, **CWS-52**, ¶¶ 41-42; SEGOB Información sobre el Permisionario**,** Producciones Móviles, S.A. de C.V., **C-371**.

[1772] *Apotex III*, Award, ¶ 8.75, **CL-174**.

[1773] *Feldman*, Award, ¶ 169, **CL-96**.

the legality of its own resolutions and revoked E-Games' permit so as to smear the previous PAN regime and to confer political favors on casino companies affiliated with the PRI party who were competing directly with Claimants' Casinos.

748. Indeed, the evidence demonstrates that Claimants were scapegoated precisely for being foreigners, as SEGOB reportedly said to one of the Claimants' prospective partners that the Casinos could not be reopened "if the 'U.S shareholders remained involved."[1774]

749. In his interview with Black Cube, Mr. Rosenberg also explained that corruption and local favoritism were a widespread phenomenon within SEGOB during the Peña Nieto administration, putting foreign companies at a great disadvantage.[1775] Hence, SEGOB has no legitimate justification for its differential treatment between E-Games and Producciones Móviles, since no rational government policy can find its basis in a political vendetta, racial animus or corruption.

b. Mexico Accorded Claimants and their Investments Less Favorable Treatment than Petolof

750. Petolof is another Mexican-owned casino company to whom Mexico accorded more favorable treatment than E-Games. Petolof secured independent operator status through the principle of "acquired rights."[1776] While SEGOB argued falsely and incorrectly that the principle of "acquired rights" had been ruled unconstitutional in rescinding E-Games' permit,[1777] it nonetheless maintained the position before the judiciary and Claimants. SEGOB has allowed Petolof to continue to operate, and even granted Petolof its own independent permit on May 27, 2016.[1778] On information and belief, a Mexican company, Urban Publicity, S.A.

[1774] Witness Statement of Benjamin Chow, **CWS-11**, ¶¶ 9, 11; Witness Statement of Luc Pelchat, **CWS-10**, ¶ 9.

[1775] Black Cube Statement, **CWS-57**, ¶ 51.

[1776] *See* SEGOB Resolution (Oct. 28, 2008), **C-253**.

[1777] SEGOB Resolution (Aug. 28, 2013), **C-289**.

[1778] *See* González Report, **CER-3**, ¶ 40-49, 55-56; Julio Gutiérrez Statement, **CWS-52**, ¶ 27; Petolof Permit No. DGJS/DGAAD/DCRCA/P-01/2016 (May 27, 2016), **C-328**.

de C.V. and a Mexican national, Sergio Jacinto Gil García are major shareholders of Petolof.[1779]

751. E-Games and Petolof are in "like circumstances." Petolof and E-Games operate gaming facilities in Mexico, are subject to the Gaming Regulation, and compete with each other in the Mexican casino industry. Petolof currently has four registered gaming establishments, each with remote gambling centers and lottery number rooms, and two of them are located in beach towns in Quintana Roo (Playa del Carmen and Cancun), which would have been in direct competition with Claimants' contemplated project in Cancun that never came to fruition due to Mexico's illegal actions.[1780]

752. Similar to E-Games, Petolof initially began its casino operation under a contractual arrangement with a third-party permit holder, EDN, whose permit was later revoked by SEGOB for its failure to comply with the permit conditions and the Gaming Regulation.[1781] Despite this, SEGOB allowed Petolof to continue to operate the casinos by issuing a resolution on October 28, 2008, finding that Petolof had "acquired rights" in connection with the permit issued to EDN.[1782]

753. Less than a year later on May 18, 2009, specifically relying on the October 28, 2008 Resolution, E-Games sought administrative permission to operate its Casinos independently of any permission from E-Mex, including the Operation Agreement it had executed with E-Mex.[1783] SEGOB granted this request and recognized E-Games as an

[1779] SEGOB document listing Urban Publicity, S.A. de C.V. and Sergio Jacinto Gil García as shareholders of Petolof as of 2012, **C-372**.

[1780] *See* SEGOB Información sobre el Permisionario**,** Petolof, S.A. de C.V. Retrieved from https://sijscasinos.segob.gob.mx/consultaWebCasinos/AppDGTI/consultaWeb/receiver.php?do=Consulta&action=200&id=32, **C-373**.

[1781] González Report, **CER-3**, ¶ 50, 53(c).

[1782] González Report, **CER-3**, ¶¶ 40, 45, 47, 53-54; SEGOB Resolution (Oct. 28, 2008), **C-253**.

[1783] *See* Gordon Burr Statement, **CWS-50**, ¶ 54; Erin Burr Statement, **CWS-51**, ¶ 53; Julio Gutiérrez Statement, **CWS-52**, ¶¶ 25-27.

independent operator through the May 27, 2009 Resolution.[1784] As can be seen, the circumstances under which SEGOB recognized the independent operator status of Petolof and E-Games were almost identical: their respective status as independent operators were granted on the basis of the principle of "acquired rights," which in turn stemmed from a contractual agreement between the permit holder (EDN or E-Mex) and a third-party operator under such permit (Petolof or E-Games).[1785]

754. However, despite these similarities between Petolof and E-Games, Mexico has accorded less favorable treatment to E-Games. As discussed in detail in Section IV.X.1, in response to E-Mex's untimely and thus inadmissible request, the Sixteenth District Judge ruled the May 27, 2009 Resolution unconstitutional in his January 31, 2013 Order.[1786] It is worth reiterating that the January 31, 2013 Order did not hold the principle of "acquired rights" unconstitutional.[1787] Nor did this order jeopardize E-Games' status as an autonomous permit holder, because E-Games' November 16, 2012 permit was based on its full compliance with all requirements under the Gaming Resolution for the issuance of a new permit and thus was not in any way related to E-Games' prior status as an independent operator that SEGOB recognized through the principle of "acquired rights."[1788]

755. However, going beyond the scope of what the Sixteenth District Judge had ruled and drastically reversing the prior stance taken by the same agency, the PRI-controlled SEGOB rescinded E-Games' casino permit on the grounds that all SEGOB resolutions, including the November 16, 2012 Resolution, were subsidiary to and dependent upon the May 27, 2009

[1784] SEGOB Resolution No. DGAJS/SCEV/0260/2009-BIS (May 27, 2009), **C-11**.

[1785] González Report, **CER-3**, ¶¶ 40-50; Julio Gutiérrez Statement, **CWS-52**, ¶ 27;

[1786] *See* Order of the Juzgado Decimosexto de Distrito en Materia Administrativa en el Distrito Federal (Jan. 31, 2013), **C-18**.

[1787] *See supra* Section IV.W; *See* Order of the Juzgado Decimosexto de Distrito en Materia Administrativa en el Distrito Federal (Jan. 31, 2013), **C-18**.

[1788] *See* SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16**; González Report, **CER-3**, ¶¶ 75, 115 - 132; Gordon Burr Statement, **CWS-50**, ¶ 63; Erin Burr Statement, **CWS-51**, ¶ 66.

Resolution; and that the Sixteenth District Judge had struck down as unconstitutional the principle of "acquired rights."[1789] Before the Collegiate Tribunal on appeal, the PRI-controlled SEGOB had vigorously and successfully defended its decision to revoke E-Games' permit by arguing that the principle of "acquired rights" had in fact been held unconstitutional.[1790]

756. Again, all of this was pretextual and designed to get rid of Claimants as a political favor to the Hank Rhon family to benefit their Grupo Caliente gaming business.

757. To date, E-Games' permit stands revoked, resulting in the total destruction of Claimants' investments in the Mexican gaming industry. Yet, SEGOB allowed Petolof to remain in business, although Petolof's independent operator status was obtained through the application of "acquired rights" and it served as legal precedent for E-Games' petition to become the same. More strikingly, on May 27, 2016, less than three years after E-Games' permit was revoked, and still under the PRI administration, SEGOB issued Petolof its own independent permit.[1791] Mexico thus treated E-Games less favorably than Petolof and therefore violated the national treatment standard under Article 1102 of the NAFTA.

c. Mexico Accorded Claimants and their Investments Less Favorable Treatment than Other Mexican Competitors

758. Mexico also breached its Article 1102 obligation by denying E-Games' requests for the new permits for the Casinos in an arbitrary and discriminatory manner. As explained above, SEGOB's primary justification for denying E-Games' requests for the new permits was that E-Games' facilities were closed, notwithstanding that the existence of open, operating casinos has never been a requirement for the granting of a permit under the Gaming Regulation and that the only reason they were closed was due to SEGOB's illegal actions.[1792] In contrast,

[1789] *See* SEGOB Resolution (Aug. 28, 2013), **C-289**.

[1790] *See* SEGOB Resolution (Aug. 28, 2013), **C-289**

[1791] González Report, **CER-3**, ¶¶ 56 – 58; Petolof Permit No. DGJS/DGAAD/DCRCA/P-01/2016 (May 27, 2016), **C-328**.

[1792] González Report, **CER-3**, ¶ 190, 192-193; Julio Gutiérrez Statement, **CWS-52**, ¶¶ 75, 80.

Mexican-owned companies in like circumstances, i.e., those without open, operating casinos, were granted casino permit requests, both before and after Claimants made the same request to SEGOB in August 2014.

759. For instance, in the wake of the enactment of the Gaming Regulation on September 17, 2004, SEGOB issued new casino permits to various Mexican companies, including, but not limited to, E-Mex,[1793] Comercializadora de Entretenimiento de Chihuahua, S.A. de C.V.,[1794] Eventos Festivos,[1795] Juega y Juega, S. A. de C. V.,[1796] and El Palacio de Los Numeros, S.A. de C.V, [1797] although they didn't have open and operating facilities at the time of the request. On information and belief, these companies are Mexican-owned.[1798]

760. Even during the PRI administration, SEGOB granted casino permits to Mexican-owned companies without an open and operating facility.[1799] In November 2014, SEGOB altogether issued seven permits to Pur Umazal to operate casinos in Mexico.[1800] As discussed in detail in Section IV.X.3.j, SEGOB issued these permits to allow the reopening of certain casinos that previously belonged to Megasport, whose permit was revoked by SEGOB in the preceding month, and casinos were closed as a result.[1801]

[1793] SEGOB Permit No. DGAJS/SCEVF/P-06/2005 (May 25, 2005), **C-235**.

[1794] SEGOB Permit No. DGAJS/SCEVF/P-08/2005 (Nov. 28, 2005), **C-311**.

[1795] SEGOB Permit No. DGAJS/SCEVF/P-02/2005 (May 6, 2005), **C-312**.

[1796] SEGOB Permit No. DGAJS/SCEVF/P-07/2005 (May 25, 2005), **C-313**.

[1797] SEGOB Permit No. DGAJS/SCEVF/P-01/2006 (Feb. 7, 2006), **C-314**.

[1798] Julio Gutiérrez Statement, **CWS-52**, ¶ 76.

[1799] Julio Gutiérrez Statement, **CWS-52**, ¶ 76.

[1800] SEGOB Permits to Pur Umazal Tov, **C-315—C-320**; Julio Gutiérrez Statement, **CWS-52**, ¶ 77.

[1801] *See* Horacio Jiménez et al., *Polemizan con Segob por permisos*, El Universal (Dec. 4, 2014), https://archivo.eluniversal.com.mx/nacion-mexico/2014/impreso/polemizan-con-segob-por-permisos-220905.html, **C-322**; Emmanuel Campos, Winpot Pachuca podría reabrir sus puertas en cuestión de días, Quadratin Hidalgo (Dec. 4, 2014), https://hidalgo.quadratin.com.mx/principal/Winpot-Pachuca-podria-reabrir-sus-puertas-en-cuestion-de-dias/#, **C-323**; Álvaro Delgado, Osorio Chong favorece a casineros de Hidalgo, Proceso (Feb. 21, 2015), https://www.proceso.com.mx/396600 , **C-324**; Julio Gutiérrez Statement, **CWS-52**, ¶ 77.

761. Another example from the Peña Nieto administration is the 25-year-long permit issued to Discos y Producciones Premier on November 27, 2018.[1802] Under the permit, which was granted three days before the end of Peña Nieto's six-year term, Discos y Producciónes Premier is authorized to establish one casino in Tlalnepantla, State of Mexico.[1803] The company had no open casino at the time of its request for the permit, and until now it has no registered establishment.[1804]

762. All of the above-mentioned companies were in sufficiently similar situation to E-Games because they were subject to "like legal requirements"[1805] when requesting new casino permits from SEGOB. As previously explained, under Article 22 of the Gaming Regulation, E-Games was only required to "indicate the legal basis on which the applicant company has or intends to obtain the legitimate possession or ownership of the property in which the establishment is to be installed."[1806] In full compliance, E-Games provided the copies of the sub-lease agreements entered between the Juegos Companies and E-Games establishing the latter's legal right to possess the real property on which each of the five Casinos was to operate.[1807]

763. However, analogous to Canada's actions in *Bilcon*, Mexico denied E-Games' request by applying a less favorable and arbitrary evaluative standard in clear deviation from

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[1802] SEGOB Permit No. DGJS/DGAAD/DCRCA/P-03/2018 (Nov. 27, 2018), **C-325**; Julio Gutiérrez Statement, **CWS-52**, ¶ 78.

[1803] SEGOB Permit No. DGJS/DGAAD/DCRCA/P-03/2018 (Nov. 27, 2018), **C-325**.

[1804] SEGOB Información sobre el Permisionario, Discos y Producciones Premier, S.A. de C.V. Retrieved from https://sijscasinos.segob.gob.mx/consultaWebCasinos/AppDGTI/consultaWeb/receiver.php?do=Consulta&action=200&id=260, **C-326**; Julio Gutiérrez Statement, **CWS-52**, ¶ 79.

[1805] *Grand River*, Award, ¶ 166 (noting that "the identity of legal regime(s) applicable to a claimant and its purported comparators" was "a compelling factor" in assessing like circumstances in cases where a specific regulatory issue is at play), **CL-213**.

[1806] González Report, **CER-3**, ¶ 189; 2004 Mexican Gaming Regulation, Article 22, Section VIII, **CL-72**.

[1807] SEGOB Resolution No. DGJS/2738/2014 (Aug. 15, 2015), p. 5, **C-27**; SEGOB Resolution No. DGJS/2739/2014 (Aug. 15, 2015), p. 5, **C-28**; SEGOB Resolution No. DGJS/2740/2014 (Aug. 15, 2015), p. 5, **C-29**; SEGOB Resolution No. DGJS/2741/2014 (Aug. 15, 2015), p. 5, **C-30**; SEGOB Resolution No. DGJS/2743/2014 (Aug. 15, 2015), p. 5, **C-32**; Julio Gutiérrez Statement, **CWS-52**, ¶ 74.

the Gaming Regulation.[1808] Mexico will simply not be able to justify such a differential treatment in terms of its own laws and policies, because the existence of open, operating casinos is not a requirement for the granting of a permit under the Gaming Regulation, nor has it been consistently required by the agency's regulatory practice in fact.

d. Conclusion

764. E-Games and the above-mentioned Mexican-owned companies are in like circumstances; they were competing in the same casino industry and subject to the Gaming Regulation. And yet, Mexico has shown unfavorable and even hostile treatment to E-Games by applying discriminatory and arbitrary legal standards to revoke E-Games' November 16, 2012 permit and to further deny E-Games' requests for new permits. On the other hand, Mexico conferred preferential treatment to the similarly situated Mexican companies by allowing them to continue to operate their casinos and/or granting them new gaming permits.

765. As explained above, Mexico cannot justify its discriminatory treatment toward Claimants and their investments, because Mexico's various acts and omissions were in violation of its own laws and regulations, characterized by a long pattern of political favoritism and corruption, and directed against Claimants and their investments by reasons of their nationality. Therefore, Mexico has violated the national treatment standard in violation of the NAFTA.

F. Mexico Violated Its Obligation to Accord Most Favored Nation Treatment

766. Mexico's obligation to accord investors most favored nation treatment is described in NAFTA Article 1103 which provides as follows:

> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

[1808] *See Bilcon v. Canada*, Award on Jurisdiction and Liability, ¶¶ 600-604, **CL-159**.

> 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 investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.[1809]

767. Article 1103 is written in a nearly identical language as Article 1102. In fact, as the tribunal in *Cargill v. Mexico* noted, Article 1103 basically operates on the same conditions as Article 1102, except for one key distinction: the basis of comparison is foreign-to-foreign, not domestic-to-foreign.[1810] Accordingly, in order to satisfy its Article 1103 obligation, Mexico is required to accord to U.S. investors and their investments (i) treatment that is no less favorable than it accords (ii) in like circumstances (iii) to investors and investments of investors of any other state with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. As with Article 1102, Article 1103 does not require a showing of discriminatory intent.[1811] The mere fact that Mexico exhibits distinct or divergent treatment between investors or investments of different foreign nationalities can give rise to a breach of the most-favored-nation ("**MFN**") clause.

1. Article 1103 Allows Claimants to Import More Favorable Conditions from Third-Country Investment Agreements Entered Into By Mexico

768. As the International Court of Justice has described, the purpose of MFN clauses is to "establish and maintain at all times fundamental equality without discrimination among

[1809] NAFTA Article 1103, **CL-78**.

[1810] *Cargill v. Mexico*, Award, ¶ 228 (observing that Articles 1102 and 1103 impose an identical obligation with respect to investors and investments of investors of another party, the sole difference being the nationality of the comparator), **CL-136**.

[1811] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (Sept. 11, 2007), ¶ 368 ("Whether discrimination is objectionable does not in the opinion of this Tribunal depend on subjective requirements such as the bad faith or the malicious intent of the State: at least, [the MFN clause at issue] does not include such requirements. However, to violate international law, discrimination must be unreasonable or lacking proportionality, for instance, it must be inapposite or excessive to achieve an otherwise legitimate objective of the State."), **CL-162**.

all of the countries concerned."[1812] Similarly, UNCTAD described the purpose of MFN clauses as one of "giv[ing] investors a guarantee against certain forms of discrimination by host countries, and [establishing] equality of competitive opportunities between investors from different foreign countries."[1813]

769. In accordance with these apparent purposes to create "a level playing field" for foreign investors from different home states[1814] and to allow for equal competition among them, MFN clauses, "first and foremost, extend the scope of more favorable substantive rights and protections that host States offer to nationals of third states. This encompasses not only provisions in domestic laws and regulations or pure administrative practice, but also more favorable conditions offered in third-country investment treaties."[1815] In fact, the use of MFN clauses to import more favorable substantive treatment provisions from third country investment treaties is largely uncontested, as the tribunal in *Berschader v. Russia* noted: "[I]t is universally agreed that the very essence of an MFN provision . . . is to afford to investors all material protection provided by subsequent treaties."[1816]

770. In the BIT context, tribunals have frequently allowed the use of an MFN clause to import more favorable conditions granted to investors under another BIT to which the host state is a party. For example, in *MTD v. Chile*, the tribunal allowed the investor to incorporate

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[1812] *See Case Concerning Rights of Nationals of the United States of America in Morocco* (France v. United States of America), 1952 I.C.J. 176, 192 (Aug. 27, 1952), **CL-215**.

[1813] UNCTAD, Most-Favored-Nation Treatment, 1, UNCTAD/ITE/IIT/10 (Vol. III) (1999), **CL-216**.

[1814] *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (Aug. 22, 2012), ¶ 242 (interpreting the MFN clause in Argentina-Germany BIT), **CL-63**.

[1815] Stephan W. Schill, Multilateralizing Investment Treaties Trough Most-Favored-Nation Clauses, 27 BERKELEY J. INT'L L 496, 518 (2009), **CL-217**; McLaughlan, Shore & Weiniger at 345 (noting that treatment for purposes of MFN clauses includes not only "legislative measures," "judicial decisions," and "the conduct in fact of the executive," but also "[t]he assumption of a treaty obligation towards a third State"), **CL-167**.

[1816] *See Vladimir Berschader and Moïse Berschander v. Russian Federation*, SCC Case No 080/2004, Award (Apr. 21, 2006), ¶ 179, **CL-218**. *See* also Scott Vesel, Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties, 32 YALE J. INT'L L. 125, 163 (2007) (stating that the importation through an MFN clause of standards of treatment "has never been seen as problematic"), **CL-219**; Patrick Dumbery, The Importation of 'Better' Fair and Equitable Treatment Standard Protection Through MFN Clauses: An Analysis of NAFTA Article 1103, 14(1) TRANSNAT'L DISP. MGMT. 14 (2017) (noting that there is a "large consensus" on this use of MFN), **CL-220**.

via the MFN clause in the Chile-Malaysia BIT more favorable rights contained in two third-party treaties.[1817] The more favorable provisions concerned the obligation under third-party treaties to grant necessary permits once an investment has been approved under the host state's foreign investment legislation.[1818]

771. In *Bayindir v. Pakistan*, the tribunal allowed the claimant to invoke the MFN clause in the Turkey-Pakistan BIT to import a fair and equitable treatment clause found in other treaties, as the Turkey-Pakistan BIT did not contain a fair and equitable treatment clause.[1819] In *White Industries v. India*, the tribunal allowed the claimant to incorporate an "effective means" clause from a third-party treaty via the MFN clause in the India-Australia BIT.[1820] In doing so, the tribunal specifically noted that ensuring better treatment for investors through the MFN clause "does not 'subvert' the negotiated balance of the BIT. Instead, it achieves exactly the result which the parties intended by the incorporation in the BIT of an MFN clause."[1821]

772. NAFTA tribunals also accepted the principle that investors and investments covered by Article 1103 can rely on more favorable substantive conditions granted under another investment agreement to which the host state is a party. For instance, in *Pope & Talbot*, the claimant did not allege a breach of Article 1103, but rather a breach of Article 1105. However, the tribunal nevertheless suggested that Article 1103 could lead to import into the NAFTA more favorable substantive protection offered in bilateral investments treaties to which Canada is a party. [1822] There, in interpreting the FET standard under Article 1105(1) of the

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[1817] *MTD v. Chile*, Award, ¶¶ 100-104, **CL-149**.

[1818] *Id*. at ¶ 103, **CL-149**.

[1819] *Bayindir v. Pakistan*, Award, ¶ 157 **CL-171**.*See* also Rumeli Telekom, Award, ¶¶ 572, 575 (holding, inter alia, that the host State was liable for a violation of fair and equitable treatment that was incorporated into the Turkish-Kazakh BIT based on an MFN clause in that treaty from third-party treaties), **CL-113**.

[1820] *White Industries Australia Ltd. v. The Republic of India*, UNCITRAL, Final Award (Nov. 30, 2011), ¶ 11.2.3, **CL-221**.

[1821] *Id*. at ¶ 11.2.4, **CL-221**.

[1822] *Pope & Talbot*, Award on the Merits of Phase 2, ¶ 117, **CL-210**.

NAFTA, the tribunal faced two possibilities. Canada argued that the standard was equivalent to the customary international law minimum standard as formulated in the famous *Neer* case from the 1920s.[1823] Accordingly, Canada argued that "only 'egregious' misconduct" was covered under Article 1105. On the other hand, the claimant proposed a broader interpretation of fair and equitable treatment as a free-standing, independent treaty standard.[1824] Ultimately, the tribunal held that compliance with the FET standard "must be ascertained free of any threshold that might be applicable to the evaluation of measures under the minimum standard of international law."[1825]

773. In doing so, the tribunal in *Pope & Talbot* pointed to the MFN clause in Article 1103, explaining that the same would entitle investors to the broader interpretation of fair and equitable treatment in any event as this was the standard adopted in Canada's BITs with third countries. The tribunal stated:

> [T]here is a practical reason for adopting the additive interpretation to Article 1105. As noted, the contrary view of that provision would provide NAFTA investors a more limited right to object to laws, regulation and administration than accorded to host country investors and investments as well as to those from countries that have concluded BITs with a NAFTA party. … NAFTA investors and investments that would be denied access to the fairness elements untrammeled by the 'egregious' conduct threshold that Canada would grant onto Article 1005 would simply turn to Articles 1102 and 1103 for relief.[1826]

774. Shortly after the issuance of the Merits Award in *Pope & Talbot*, the NAFTA Free Trade Commission (FTC) interpreted NAFTA Article 1105 as an expression of the international minimum standard.[1827] In the wake of the 2001 Interpretive Note, several investors invoked Article 1103 to benefit from the more favorable FET protection found in other treaties entered into by the host states. Although the NAFTA tribunals ultimately rejected

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[1823] *Id*. at ¶ 108, **CL-210**.

[1824] *Id*. at ¶¶ 110-111, **CL-210**.

[1825] *Id*. at ¶ 111, **CL-210**.

[1826] *Id*. at ¶ 117, **CL-210**.

[1827] NAFTA FTC, Notes of Interpretation of Certain Chapter 11 Provisions (Jul. 31, 2001), **CL-123**.

these Article 1103 claims, the rationale for the rejection of these claims was not because these tribunals rejected the use of Article 1103 to import substantive treatment standards, but because the tribunals were not persuaded of the existence of a more favorable FET standard in other BITs.

775. For example, in *ADF v. United States*, the tribunal rejected the Canadian claimant's argument that U.S.-Albania and US-Estonia BITs provide a better treatment compared to the one contained in NAFTA Article 1105, on the grounds that the "[i]nvestor ha[d] not been able persuasively to document the existence of such autonomous [FET] standards" distinct from customary international law.[1828] In doing so, the tribunal took note of the fact that the U.S. Department of State letters transmitting the said BITs to the U.S. Senate mention specifically that the FET clauses at issue set out "'a minimum standard of treatment' that is 'based on customary international law' (in case of the U.S.-Estonia treaty) or 'based on standards found in customary international law' (in the case of the U.S.-Albania treaty)."[1829]

776. The *Chemtura* tribunal similarly rejected the U.S. investor's argument that it should be entitled to the higher FET standard found in Canada's BITs through Article 1103.[1830] There, the investor alluded to sixteen BITs signed by Canada which provide for FET in accordance with "international law" or the "principles of international law."[1831] The tribunal found that "the Claimant has not established that the FET clause of any of the treaties to which it indistinctly refers grants any additional measure of protection not afforded by Article 1105 of NAFTA"; and that "the Claimant has in any case not established that the Respondent's

[1828] *ADF*, Award, ¶ 194, **CL-18**.

[1829] *Id*. at ¶ 195, **CL-18**.

[1830] *Chemtura*, Award, ¶ 226, **CL-21**.

[1831] *Id*., **CL-21**.

conduct was in breach of such hypothetical additional measure of protection allegedly afforded by an imported FET clause."[1832]

777. In sum, in the field of investment law, there is a general consensus that the MFN clauses "grant a claimant to benefit from substantive guarantees contained in third treaties."[1833] MFN clauses thus ensure that the level of protection in any given host state match the maximum level granted in any one of the host state's investment treaties. In this regard, treaty practice of Mexico is particularly relevant, since Claimants can avail themselves of the protection of the MFN obligation in Article 1103 by reference to other investment treaties Mexico has entered into.

778. Mexico has expressly excluded from the scope of Article 1103 "all bilateral or multilateral international agreements in force or signed prior" to entry into force of the NAFTA, (i.e., January 1, 1994) as well as "international agreements in force or signed after" NAFTA "involving (a) aviation; (b) fisheries; (c) maritime matter . . . ; or (d) telecommunications transport networks and telecommunications transport services".[1834] This means that Mexico's MFN obligations apply to general trade and/or investment treaties which were signed or entered into force after January 1, 1994.

2. Treaty Practice of Mexico Demonstrates that Mexico Is Obligated to Treat Claimants Fairly and Equitably, Refrain From Arbitrary and Discriminatory Measures, and Provide Due Process

a. Unqualified, self-standing FET standard

779. Several of the BITs to which Mexico is a party contain a simple unqualified formulation of the FET standard which does no more than state the obligation of Mexico to accord fair and equitable treatment to protected investors or investments. For instance, the Mexico-Denmark BIT includes the following FET clause: "Each Contracting Party shall accord

[1832] *Id.* at ¶ 236, **CL-21**.

[1833] Dolzer & Schreuer at 211, **CL-122**.

[1834] NAFTA Annex IV, Schedule of Mexico, **CL-222**.

to investors of another Contracting Party and to their investments, fair and equitable treatment."[1835] Under such a formulation, the FET clause is *not* linked to the principles of international law or to the minimum standard of treatment under customary law.

780. As discussed above, it is the Claimants' view, as supported by various NAFTA tribunals,[1836] that the minimum standard of treatment set out in NAFTA Article 1105 has essentially converged with the fair and equitable standard as an independent treaty standard. However, in the event that the Tribunal holds that the standard under Article 1105 is less favorable than the unqualified FET standard provided for in third-party BITs to which Mexico is party, Claimants submit they are entitled to receive the more favorable treatment by virtue of NAFTA Article 1103.

b. Standard of Treatment Prohibiting Discriminatory Measures

781. Several of Mexico BITs specifically prohibit unjustifiable, unreasonable or discriminatory measures. A good example is the Mexico-Switzerland BIT, which provides, "Neither Party shall in any way impair by discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Party."[1837] Similarly, the Netherlands-Mexico BIT prohibits Mexico from "impar[ing], by unjustifiable or discriminatory measures, the operation, management, management,

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[1835] Mexico-Denmark BIT, Article 3(1), **CL-223**. *See* also Mexico-Austria BIT, Article 3(1) ("Each Contracting Party shall accord to investors of the other Contracting Party and to their investments fair and equitable treatment and full and constant protection and security."), **CL-224**; Mexico-Australia BIT, Article 4(1) ("Investments of Investors of either Contracting Party and the activities associated with investments shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party."), **CL-225**; Mexico-Czech Republic BIT, Article 2(3)("Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party."), **CL-226**.

[1836] *See, e.g.*, *Mondev*, Award, ¶¶ 116–117 (further observing that these treaties "will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law"), ¶ 125 (emphasizing that "the investments of investors under NAFTA are entitled, under the customary international law which NAFTA Parties interpret Article 1105(1) to comprehend, to fair and equitable treatment"), **CL-17**; *Merrill*, Award, ¶ 210 ("A requirement that aliens be treated fairly and equitably . . . 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."), **CL-124**.

[1837] Mexico-Switzerland BIT, Article 4(1), **CL-227**.

maintenance, use, enjoyment or disposal thereof by" Dutch investors.[1838] The Mexico BITs with Austria, Italy and Finland also contain similar investor protection provisions against unreasonable and discriminatory measures.[1839]

782. As discussed above, the prohibition of unreasonable, arbitrary and/or discriminatory measures are one of the core elements of the FET obligation under the customary international law minimum standard as provided for under NAFTA Article 1105. The existence of stand-alone provisions against discriminatory and unreasonable measures in Mexico's third-party treaties further reinforces this position, because "the contrary view . . . would provide NAFTA investors a more limited right to object to laws, regulations and administration than accorded to . . . those from countries that have concluded BITs with a NAFTA party", [1840] which is clearly inconsistent with the MFN norm under Article 1103.

c. Inclusion of Denial of Justice in FET Clauses

783. A number of investment chapters in free trade agreements entered into by Mexico have expressly included a reference to a denial of justice in their FET clauses. For instance, the CAFTA-Mexico contains a clause that states that "'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."[1841] The word 'includes' indicates that the obligation not to deny justice

[1838] Netherlands-Mexico BIT, Article 3(1), **CL-229**.

[1839] Austria-Mexico BIT, Article 3(2) ("A Contracting Party shall not impair by unreasonable or discriminatory measures the management, operation, maintenance, use, enjoyment, sale and liquidation of an investment by investors of the other Contracting Party."), **CL-224**; Italy-Mexico BIT, Article 2(2) ("Each Contracting Party shall accord to investments made in its territory by investors of the other Contacting Party fair and equitable treatment and shall refrain from adopting discriminatory measures which might impair the operation, management, maintenance, use, disposal, transformation or liquidation of the investment. Such investments shall enjoy full legal protection and security."), **CL-230**; Finland-Mexico BIT, Article 2(3)("Ninguna Parte Contratante deberá impedir, a través de medidas arbitrarias o discriminatorias en su territorio, la administración, el mantenimiento, uso, goce, adquisición o disposición de inversiones de inversionistas de la otra Parte Contratante."), **CL-228**.

[1840] *Pope & Talbot*, Award on the Merits of Phase 2, ¶ 117, **CL-210**.

[1841] CAFTA-Mexico, Article 11.3(2) ("(a)'*trato justo y equitativo' incluye, pero no está limitado a, la obligación de no denegar justicia en procedimientos penales, civiles o contencioso administrativos, de conformidad con el*

forms part of the FET standard but that the latter is not limited to the denial of justice only. The Mexico-Panama FTA, Additional Protocol to the Framework Agreement of the Pacific Alliance, and CPTPP all include identically worded clauses.[1842]

784. The FET standard contained in these agreements is expressly tied to the minimum standard under customary international law,[1843] and thus does not grant any additional measure of protection not afforded by Article 1105 of the NAFTA. For this reason, Claimants do not suggest that such FET clauses explicitly referencing to the denial of justice be imported into the NAFTA by means of Article 1103. Rather, Claimants reiterate that denial of justice is a fundamental component of FET under the customary international law minimum standard as provided for under NAFTA Article 1105. By entering into the above-referenced agreements, Mexico has also explicitly recognized its "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."[1844]

3. Mexico Breached Its Obligation to Accord Sympathetic Consideration to E-Games' Permit Requests

785. In the BIT between Mexico and Finland, one of investor protection provisions provides:

> Each Party shall, within the framework of its legislation, give a sympathetic consideration to requests for the granting of necessary permits in connection

principio de debido proceso incorporado en los principales sistemas legales del mundo") (counsel translation), **CL-181**.

[1842] Mexico-Panama FTA, Article 10.5(2), **CL-182**; Pacific Alliance Additional Protocol, Article 10.6(2), **CL-183**; CPTPP, Article 9.6 (2), **CL-180**.

[1843] *See*, e.g., CAFTA-Mexico, Article 11.3(2) ("*Para mayor certeza, el párrafo 1 prescribe que el nivel mínimo de trato a los extranjeros según el derecho internacional consuetudinario es el nivel mínimo de trato que se le otorgará a las inversiones de los inversionistas de la otra Parte. Los conceptos de 'trato justo y equitativo' y 'protección y seguridad plenas' no requieren un tratamiento adicional o más allá de aquel exigido por ese nivel, y no crean derechos sustantivos adicionales*."), **CL-181**; CPTPP, Article 9.6(2) ("For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights."), **CL-180**.

[1844] CAFTA-Mexico, Article 11.3(2) (counsel translation), **CL-181**.

> with the investments in its territory, including authorizations to employ managerial and technical personnel of choice from abroad.[1845]

786. There is no comparable provision relating to the granting of permits in the NAFTA. Thus, by way of NAFTA Article 1103, Claimants are entitled to the benefit of "sympathetic consideration" available to investors of Finland.[1846] However, as set out in Section IV.X.3.i, when in 2014 E-Games requested new and independent permits for its Casinos in full compliance with all requirements set forth in the Gaming Regulation, SEGOB denied such requests on unjustifiable and purely technical grounds nowhere found in the Gaming Regulation: namely, that Claimants' Casinos were closed, and that one of the voluminous set of documents E-Games submitted with its request—a certificate of good standing from the relevant municipalities—was supposedly outdated, did not comply with certain formalities and was originally tied to E-Mex's permit.[1847]

787. However, as noted above, the existence of open, existing casinos is not a requirement for the granting of permit under the Gaming Regulation.[1848] In addition, SEGOB's reliance on an insignificant technicality as the basis for denying E-Games' requests, as well as its failure to afford E-Games the opportunity to rectify it, further demonstrates that no fair, reasonable and sympathetic consideration was given to Claimants' new permit requests.

788. As such, in addition to breaching the other NAFTA substantive obligations as argued above, Mexico also breached its obligations to provide "sympathetic consideration" to

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[1845] Finland-Mexico BIT, Article 2(4)("*Cada Parte Contratante deberá, dentro del marco de su legislación, considerar de manera empática, las solicitudes para el otorgamiento de los permisos necesarios en relación con las inversiones en su territorio, incluyendo autorizaciones para emplear personal gerencial y técnico de su elección proveniente del exterior*.") (counsel translation), **CL-228**.

[1846] *See Bayindir v. Pakistan*, Award, ¶ 157 (allowing the claimant to import an FET clause that was absent from the basic treaty), **CL-171**; *MTD v. Chile*, Award, ¶ 103 (allowing the claimant to import a provision from the Croatia-Chile BIT relating to the grant of permits), **CL-149**.

[1847] SEGOB's denial of E-Games' requests (Aug. 15, 2015), **C-27 – C-33**; Julio Gutiérrez Statement, **CWS-52**, ¶ 75.

[1848] González Report, **CER-3**, ¶ 190; Julio Gutiérrez Statement, **CWS-52**, ¶¶ 75-76.

Claimants' request for a new gaming permit, as imported under NAFTA Article 1103 from the Mexico-Finland BIT.

789. As explained throughout this Memorial, Mexico, driven by political, discriminatory and corrupt motives, had set its mind to forcing Claimants out of the Mexican gaming industry and it invariably found ways to achieve that goal. In doing so and in egregious violations of the NAFTA, Mexico fully destroyed the value of Claimants' Casino businesses and investments, entitling Claimants to the damages described in detail below, which damages Mexico has a duty under the NAFTA and international law to fully compensate.

VI. DAMAGES

A. Claimants Are Entitled to Damages for Mexico's NAFTA Violations

790. As demonstrated in Section V above, Mexico breached the provision of the NAFTA prohibiting unlawful expropriation without compensation, as well as the provisions requiring Mexico to afford Claimants fair and equitable treatment (including denial of justice), national treatment, and most-favored nation treatment.

791. These NAFTA breaches, led directly, *inter alia*, to Mexico's (i) cancellation of Claimants' gaming permit, (ii) its illegal closure of their Casinos; (iii) denial and impediments to Claimants' efforts to sell their Casinos and other gaming assets; (iv) unreasonable and unlawful denial of Claimants' requests for new gaming permits; (v) illegal reopening of the Casinos to the benefit of Claimants' competitors; and (iv) the pilfering of Claimants' gaming machines and other assets. There thus can be no legitimate question that Mexico's measures caused direct and substantial harm to Claimants and their investments, leading to the total destruction of their investments, for which they seek full reparation in this arbitration.

792. In accordance with well-settled principles of international law, Claimants seek "full reparation" for the losses they suffered as a result of Mexico's violations of the NAFTA

and international law, in the form of monetary compensation sufficient to wipe out the consequences of Mexico's wrongful acts.[1849]

793. Claimants' claim for damages is explained and quantified in the Berkeley Research Group ("**BRG**") Expert Report submitted with this Memorial by economists Santiago Dellepiane and Andrea Cardani, both experts with extensive experience in the valuation and quantification of damages (the "**BRG Report**").[1850] The BRG Report relies on the fair market value of Claimants' investments in Mexico and the resulting damages flowing from Mexico's internationally wrongful conduct. On the basis of the BRG Report, Claimants estimate that their damages caused by Mexico's breaches are at least USD 415.8 million as of April 21, 2020.[1851] Claimants' damages are summarized in the below Table:[1852]

USD Million	April 2014 - Nov. 2037	Nov. 2037 - Nov. 2052	Terminal Value	Total Damages
Claimants' Casinos	$120.2	$25.9	$17.6	$163.7
Cabo Project	$54.3	$14.2	$9.4	$77.9
Cancun Project	$28.6	$8.3	$5.5	$42.4
Online Gaming Project	$24.5	$6.4	$5.2	$36.0
Total	**$227.6**	**$54.8**	**$37.6**	**$320.0**
Pre-Award Interest (up to April 21, 2020)				$95.8
Damages as of April 21, 2020				**$415.8**

794. In the following sections, Claimants address: (A) the applicable standard and methodology for the assessment of compensation; (B) the quantum of compensation owed to Claimants for the Casinos, the Cabo and Cancun Projects and the Online Gaming Project; (C) interest; and (D) taxes.

[1849] ILC Articles, Art. 31(1), **CL-94**.

[1850] BRG Report, **CER-4**, ¶¶ 18–24.

[1851] BRG Report, **CER-4**, ¶ 16.

[1852] BRG Report, **CER-4**, ¶ 16.

B. Applicable Standard and Methodology

1. Full Compensation is the Appropriate Standard of Reparation Under Customary International Law

795. It is a well-established principle of international law that a State must afford "full reparation for the injury caused by [its] internationally wrongful act."[1853] Reparation may take the form of restitution, compensation or satisfaction, either individually or in combination.[1854] Here, restitution in kind is neither possible nor practical.[1855] Claimants' investments have been destroyed; the Casinos have been shuttered since 2014, SEGOB has allowed some of them to be reopened and has returned possession of the establishments to Mexican third parties, Claimants' assets have been stolen following SEGOB's illegal reopening of the Casinos and lifting of the closure seals for the establishments, and Claimants' expansion projects, both in Cabo and Cancun, as well as in online gaming, have been suspended indefinitely and entirely. Thus, the only appropriate remedy is monetary compensation sufficient to erase the consequences of Mexico's internationally wrongful conduct.

796. It is firmly established that the customary international law principle governing recovery from injury for internationally wrongful acts is that of "full reparation."[1856] As established in *Chorzów Factory* by the Permanent Court of International Justice ("**PCIJ**") in 1928:

797. 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

[1853] ILC Articles, Art. 31(1), **CL-94**.

[1854] ILC Articles, Art. 34, **CL-94**.

[1855] *See, e.g.*, *CMS*, Award, ¶ 406, **CL-129**.

[1856] ILC Articles, Art. 31 ("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."), **CL-94**.

consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.[1857]

798. The obligation to provide full reparation is also reflected in the International Law Commission's Articles on State Responsibility ("**ILC Articles**"),[1858] which provide that a State "responsible for an internationally wrongful act is under an obligation to compensate [the investor] for the damage caused thereby" and that such compensation "shall cover any financially assessable damage including loss of profits insofar as it is established."[1859]

799. Tribunals have repeatedly confirmed the "full reparation" principle set out above as the international law standard applicable to the compensation owed for breaches of bilateral investment treaties.[1860] For example, as explained in *Gold Reserve v. Venezuela*:

800. [I]t is well accepted in international investment law that the principles espoused in the *Chorzów Factory* case, even if initially established in a State-to-State context, are the relevant principles of international law to apply when considering compensation for breach of a BIT. It is these well-established principles that represent customary international law, including for breaches of international obligations under BITs, that the Tribunal is bound to apply.[1861]

[1857] *Case Concerning the Factory at Chorzów (Germany/Poland)* (Merits) [1928] PCIJ Series A, No 17, p. 47 (emphasis added), **CL-231**; *see also* ILC Articles, Art. 34 ("Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination"), **CL-94**.

[1858] The ILC Articles, and in particular Article 36, have frequently been invoked in investment treaty decisions in relation to compensation issues. *See, e.g.*, *Siemens*, Award, ¶ 350, **CL-91**; *Vivendi II*, Award, ¶ 8.2.6, **CL-92**; *Archer Daniels*, Award, ¶¶ 280–281, **CL-86**; *Gemplus S.A. and others v. United Mexican States* and *Talsud S.A. v. United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 and ARB(AF)/04/4, Award (Jun. 16, 2010), ¶¶ 13-79–13-81, **CL-232**; *Joseph Charles Lemire v. Ukraine*, ICSID Case No ARB/06/18, Award (Mar. 28, 2011), ¶¶ 151, 245, **CL-233**; *El Paso v. Argentina*, Award, ¶ 710, **CL-139**.

[1859] ILC Articles, Art. 36, **CL-94**.

[1860] *See CMS*, Award, ¶ 400, **CL-129**. *See also Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007), ¶ 400, **CL-148**; *Vivendi II*, Award, ¶¶ 8.2.4-8.2.5, **CL-92**; *Biwater v. Tanzania*, Award, ¶¶ 773, 775, **CL-22**.

[1861] *Gold Reserve*, Award, ¶ 678, **CL-137**.

801. Thus, any monetary award must put Claimants in the economic position that they would have been in had the internationally wrongful act not occurred at all.[1862] In other words, the valuation must reflect the situation that would have existed *but for* the State's wrongful conduct. As explained by the tribunal in *SD Myers v. Canada*, damages "should reflect the general principle of international law that compensation should undo the material harm inflicted by a breach of an international obligation."[1863] As the tribunal in *Vivendi 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 compensate the affected party fully and to eliminate the consequences of the state's action.[1864]

2. The NAFTA Provides a Compensation Standard for Lawful Expropriations Only and No Standard for Unlawful Expropriations or Other Breaches; Thus the Customary International Law Standard Applies

802. The only compensation standard provided in the NAFTA is for a *lawful* expropriation. As explained in Section V.B, NAFTA Article 1110(1) lists the four necessary criteria for a lawful expropriation.[1865] The fourth criterion states that "payment of compensation [shall be] in accordance with paragraphs 2 through 6." Paragraph 2 of Article 1110 immediately follows Article 1110(1) and provides that "[c]ompensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place . . . ."[1866] The placement of the Article 1110(2) compensation standard,

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[1862] *Case Concerning the Factory at Chorzów (Germany/Poland)* (Merits) [1928] PCIJ Series A, No 17, pp. 46-47, **CL-231**; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (Apr. 4, 2016), ¶¶ 847–849, **CL-95**; *Petrobart v. Kyrgyzstan*, Arbitral Award, pp. 78-79 ("The Arbitral Tribunal agrees that, insofar as it appears that Petrobart has suffered damage as a result of the Republic's breaches of the Treaty, Petrobart shall so far as possible be placed financially in the position in which it would have found itself, had the breaches not occurred."), **CL-202**.

[1863] *S.D. Myers*, Partial Award, ¶ 315, **CL-30**; *El Paso v. Argentina*, Award, ¶ 700, **CL-139** (emphasis added).

[1864] *Vivendi II*, Award, ¶ 8.2.7 (emphasis added), **CL-92**.

[1865] NAFTA Article 1110(1), **CL-78**.

[1866] NAFTA Article 1110(2), **CL-78**.

and the explicit link to the clause discussing a lawful expropriation make clear that Article 1110(2) applies only to compensation for lawful expropriations. The NAFTA does not provide a standard of compensation for an *unlawful* expropriation nor does it provide a compensation standard for breaches of fair and equitable treatment, denial of justice, or national treatment.

803. In the absence of *lex specialis*, the relevant standard for the determination of the compensation owed to Claimants with respect to Mexico's breaches of the NAFTA must be assessed with reference to applicable principles of customary international law as discussed above.[1867] As the tribunal stated in *Vivendi II*,

> There can be no doubt about the vitality of [the Chorzów Factory] statement of the damages standard under customary international law, which has been affirmed and applied by numerous international tribunals as well as the PCIJ's successor, the International Court of Justice. It is also clear that such a standard permits, if the facts so require, a higher rate of recovery than prescribed in [the BIT] for lawful expropriations.[1868]

804. Similarly, the tribunal in *Houben v. Burundi* noted that where a treaty provides that the amount of compensation for expropriation should be calculated on the basis of the investment value on the eve of the expropriation, that standard should be interpreted to mean that it applies to lawful expropriation, not unlawful expropriations.[1869] Further, the tribunal held that if the treaty in question is silent on the method for calculating the amount of compensation for unlawful expropriation, customary international law shall apply, and in

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[1867] *See Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (Apr. 4, 2016), ¶ 846, **CL-95**; *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award (Feb. 7, 2017), ¶ 160, **CL-234**; *ADC v. Hungary*, Award, ¶¶ 481, 483, **CL-117**; *Amoco Int'l Finance Corp. v. Iran*, Iran-US Claims Tribunal, Partial Award (Jul. 14, 1987), 15 Iran-US CTR 189, ¶¶ 189, 191-193, **CL-107**; *Nykomb Synergetics Technology Holding AB v. Republic of Latvia*, SCC, Arbitral Award (Dec. 16, 2003), ¶ 5.1, **CL-235**.

[1868] *Compañia de Aguas de Aconquija S.A. and Vivendi Universal S.A. v. Republic of Argentina*, ICSID Case No. ARB/97/3, Award (Jul. 25, 2007), ¶ 8.2.5, **CL-92** (emphasis added).

[1869] *Joseph Houben v. Republic of Burundi*, ICSID Case No. ARB/13/7, Award (Jan. 12, 2016), ¶¶ 219-220, **CL-236**.

particular, the *Chorzów* standard.[1870] Thus, in this case, customary international law applies to the question of damages for unlawful expropriation and other breaches of the NAFTA.

805. Where the compensation standards for lawful expropriations under the NAFTA and breaches under customary international law coincide is in establishing the fair market value standard as the appropriate standard for full reparation. As discussed below, the fair market value standard is the most commonly accepted damages standard for full reparation, and also appropriate for this case.[1871]

3. Compensation Must Be Equal to At Least the Fair Market Value of Claimants' Gaming Business Had it Been Allowed to Continue Operating as Prescribed by Law

806. The proper method for calculating Claimants' damages in this case is to determine the fair market value ("**FMV**"*)* of Claimants' investments, assuming it would have continued operating as prescribed by applicable law.[1872]

807. According to the ILC Articles, "[c]ompensation 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."[1873] The 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment are similarly clear, providing that

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[1870] *Id.* at ¶ 220, **CL-236**.

[1871] *Metalclad,* Award, ¶ 118, **CL-79**; *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award (Mar. 14, 2003), ¶¶ 498–500, **CL-108**; J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* 225 (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."), **CL-238**.

[1872] C. N. Brower and J.D. Brueschke, *The Iran-United States Claims Tribunal* 593 (1998) (stating that "market price is the most reliable indicator of the actual value of an asset at a determined date"), **CL-239**; *Vivendi II*, Award, ¶¶ 8.2.9-8.2.11, **CL-92**.

[1873] ILC Articles, Art. 36, Commentary ¶ 22, **CL-94**. *See* Brower and Brueschke, *The Iran-United States Claims Tribunal* 539 (1998), ("[M]arket price is the most reliable indicator of the actual value of an asset at a determined date."), **CL-239**; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007), ¶ 404, **CL-148**; *ADC v. Hungary*, Award, ¶ 499, **CL-117**.

compensation for expropriation "will be deemed 'adequate' if it is based on the fair market value of the taken asset."[1874]

808. The Iran-U.S. Claims Tribunal has defined FMV as "the 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."[1875]

809. As recently recognized by the tribunal in *Crystallex v. Venezuela*, proper assessment of an investment's FMV ensures that the injured party is restored to the situation it would have been in *but for* the internationally wrongful acts:

> [I]t is well-accepted that reparation should reflect the "fair market value" of the investment. Appraising the investment in accordance with the fair market value methodology indeed ensures that the consequences of the breach are wiped out and that the situation which would, in all probability, have existed if the wrongful acts had not been committed is reestablished.[1876]

810. International tribunals have regularly applied the FMV standard in cases involving both breaches of the fair and equitable treatment,[1877] expropriation,[1878] denial of

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[1874] World Bank Group, *Legal Framework for the Treatment of Foreign Investment* 41 (Vol. II: Guidelines) (1992) ("World Bank Group"), **CL-240**. *See also* J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* 225-226 (2002), **CL-238.**

[1875] *Starrett Housing Corporation and others v. Government of the Islamic Republic of Iran*, Final Award (Aug.14, 1987), (1987-Volume 16) Iran-US Claims Tribunal Report, ¶ 277, **CL-241**.

[1876] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (Apr. 4, 2016), ¶ 850 (emphasis added), **CL-95**. *See also Gold Reserve*, Award, ¶ 681 ("As the consequence of the serious breach in the present situation was to deprive the investor totally of its investment, the Tribunal considers it appropriate that the remedy that would wipe-out the consequences of the breach is to assess damages using a fair market value methodology."), **CL-137**; *Vivendi II*, Award, ¶ 8.2.10, **CL-92**.

[1877] *See, e.g., CMS*, Award, ¶ 410, **CL-129**; *Azurix*, Award, ¶ 424, **CL-126**; *Enron Corporation and Ponderosa Assets LP v. Argentine Republic*, ICSID Case No ARB/01/3, Award (May 22, 2007), ¶¶ 359-363, **CL-242**; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007), ¶¶ 403-404, **CL-148**; *El Paso v. Argentina*, Award, ¶¶ 702-703, **CL-139**.

[1878] *See, e.g., Metalclad*, Award, ¶ 118, **CL-79**; *CME*, Final Award, ¶¶ 496-500, **CL-237**; *Bernardus Henricus Funnekotter & Ors. v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award (Apr. 22, 2009), ¶ 124, **CL-119**.

justice,[1879] national treatment,[1880] and most favored nation[1881] clauses of bilateral investment treaties. Given that the NAFTA prescribes FMV for expropriation breaches and customary international law prescribes FMV for all treaty breaches, the standard for calculating compensation for Mexico's expropriation is the same—*i.e.*, FMV of Claimants' gaming business assuming it would have continued operating as prescribed by applicable law—for any breaches of the NAFTA by Respondent.

4. DCF Is the Most Appropriate Methodology To Assess the FMV of the Claimants' Investments

811. The relevant method for the assessment of the FMV of an asset or investment depends on the circumstances and characteristics of each individual case. In *Crystallex v. Venezuela*, the tribunal explained as follows:

> Tribunals may consider any techniques or methods of valuation that are generally acceptable in the financial community, and whether a particular method is appropriate to utilize is based on the circumstances of each individual case. A tribunal will thus select the appropriate method basing its decision on the circumstances of each individual case . . . .[1882]

812. In accordance with these observations, in order to reliably assess the quantum of damages Claimants are owed, BRG carefully considered the individual characteristics of the Casinos, the Cabo Project, the Cancun Project, the Online Gaming Project as well as the applicable financial and industry standards. After this consideration, BRG determined that the discounted cash flow ("**DCF**") method through the income approach, is the most appropriate method to accurately capture the value of the Claimants' investments.[1883]

[1879] *See, e.g., Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award (Nov. 18, 2014), ¶ 781, **CL-103**.

[1880] *See, e.g., Olin Holdings Ltd v. Libya, ICC Case No. 20355/MCP,* Final Award (May 25, 2018), ¶475, **CL-214**; *Cargill v. Mexico, Award,* ¶ 444, **CL-136**; *Cargill, Inc. v. Republic of Poland, ICSID Case No. ARB(AF)/04/2*, Final Award (Feb. 29, 2008), ¶ 644, **CL-209**.

[1881] *See, e.g., EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award (Jun. 11, 2012), ¶ 1183, **CL-243**.

[1882] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (Apr. 4, 2016), ¶ 886, **CL-95**.

[1883] BRG Report, **CER-4**, ¶¶ 75–83.

813. Favored in both international finance and international law,[1884] the DCF method is grounded on the estimation of the future stream of cash flows that an asset is expected to generate over a certain period of time.[1885] This sort of forward-looking valuation method provides an appropriate determination of fair market value.[1886] BRG explains that the DCF method is particularly useful when information regarding the historical financial performance of the business is available, as well as in cases in which cash flows originating from an asset can be estimated.[1887]

814. Since the DCF method is considered the most common and preferred valuation methodology for income-earning assets[1888] and given the availability of historical and prospective data to estimate the stream of future cash flows for the Casinos, as well as the Cabo, Cancun, Online Gaming Projects (collectively, the "**Expansion Projects**"),[1889] BRG concludes that the DCF method is the appropriate methodology to measure the Claimants' damages in this case.

815. Further, as BRG explains and as referenced above, the DCF is one of the most widely accepted techniques in valuation analysis, particularly in international disputes.[1890] The DCF method has been widely endorsed and applied by international arbitral tribunals to determine the appropriate compensation due as a result of expropriation, as well as other

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[1884] *See, e.g.*, World Bank Group at 41-42, **CL-240**; P. D. Friedland and E Wong, *Measuring Damages for the Deprivation of Income-Producing Assets: ICSID Case Studies*, 6 ICSID REV.–FOREIGN INV. L. J. 400, 407-408, **CL-244**; W. C. Lieblich, *Determinations by International Tribunals of the Economic Value of Expropriated Enterprises*, 7 J. OF INT'L ARB. 37, 37-39(1990), **CL-245**; *Gold Reserve*, Award, ¶ 831, **CL-137**.

[1885] BRG Report, **CER-4**, ¶ 75.

[1886] BRG Report, **CER-4**, ¶ 78.

[1887] BRG Report, **CER-4**, ¶ 78.

[1888] BRG Report, **CER-4**, ¶ 76.

[1889] BRG Report, **CER-4**, ¶ 78.

[1890] BRG Report, **CER-4**, ¶¶ 76–77.

breaches of investment treaties.[1891] In *Chorzów Factory*, the PCIJ specifically noted that "future prospects," "probable profit" and future "financial results" were factors material to the valuation.[1892] Similarly, in the case of *Phillips Petroleum v. Iran* the Iran-U.S. Claims Tribunal explained that:

> [A]nalysis of a revenue-producing asset . . . must involve a careful and realistic appraisal of the revenue-producing potential of the asset over the duration of its term, which requires appraisal of the level of production that reasonably may be expected, the costs of operation, including taxes and other liabilities, and the revenue such production would be expected to yield, which, in turn, requires a determination of the price estimates for sales of the future production that a reasonable buyer would use in deciding upon the price it would be willing to pay to acquire the asset.[1893]

816. The Casinos and the Expansion Projects would have continued and/or begun operating for the term of Claimants' 25-year gaming permit and then for at least one additional 15-year period *but for* Mexico's expropriation.[1894] BRG has taken into account the individual cash flows for each of these business units as companies that could have continued or begun operating for the foreseeable future *but for* the expropriation.[1895] Therefore, BRG's DCF analysis appropriately takes into account the value of future cash flows that the Casinos and the Expansion Projects would have generated in the absence of Mexico's unlawful conduct.[1896]

817. In order to reflect the *Chorzów Factory* "full reparation" principle, the DCF analysis normally creates two models, one projecting future cash flows assuming the offending measures are in place (the "actual" model), and one assuming that the government had never

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[1891] *See, e.g., CMS*, Award, ¶¶ 411-417, **CL-129**; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3*Award (May 22, 2007), ¶ 385, **CL-242**; *Biwater v. Tanzania*, Award, ¶ 793, **CL-22**; *National Grid P.L.C. v. The Argentine Republic*, UNCITRAL, Award (Nov. 3, 2008), ¶ 275, **CL-64**.

[1892] *Case Concerning the Factory at Chorzów (Germany/Poland)* (Merits) [1928] PCIJ Series A, No 17, pp. 50-52, **CL-231**.

[1893] *Phillips Petroleum Company Iran v. Islamic Republic of Iran and the National Iranian Oil Company*, Award, (June 29, 1989), (1989-Volume 21) Iran-U.S. Claims Tribunal Report, ¶ 111 (emphasis added), **CL-246.**

[1894] BRG Report, **CER-4**, ¶ 86.

[1895] BRG Report, **CER-4**, ¶ 85.

[1896] BRG Report, **CER-4**, ¶¶ 83, 85. *See also* BRG Report, **CER-4**, ¶¶ 112–114, 129-130, 136, 155.

breached the treaty (the "but-for" model).[1897] The difference in the value of an income-producing asset in the "but-for" and the "actual" model then provides the primary measure of damages.[1898]

818. In the present case, the full expropriation of Claimants' investments means that the "actual" value of these investments is necessarily zero—in other words, Mexico's wrongful conduct caused the loss of the full value of the Casinos and the Expansion Projects. The but-for value in this case consists of the future stream of cash flows that the Casinos and the Expansion Projects would have generated in the absence of Mexico's expropriation.

819. For the reasons set out above, the DCF method is the appropriate method to assess the FMV of the expropriated investments in Casinos, the Cabo Project, and Cancun Project, and the Online Gaming Project, and is the methodology BRG adopts in its expert report to assess Claimants' damages.

5. The Appropriate Valuation Date for the Casinos and the Expansion Projects is as of Mexico's Illegal Closure of the Casinos

820. Pursuant to the full reparation principle, the injured claimant must be made whole, and the consequences of the State's internationally wrongful conduct must be entirely wiped out. This standard of full reparation is the guiding principle affecting all aspects of the valuation analysis—including the appropriate date of valuation.

821. NAFTA Article 1110(2) provides a fixed valuation date for lawful expropriations as "immediately before the expropriation took place."[1899] However, the NAFTA is silent on the valuation date for breaches of other provisions of the Treaty, such as unlawful expropriations, fair and equitable treatment, national treatment, and most favored nation treatment. Therefore, here, where the State has committed an unlawful expropriation

[1897] BRG Report, **CER-4**, ¶ 8.

[1898] BRG Report, **CER-4**, ¶ 8.

[1899] NAFTA Article 1110(2), **CL-78**.

and breaches of non-expropriation provisions of the Treaty, no applicable *lex specialis* exists, and the Tribunal should determine the appropriate valuation date.[1900]

822. As has been articulated in the Journal of Damages in International Arbitration, "the current state of the law appears reasonably clear: where they have been victims of unlawful state action, claimants are entitled to select either the date of expropriation or the date of award as the date of valuation."[1901] Thus, for unlawful expropriations and breaches of non-expropriation provisions of the NAFTA, Claimants may choose the valuation date that provides them with the higher amount of damages.[1902]

823. When determining the appropriate valuation date for an unlawful expropriation, the tribunal must "ensure full reparation and [] avoid any diminution of value attributable to the State's conduct leading up to the expropriation."[1903] Mexico's actions that diminished the value of Claimants' investments prior to the expropriation should be taken into account when calculating the final valuation.

824. In this case, the valuation date for the NAFTA breaches must take into account the full measure of the harm done to Claimants' investment to date. Here, BRG considers the valuation of Claimants' Casinos and Expansion Projects as of April 23, 2014 (the day before the illegal closure of the Casinos, the "**Date of Valuation**").[1904] Then, BRG values the Casinos and Expansion Projects through the expiration date of E-Games' gaming permit assuming they

[1900] *S.D. Myers*, Partial Award, ¶ 309 (NAFTA's silence indicates the drafters' intentions to generally "leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case"), **CL-30**; *El Paso v. Argentina*, Award, ¶ 700, **CL-139**.

[1901] Floriane Lavaud and Guilherme Recena Costa, *Valuation Date in Investment Arbitration: A Fundamental Examination of Chorzów's Principles*, J. DAMAGES INT'L ARB., Vol. 3(2) (2016), p. 34, **CL-247 (**emphasis added).

[1902] *Yukos Universal Ltd. (Isle of Man) v. Russian Federation*, UNCITRAL, PCA Case No. AA227, Final Award (Jul. 18, 2014), ¶¶ 1763-9, **CL-248**; *Ioannis*, Award, ¶ 514, **CL-69**.

[1903] *Ioannis*, Award, ¶ 517, **CL-69**. Although NAFTA Article 1110(2) notes that compensation "shall not reflect any change in value occurring because the intended expropriation had become known earlier," this clause is applicable only to compensation for lawful expropriations.

[1904] BRG Report, **CER-4**, ¶ 7.

continued to operate through the expiration of the gaming permit in November 16, 2037.[1905] Then, BRG considers a 15 year extension of the permit, as provided for in the Gaming Regulation, up to November 16, 2052.[1906] To reflect the Casinos and Expansion Projects' value beyond 2052, BRG also calculates a terminal value as of November 16, 2052.[1907] Finally, they calculate the equity value of the Casinos and Expansion Projects by deducting any outstanding debt net of cash available as of the Date of Valuation.[1908] Finally, BRG calculates the pre-award interest from the Date of Valuation up to the filing date of this report (April 21, 2020) as a proxy for the date of the Award.[1909]

C. Calculation of the FMV of Claimants' Investment in the Casinos

825. BRG utilizes the DCF method to value the Claimants' five Casinos.[1910]

826. BRG's valuation of the Casinos is driven by seven components: (i) revenues; (ii) operating expenses; (iii) taxes; (iv) capital expenditures; (v) depreciation and amortization; (vi) terminal value, and (vii) discount rate. Each component is addressed below.

Revenues

827. BRG explains that the revenue from gaming activities are equal to the amount wagered in a game (the "handle") minus any redemptions or prizes paid to customers.[1911] Revenues in a Casino are driven largely by (i) the number of active players, (ii) the handle; and (iii) the house advantage (i.e., the theoretical percentage of each monetary amount wagered that the house wins).[1912]

[1905] BRG Report, **CER-4**, ¶ 86.

[1906] BRG Report, **CER-4**, ¶ 86.

[1907] BRG Report, **CER-4**, ¶ 86.

[1908] BRG Report, **CER-4**, ¶ 14.

[1909] BRG Report, **CER-4**, ¶¶ 156-160. BRG reserves the right to update this interest calculation closer to the date of the Award.

[1910] BRG Report, **CER-4**, ¶ 85.

[1911] BRG Report, **CER-4**, ¶ 88.

[1912] BRG Report, **CER-4**, ¶ 88.

828. To forecast the Casinos' revenue, BRG considered the historical net gaming revenue for each of the Juegos Companies as reported in E-Games' Audited Financial Statements from 2011 through 2013, with some minor adjustments based upon the Mexican government's interferences with the Casinos during this period.[1913]

829. Then, BRG divides the but-for revenues into three time periods. From 2014 through 2019, BRG assumes the revenues for each of the Casinos grew with the expected growth of Mexico's GDP, and then converts the forecasted revenue to USD.[1914] From 2020 through 2052, BRG assumes that the Casinos would have grown, in USD, with a long-term U.S. inflation rate of 2%.[1915] Beyond 2052, BRG assumes that the Casinos would have continued to grow in perpetuity in line with a long-term U.S. inflation rate of 2%.[1916]

1. Operating Expenses

830. The operating expenses for the Casinos include expenses incurred by the Casinos and corporate expenses apportioned to the Juegos Companies.[1917] BRG's forecast of operating expenses for both categories is driven by the actual historical operating expenses reported in the expense reports prepared by E-Games for 2012 through 2013, and the relationship of those historical expenses to revenue.[1918] For variable expenses, BRG conservatively assumes that the average percentage of variable expenses over revenue observed in 2012 and 2013 remains constant over the forecast period.[1919] For fixed expenses, BRG assumes that they grow with inflation for the currency in which the costs were incurred.[1920]

[1913] BRG Report, **CER-4**, ¶ 91.

[1914] BRG Report, **CER-4**, ¶ 92.

[1915] BRG Report, **CER-4**, ¶ 92.

[1916] BRG Report, **CER-4**, ¶ 92.

[1917] BRG Report, **CER-4**, ¶ 94.

[1918] BRG Report, **CER-4**, ¶ 95.

[1919] BRG Report, **CER-4**, ¶ 96.

[1920] BRG Report, **CER-4**, ¶ 96.

BRG applies adjustments for costs that were incurred in 2012 and 2013, including payroll expenses, security expenses, and payments to the B-Mex companies, which would have decreased after 2013.[1921]

2. Taxes

831. BRG also incorporates into its valuation the various taxes that Claimants were required to pay under Mexican law, including the IEPS, the ISR, the IETU, the SEGOB Participation Tax, and the IDE.[1922]

3. Capital Expenditures

832. Capital expenditures for the Claimants' Casinos are made up of periodic remodels and annual capital expenditures. Periodic remodels are based upon remodels of the Casinos which were necessary in order to remain competitive.1923 In order to forecast future remodels, BRG considers the per-square meter cost of the Naucalpan remodel and applies it to each of the Casinos and then calculates the ratio of such costs to each of the Casinos' Net Gaming Revenue for 2011.1924 BRG assumes that the Casinos would engage in periodic remodels every seven years beginning with the last remodel for each Casino, and estimates remodeling costs by (i) applying the cost per-square meter of the Naucalpan remodel to the corresponding area of each Casino and (ii) performing appropriate inflation adjustments.[1925]

833. For annual capital expenditures, BRG considers expenses that the Casinos incurred in the normal course of business, like gaming machines, furniture, and transportation equipment.[1926] In order to calculate annual capital expenditures, BRG relies on the Juegos

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[1921] BRG Report, **CER-4**, ¶ 98.

[1922] BRG Report, **CER-4**, ¶¶ 100-05.

[1923] BRG Report, **CER-4**, ¶ 106(a).

[1924] BRG Report, **CER-4**, ¶ 106(a).

[1925] *BRG Report, **CER-4**, ¶ 106(a).*

[1926] BRG Report, **CER-4**, ¶ 106(b).

Companies' Audited Financial Statements and forecast based on the currency in which each expense was incurred, assuming that capital expenditures would have grown with inflation.[1927]

4. Depreciation and Amortization

834. Capital expenditures are assumed to depreciate at historical rates from the Audited Financial Statements, and remodels are assumed to depreciate at 14%.[1928]

5. Terminal Value

835. BRG then calculates the terminal value of E-Games' permit through November 2052 based upon the understanding that the permit was to remain valid for an initial period of 25 years, until November 16, 2037 and that beyond 2037, the permit could have been validly extended for additional periods of up to 15 years, until November 16, 2052.[1929]

836. BRG also calculates the terminal value of Claimants' Casinos as of November 16, 2052. As of November 2052, if the permit was not extended, Claimants could have sold their assets, or they could have applied for a renewal of their permit, as the Mexican government has recently granted permits with unlimited validity.[1930] To calculate the terminal value, BRG projects that cash flows would continue at a steady rate of growth in line with long term U.S. inflation rate of 2% and a discount rate equal to the weighted average cost of capital ("**WACC**") for casinos and gaming companies in Mexico of 8.12%.[1931]

6. Discount Rate

837. BRG computes a discount rate that reflects the risks of operating a casino business, including consideration of the additional risks of operating in Mexico. As such, they

[1927] BRG Report, **CER-4**, ¶ 106(b).

[1928] BRG Report, **CER-4**, ¶ 107.

[1929] BRG Report, **CER-4**, ¶ 108.

[1930] BRG Report, **CER-4**, ¶ 109.

[1931] BRG Report, **CER-4**, ¶ 110.

discount cash flows using a discount rate calculated as the WACC of 8.12% as of April 23, 2014.[1932]

7. Calculation of the FMV of the Cabo and Cancun Projects

838. BRG also utilizes the DCF model that they developed to estimate the value of Claimants' Casinos as of the Date of Valuation in order to value the Cabo and Cancun Projects.[1933] BRG values the lost profits from Claimants' gaming permit that were associated with the Casino operations of the Cabo Project and the Cancun Project.[1934] They assume that but for Mexico's illegal actions, the Cabo Project and the Cancun Project would have been able to start and continue their gaming operations long after the Date of Valuation.[1935] BRG uses the Cuernavaca Casino as a baseline for the determination of damages for the Cabo and Cancun Projects.[1936] They chose the Cuernavaca Casino as their baseline conservatively, because it was similar in size to the anticipated Cabo and Cancun projects and also attracted tourists.[1937]

8. Cabo Project

839. BRG values the Cabo Project through the expiration of E-Games' gaming permit, assuming, as explained, that the Cabo Project continued to operate through the expiration of the gaming permit in November 16, 2037 with a 15-year extension up to November 16, 2052.[1938] Revenue projections for the Cabo project are based on the number of active players (estimated at 500) and the daily revenue per active player.[1939] For the daily revenue per active player, BRG considers that the state of Baja California Sur, where Cabo is

[1932] BRG Report, **CER-4**, ¶ 111.

[1933] BRG Report, **CER-4**, ¶ 115.

[1934] BRG Report, **CER-4**, ¶ 115.

[1935] BRG Report, **CER-4**, ¶¶ 115, 116, 131, 133.

[1936] BRG Report, **CER-4**, ¶ 115.

[1937] BRG Report, **CER-4**, ¶ 115.

[1938] BRG Report, **CER-4**, ¶ 116.

[1939] BRG Report, **CER-4**, ¶ 119.

located, has approximately 4.7 times more GDP per tourist than the Casino in Cuernavaca.[1940] As such, the daily revenue per active player is estimated higher for Cabo than in the Casino in Cuernavaca.

840. BRG assumes that the development of the Cabo project would have begun on or around mid-2014 and that development would have lasted 24 months.[1941]

841. BRG then considers the taxes that Claimants would have needed to pay on the Cabo Project that are included in their damages analysis. These taxes include the ISR and the SEGOB Participation Tax.[1942] BRG also forecasts capital expenditures on the Cabo Project, including construction and development, periodic remodels, and annual capital expenditures.[1943] BRG estimates depreciation and amortization expenses for the Cabo Project based on its estimated capital expenditures.[1944]

842. For the Cabo Project's tangible assets, BRG assumes depreciation for development capital expenditures, periodic remodels, and annual capital expenditures.[1945] In order to calculate after tax free cash flows, BRG subtracts depreciation and amortization from the gaming EBITDA, and further subtracts corporate taxes.[1946] BRG then adds depreciation and amortization back to this figure and subtracts capital expenditures.[1947] BRG then discounts the projected cash flows using a WACC of 8.12% to reflect the risks involved in the Cabo Project.[1948]

[1940] BRG Report, **CER-4**, ¶ 120.

[1941] BRG Report, **CER-4**, ¶ 118.

[1942] BRG Report, **CER-4**, ¶ 123.

[1943] BRG Report, **CER-4**, ¶ 124.

[1944] BRG Report, **CER-4**, ¶ 125.

[1945] BRG Report, **CER-4**, ¶ 126.

[1946] BRG Report, **CER-4**, ¶ 127.

[1947] BRG Report, **CER-4**, ¶ 127.

[1948] BRG Report, **CER-4**, ¶ 127.

843. BRG uses the same methodology as it used for Claimants' five Casinos in order to determine the terminal value of the Cabo project.[1949] They also calculate the but for cash flows for this Project as of the Date of Valuation.[1950]

9. Cancun Project

844. For the damages assessment for the Cancun Project, BRG adopts the same methodology that they utilize for the Cabo Project, except that they modify specific assumptions regarding the Cancun Project's expected start date and capital expenditure amounts. For the Cancun Project, BRG assumes that the construction would have begun 6 months after construction began on the Cabo Project and would have lasted 24 months.[1951] For revenue projections, BRG adjusts the baseline Cuernavaca Casino's daily revenue with an adjustment factor of 3x based upon the GDP per tourist in Quintana Roo to achieve the proposed revenue for the Cancun Project.[1952]

D. Calculation of the FMV of the Online Gaming Project

845. To assess the value of Claimants' Online Gaming Project, BRG develops a DCF analysis which forecasts the annual cash flows stemming from the Online Gaming Project's operations from July 2014 assuming that Claimants would have started and continued online gaming operations in the absence of the expropriation of Claimants' investment in Mexico. BRG then discounts these annual cash flows back to the Date of Valuation using a discount rate that accounts for the risk of the Casinos and gaming industry in Mexico.[1953]

846. BRG's valuation is driven by the following components: (i) the start date of operations; (ii) net revenues; (iii) operating expenses; (iv) taxes; (v) capital expenditures; (vi)

[1949] BRG Report, **CER-4**, ¶ 128.

[1950] BRG Report, **CER-4**, ¶ 129.

[1951] BRG Report, **CER-4**, ¶ 133.

[1952] BRG Report, **CER-4**, ¶ 134.

[1953] BRG Report, **CER-4**, ¶ 138.

depreciation and amortization; (vii) after tax free cash flows, and (viii) terminal value. Each component is addressed below.

1. Start Date of Operations

847. BRG assumes that that the start date for Claimants' Online Gaming Project would have been July 2014.[1954]

2. Net Revenues

848. To forecast the Online Gaming Revenue, BRG utilizes the Claimants' Online Gaming projections as well as macroeconomic forecasts.[1955] From July 1, 2014 through June 30, 2017, BRG calculates revenues based upon Claimants' projected number of visits and spending per visit for both new and active visitors.[1956] From July 1, 2017 through December 31, 2019, BRG calculates revenues based upon the forecasted growth rate of Mexico's nominal GDP converted into USD.[1957] For the remaining periods in BRG's projections, they project Online Gaming Revenue based on the long-term U.S. inflation rate of 2%.[1958] For all years, BRG deducts gaming taxes from the total forecasted Online Gaming Revenue.

3. Operating Expenses

849. BRG utilizes the assumed operating expenses from the Claimants' online gaming projections as well as documents obtained from Bally, the company that was slated to become Claimants' partner for online gaming, to forecast operating expenses for the Online Gaming Project.[1959] These operating expenses include both fees paid to Bally and other costs which are calculated as a percentage of revenue in certain instances and estimated directly in

[1954] BRG Report, **CER-4**, ¶ 141.

[1955] BRG Report, **CER-4**, ¶ 143.

[1956] BRG Report, **CER-4**, ¶ 143.

[1957] BRG Report, **CER-4**, ¶ 143.

[1958] BRG Report, **CER-4**, ¶ 143.

[1959] BRG Report, **CER-4**, ¶ 147.

others.[1960] BRG then classifies the remaining costs as either fixed or variable costs based on their likely relationship with revenues.[1961] BRG also includes certain additional cost items, including a monthly license fee that was a part of the Bally proposal, the Value Added Tax ("**VAT**"), and certain marketing-related initial investments.[1962] BRG calculates the VAT based on the general rate of 16% in effect as of the Date of Valuation and applies it to expenses incurred in Mexico that are not related to payroll, donations, or payments to B-Mex companies.[1963]

4. Taxes

850. BRG assumes (consistent with the income tax that Claimants' paid on their Casinos) that the Online Gaming Project would have paid a corporate income tax (ISR) of 30% as well as the IEPS tax.[1964]

5. Capital Expenditures, Depreciation and Amortization

851. Based upon Claimants' online gaming projections, BRG includes capital expenditures of initial investments pertaining to licensing, IT equipment, and marketing in the first month of their forecast for the Online Gaming Project.[1965] Further, BRG treats initial investments related to licensing fees and technological infrastructure as capital expenditures which they depreciate and amortize.[1966] Finally, BRG assumes that CAPEX pertaining to Claimants' online gaming technological infrastructure would recur on an inflation-escalated basis at intervals equal to its estimated useful life.

[1960] BRG Report, **CER-4**, ¶ 147.

[1961] BRG Report, **CER-4**, ¶ 147.

[1962] BRG Report, **CER-4**, ¶ 148.

[1963] BRG Report, **CER-4**, ¶ 148.

[1964] BRG Report, **CER-4**, ¶ 149.

[1965] BRG Report, **CER-4**, ¶ 150.

[1966] BRG Report, **CER-4**, ¶ 151.

6. After Tax Cash Flows

852. To compute after-tax free cash flows, BRG subtracts operating expenses and depreciation & amortization from revenue after gaming taxes to arrive at Gaming EBIT.[1967] They then deduct corporate taxes based on a rate of 30% of EBIT to arrive at net operating income.[1968] BRG then adds depreciation & amortization back to this figure since it is a non-cash expense item and subtracts cash CAPEX.[1969] BRG refers to this final figure as After-Tax Free Cash Flows.[1970] BRG then discounts the projected cash flows using a WACC of 8.12%.[1971]

7. Terminal Value

853. For the calculation of terminal value, discount rate and discounting of cash flows, BRG uses the same methodology implemented for the Claimants' Casinos.[1972]

E. Total DCF Damages

854. Based upon the three categories of damages: Claimants' Casinos, the Cabo and Cancun Projects, and the Online Gaming Project, BRG concludes that the total DCF damages suffered by Claimants amount to USD $ 415.8 million as of April 21, 2020, on which damages will continue to increase until Mexico pays Claimants full reparation.[1973]

[1967] BRG Report, **CER-4**, ¶ 153.

[1968] BRG Report, **CER-4**, ¶ 153.

[1969] BRG Report, **CER-4**, ¶ 153.

[1970] BRG Report, **CER-4**, ¶ 153.

[1971] BRG Report, **CER-4**, ¶ 153.

[1972] BRG Report, **CER-4**, ¶ 154.

[1973] BRG Report, **CER-4**, ¶ 161.

F. Full Reparation Requires Claimants To Be Awarded Pre- and Post-Award Interest at a Commercially Reasonable Rate

1. Claimants Should Receive Pre- and Post-Award Interest at a Rate that Ensures "Full Reparation"

855. In order to return Claimants to the economic position they would have been in but for the expropriation of Claimants' investment in Mexico, damages must include a measure of pre- and post-award interest. The NAFTA specifies that "compensation [for lawful expropriation] shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.[1974] BRG conservatively includes annual pre-award interest at a rate equal to the interest rate on sovereign bonds issued by the Mexico, 4.46%.[1975] Based upon prior NAFTA precedent, this rate is commercially reasonable.[1976]

856. In this case, post-award interest is also an integral component of full compensation under customary international law for breaches of other treaty obligations and unlawful expropriations.[1977] A State's duty to make reparation arises immediately after its unlawful actions cause harm, and to the extent that payment is delayed, the claimant loses the opportunity to invest the compensation.[1978] As the ILC Articles specify, when interest is

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[1974] NAFTA Article 1110(4), **CL-78**. See also NAFTA Article 1135(1), **CL-78**.

[1975] BRG Report, **CER-4**, ¶ 159. As an alternative, BRG provides the calculation of interest corresponding to the pre-tax cost of debt for Claimants. *See* BRG Report, **CER-4**, ¶ 159. Under this approach, the interest rate equals 7.46%, which leads to a pre-award interest amount of USD $ 172.8 million as of April 21, 2020. BRG Report, **CER-4**, ¶¶ 159-160.

[1976] *See, e.g.*, *Metalclad*, Award, ¶ 128 (finding that the pre-award interest at a rate of 6% compounded annually is appropriate to "restore the Claimants to a reasonable approximation of the position in which it would have been if the wrongful act had not taken place"), **CL-79**; *Pope & Talbot*, Award in Respect of Damages, ¶¶ 89-90 (stating that "applicable rules of international law . . . call for the award of appropriate interest" and awarding interest at a rate of "5% compounded quarterly"), **CL-169**.

[1977] *Vivendi II*, Award, ¶ 9.2.1 ("the liability to pay interest is now an accepted legal principle"), **CL-92**; ILC Articles, Art. 38, Commentary ¶ 2 ("As a general principle, an injured State is entitled to interest on the principal sum representing its loss, if that sum is quantified as at an earlier date than the date of the settlement of, or judgment or award concerning, the claim and to the extent that it is necessary to ensure full reparation."); J. Y. Gotanda, *Awarding Interest in International Arbitration*, 90 AM. J. INT'L L. 40, 57 (1996), **CL-249**; *Emilo Agustin Maffezini v. Kingdom of Spain*, ICSID Case No ARB/97/7, Award (Nov. 13, 2000), ¶ 96, **CL-250**; *Santa Elena*, Final Award, ¶¶ 96–97, **CL-81**; *Siemens*, Award, ¶ 395, **CL-91**.

[1978] *Metalclad*, Award, ¶ 128, **CL-79**; *Vivendi II*, Award, ¶ 9.2.3, **CL-92**.

awarded, it should run "from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled."[1979] Although BRG has already calculated pre-award interest, Mexico's obligation to award Claimants full compensation also encompasses post-award interest.

857. Since the payment of interest is an integral element of reparation, the purpose of an award of interest is the same as that of an award of damages for breach of an international obligation: the interest awarded should place the victim in the economic position it would have occupied had the State not acted wrongfully.[1980] On this basis, international arbitral tribunals accept that interest is not an award *in addition* to reparation; rather, it is a component of, and should give effect to, the principle of full reparation.[1981] The requirement of full reparation must therefore inform all aspects of an interest award, including the appropriate rate of interest, whether interest should be simple or compound and the periodicity of compounding.[1982]

858. As a result, Claimants are entitled to receive interest until Mexico effectively pays the Award at a rate that reflects the damage that was suffered for not having received the sums Mexico owes to them for the breaches of the NAFTA. The purpose of post-award interest is "to compensate the additional loss incurred from the date of the award to the date of final

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[1979] ILC Articles, Art. 38(2), **CL-94**.

[1980] ILC Articles, Art. 38(1) ("Interest 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."), **CL-94**.

[1981] *See Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (Jun. 27, 1990), ¶ 114 ("The 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 . . . ."), **CL-251**; *Middle East Cement Shipping*, Award, ¶ 174 ("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 . . . ."), **CL-80**. *See generally* J. Y. Gotanda, *Awarding Interest in International Arbitration*, 90 AM. J. INT'L L. 40 (1996), **CL-249**; J. Y. Gotanda, *A Study of Interest*, Villanova Law Working Paper Series (2007), **CL-252**.

[1982] Compounding periodicity is the regularity with which interest accrued is added to the underlying capital amount. Capital growth increases when the compounding period is shortened. *See* Gotanda, *A Study of Interest*, p. 5, **CL-252**.

payment."[1983] Any delays in payment of a damages award should therefore be reflected and accounted for through the determination of post-award interest. This rate should be a commercially reasonable rate.[1984] BRG will recommend a commercially reasonable rate at a date that is closer to the date of the Award. Interest shall keep accruing until full payment of the Award by Mexico, including on any accrued post-award interest.

2. Interest Should Be Compounded Annually

859. The only way to fully compensate Claimants for Mexico's unlawful conduct is to compound the post-award interest rate on an annual basis.[1985] Tribunals have frequently noted that compound interest best gives effect to the rule of full reparation.[1986] Compound interest ensures that a respondent State is not given a windfall as a result of its breach, as compounding recognizes the time value of the claimant's losses.[1987] It also "reflects economic reality in modern times" where "[t]he time value of money in free market economies is measured in compound interest."[1988] On this basis, interest awarded to Claimants should be subject to reasonable compounding. The appropriate periodicity of the compounding is annual.

[1983] *Autopista Concesionada de Venezuela, CA v. Bolivarian Republic of Venezuela*, ICSID Case No ARB/00/5, Award (Sept. 23, 2003), ¶ 380, **CL-253**.

[1984] NAFTA Article 1110(4) ("If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment."). **CL-78**.

[1985] *See* Gotanda, *A Study of Interest*, p. 34 ("[T]he opportunity cost in a commercial enterprise is a forgone investment opportunity. Thus, awarding compound interest at the claimant's opportunity cost would be the most appropriate way to compensate it for the loss of the use of its money."), **CL-252**; *see also ADC v. Hungary*, Award, ¶ 522 ("[T]ribunals in investor State arbitrations in recent times have recognized economic reality by awarding compound interest"), **CL-117**.

[1986] *See, e.g., Azurix*, Award, ¶ 440, **CL-126**; *Pey Casado v. Chile*, Award, ¶¶ 709, 712, **CL-188**; *Continental Casualty Company v. The Argentine Republic*, ICSID Case No ARB/03/9, Award, (Sept. 5, 2008), ¶¶ 308-313, **CL-254**; *National Grid P.L.C. v. The Argentine Republic*, UNCITRAL Award (Nov. 3, 2008), ¶ 294, **CL-100**; *Impregilo S.p.A v. The Argentine Republic*, ICSID Case No ARB/07/17, Award (Jun. 21, 2011), ¶ 382, **CL-161**; *El Paso v. Argentina*, Award, ¶ 746, **CL-139**. *See also Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award (May 16, 2012), ¶ 325, **CL-70**; *Quasar de Valores SICAV SA and others v. Russian Federation*, SCC Case No 24/2007, Award (July 20, 2012), ¶ 226, **CL-255**.

[1987] T. J. Sénéchal and J. Y. Gotanda, *Interest as Damages*, 47 COLUM. J. TRANSNAT'L L. 491,532-533 (2009), **CL-256**. *See* A. X. Fellmeth, *Below-Market Interest in International Claims Against States*, 13 J. INT'L ECON. L. 423, 437-440 (2010), **CL-160**.

[1988] *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008), ¶ 309, **CL-254**.

G. Full Compensation Requires that Any Award of Damages Be Net of Tax

860. As explained above, the valuations set out in the BRG Report have been prepared net of tax. Consequently, any taxation by Mexico of the eventual Award in this arbitration would result in Claimants being effectively taxed twice for the same income, thereby undermining the very purpose of the Award—that is, it would place Claimants in the financial position in which they would have been had Mexico not breached its obligations under the Treaty. This principle has been confirmed by the tribunal in *Rusoro Mining* in the following terms:

> The BIT specifies that the compensation for expropriation must be "prompt, adequate and effective" and "shall be paid without delay and shall be effectively realizable and freely transferable". . . . If the Bolivarian Republic were to impose a tax on Rusoro's award, Venezuela could reduce the compensation "effectively" received by Rusoro. A *reductio ad absurdum* proves the point: Venezuela could practically avoid the obligation to pay Rusoro the compensation awarded by fixing a 99% tax rate on income derived from compensations issued by international tribunals, thereby ensuring that Rusoro would only effectively receive a compensation of 1% of the amount granted. . . . <u>In conclusion</u>, the Tribunal declares that the compensation, damages and interest granted in this Award are net of any taxes imposed by the Bolivarian Republic and orders the Bolivarian Republic to indemnify Rusoro with respect to any Venezuelan taxes imposed on such amounts.[1989]

861. To secure the finality of the Tribunal's Award in this arbitration, Claimants request that the Tribunal declare that: <u>(i) its Award is made net of all applicable taxes; and (ii) Mexico may not tax or attempt to tax the Award</u>.

H. Summary of Damages

862. As established above and in the BRG Report, Claimants are entitled to full compensation for Mexico's breaches of the NAFTA, including for the Casinos, the Cabo and

[1989] *Rusoro Mining*, Award, ¶¶ 852-855, **CL-125**. *See Phillips Petroleum Company Venezuela Limited and ConocoPhillips Petrozuata B.V. v. Petróleos de Venezuela S.A.*, ICC Case No 16848/JRF/CA, Final Award (Sept. 17, 2012), ¶¶ 313, 333(1)(vii), **CL-161**; *Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/23, Award (Dec. 12, 2016), ¶¶ 788-792, **CL-163**.

Cancun Projects, and for the Online Gaming Project. Such compensation amounts to a total figure of at least USD $415.8 million as of April 21, 2020.[1990]

863. A commercially reasonable interest rate should accrue on this amount both before and after the Award is issued and until payment in full by Mexico.

864. The compensation should be paid without delay, be effectively realizable and be freely transferable, and bear interest at a compound rate sufficient to fully compensate Claimants for the loss of the use of their capital as at the respective date of valuation for its investment. The award of damages and interest should be made net of all taxes; Mexico should not tax, or attempt to tax, the payment of the Award.

VII. REQUEST FOR RELIEF

865. On the basis of the foregoing, without limitation and reserving Claimants' right to supplement these prayers for relief, including without limitation in the light of further action which may be taken by Mexico, Claimants respectfully request that the Tribunal:

(i) DECLARE that Mexico has breached Article 1110 (Expropriation), Article 1105 (Fair and Equitable Treatment and Denial of Justice), Article 1102 (National Treatment), and Article 1103 (Most-Favored Nation Treatment) of the NAFTA;

(ii) ORDER Mexico to compensate Claimants for their losses resulting from Mexico's breaches of the NAFTA and international law for an amount of at least USD $ 415.8 million as of April 21, 2020 (inclusive of pre-Award interest), to be supplemented if necessary in a subsequent report, plus post-Award interest until payment at a commercially reasonable rate, compounded annually;

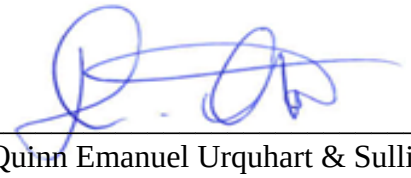
(iii) DECLARE that: (a) the award of damages and interest be made net of all taxes; and (b) Mexico may not deduct taxes in respect of the payment of the award of damages and interest;

(iv) AWARD such other relief as the Tribunal considers appropriate; and

(v) ORDER Mexico to pay all of the costs and expenses of these arbitration proceedings.

[1990] BRG Report, **CER-4**, ¶ 161.

Respectfully submitted,



Ríos-Ferrer Guillén-Llarena, Treviño y Rivera S.C.
Julio Gutiérrez Morales
jgutierrez@riosferrer.com.mx

Quinn Emanuel Urquhart & Sullivan LLP
David M. Orta
davidorta@quinnemanuel.com
Daniel Salinas-Serrano
danielsalinas@quinnemanuel.com
José R. Pereyó
josepereyo@quinnemanuel.com
Julianne Jaquith
juliannejaquith@quinnemanuel.com
Ana Paula Luna
analuna@quinnemanuel.com
Woo Yong Chung
wooyongchung@quinnemanuel.com

Counsel to the Claimants