The Spanish version is the original and shall prevail over this courtesy translation in case of discrepancy.

BEFORE THE HONORABLE ARBITRATION TRIBUNAL ESTABLISHED PURSUANT TO CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT

B-MEX ET AL
(CLAIMANTS)

V.

THE UNITED MEXICAN STATES
(RESPONDENT)

CIADI CASE NO. ARB (AF)/16/3

COUNTER-MEMORIAL ON THE MERITS

By the United Mexican States:

Orlando Perez Garate

Assisted by:

Department of the Economy
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December 4, 2020

Table of Contents

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GLOSSARY

Abbreviation	Definition
Advent	Advent International
Amparo 1151/2012	Writ of Amparo filed by E-Mex against the permits granted to E-Games (permit DGAJS/SCEVF/P-06/2005-BIS) and Producciones Moviles (permit DGAJS/SCEVF/P-06/2005-TER)
Amparo 1668/2011	Writ of Amparo filed by E-Mex against the certifications and suspension of operations by SEGOB of some establishments and the revocation of its permit
BlueCrest	BlueCrest Capital
CAM	Centro de Arbitraje de Mexico *[Mexican Center of Arbitration]*
Casinos	Draw rooms and remote gambling centers operated by E-Games in Naucalpan, Mexico City, Cuernavaca, Puebla, and Villahermosa.
Juegos Companies	Juegos de Video y de Entretenimiento de Mexico, S. de R.L. de C.V.; Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V.; Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V.; Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V., y Juegos y Video de Mexico S. de R.L. de C.V.
Operator Certificate	Oficio DGAJS/SCEV/0194/2009 dated May 8, 2009 by SEGOB issued a certificate that E-Games is the operator of E-Mex
Operating Agreement	Agreement dated November 1, 2009, executed by E-Games and E-Mex
Transaction Agreement	Agreement dated April 1, 2008, executed by E-Mex, the Juegos Companies, and JEV Monterrey
Respondent or Mexico	United Mexican States

Claimants	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
DGJS	Direccion General de Juegos y Sorteos *[General Directorate of Games and Sweepstakes]*
DOF	Diario Oficial de la Federacion *[Federal Daily Gazette]*
EDN	Espectaculos y Deportes del Norte S.A. de C.V.
E-Games	Exciting Games, S. de R.L. de C.V.
E-Mex	Entretenimientos de Mexico, S.A. de C.V.
Eventos Festivos	Eventos Festivos de Mexico, S.A. de C.V.
Non-Compliance Claim	Non-Compliance Complaint 82/2013 against the Second compliance decided by the Seventh Collegiate Court
JCA	Juicio contencioso administrativo *[Administrative Proceeding]*
JEV Monterrey	Juegos de Entretenimiento y Video de Monterrey, S.A. de C.V.
Sixteenth Court	Sixteenth District Administrative Court in the Federal District (now Mexico City), which decided Amparo 1668/2011

Third Court	Third District Administrative Court in the Federal District (now Mexico City), which decided Amparo 356/2012, in which E-Games filed an action against the inspection of the Casino in Puebla.
JVE Centro	Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V., which operated the Casino in Puebla
JVE DF	Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V., which operated the Casino in Mexico City
JVE Mexico	Juegos de Video y de Entretenimiento de Mexico, S. de R.L. de C.V., which operated the Casino in Naucalpan
JVE Sureste	Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V., which operated the Casino in Villahermosa
JyV Mexico	Juegos y Video de Mexico S. de R.L. de C.V., which operated the Casino in Cuernavaca
LFJS	Ley Federal de Juegos y Sorteos *[Federal Games and Sweepstakes Law]*
LFPA	Ley Federal del Procedimiento Administrativo *[Federal Law of Administrative Procedure]*
MP	Ministerio Publico *[Public Prosecutor]*
2009-BIS Oficio	DGAJS/SCEV/0260/2009-BIS Oficio, dated May 27, 2009
Operator Oficio	DGAJS/SCEV/00619/2008 Oficio dated December 9, 2009, which authorizes E-Mex to have E-Games as its operator.
Permitholder Oficio	DGAJS/SCEV/0827/2012 Oficio dated August 15, 2012, whereby SEGOB changed the status of E-Games from operator to permitholder of seven casinos under the same terms and conditions as the E-Mex Permit.

Permitholder-BIS Oficio	DGJS/SCEV/1426/2012 Oficio dated November 16, 2012, whereby the General Director of the DGJS clarifies that the Oficio of Permitholder is valid and issues permit number DGAJS/SCEVF/P-06/2005-BIS to E-Games
Verification Orders	Verification orders dated April 23, 2014
E-Mex Permit	Permit number DGAJS/SCEVF/P-06/2005 issued to E-Mex to operate 40 draw rooms and remote gambling centers
Petolof	Petolof S.A. de C.V.
Prescience, LLC	Prescience
First Compliance	Ruling issued by SEGOB dated July 19, 2013, which voided the 2009-BIS Oficio and rejected E-Games' petition to operate the E-Mex Permit independently
First Collegiate Court	First Collegiate Administrative Court of the Fourth Circuit, Nuevo Leon
Disciplinary Proceeding	Administrative proceeding that decides penalties in accordance with the LFJS and its Regulations, which may decide to remove a permit or close down an establishment.
Producciones Moviles	Producciones Moviles, S.A. de C.V.
Projects	The Claimants' alleged projects relating to online casinos and those located in Cabo San Lucas, Baja California, and Cancun, Quintana Roo

Motion for Reconsideration	Motion for Reconsideration filed by E-Games against the Non-Compliance Claim and the ruling dated March 10, 2014, in which the Sixteenth Court ruled that the judgment from Amparo 1668/2011 had been enforced. The Supreme Court assigned it case number 406/2014, which was forwarded to the Seventh Collegiate Court and assigned Reconsideration file number 5/2014 connected with Reconsideration 9/2014.
Petolof Decision	Decision issued on October 28, 2008, in administrative proceeding UG-010/2008, enforcing the amparo judgment in favor of Petolof as a member of EDN
Review 107/2013	Motion for Review filed by E-Mex, E-Games, Producciones Moviles, and SEGOB against the judgment from Amparo 1668/2011, dated January 31, 2013
Administrative Review	Motion for Administrative Review filed by E-Games against the inspection orders and verification reports.
RLFJS or Regulations	Reglamento de la Ley Federal de Juegos y Sorteos *[Regulations to the Federal Games and Sweepstakes Law]*
SAT	Servicio de Administracion Tributaria *[Tax Administration Service]*
SEGOB	Secretariat of the Interior
Second Regional Chamber	Hidalgo-Mexico Second Regional Chamber of the Federal Tax and Administrative Court
Second Compliance	Ruling issued by SEGOB dated August 26, 2013, which voided all official notices issued based on the 2009-BIS Oficio, including the Permitholder-BIS Oficio
Seventh Collegiate Court	Seventh Collegiate Administrative Court of the First Circuit, which decided Review 107/2013, the Non-Compliance Claim, and the Motion for Reconsideration
SPA	Share purchase agreement with Eventos Festivos

Supreme Court	The Federal Supreme Court
TFJFA	Tribunal Federal de Justicia Fiscal y Administrativa *[Federal Tax and Administrative Tribunal]* (now the Tribunal Federal de Justicia Administrativa) *[Federal Administrative Tribunal]*
Audits	Audits conducted on the E-Games Casinos on April 24, 2014

I. Introduction

1. The Claimants have filed a baseless claim and the Tribunal must dismiss it in its entirety. This introduction provides a brief summary of the facts of the claim, the main legal arguments made by the Respondent, and its position on the damages claim.

2. The Claimants began operating casinos in Mexico in 2005, shortly after the publication of the Regulations to the Federal Games and Sweepstakes Law *[Reglamento de la Ley Federal de Juegos y Sorteos]* (RLFJS or Regulations). They did this without obtaining the permit required by the Regulations and with knowledge that the requisite existed, since they have confirmed that they conducted a detailed due diligence prior to investing in Mexico.

3. The excuse they have provided is that Congress had filed a constitutional challenge *[controversia constitucional]* against several provisions of the Regulations and there was uncertainty about the end result. However, they failed to mention that from the date in which the dispute was filed until the date it was decided, the Regulations remained in force and the permit requirement to operate a casino was in force.

4. The Claimants were able operate their casinos for several years by posing as video arcades under the Monterrey Resolution that was issued to Juegos y Video de Monterrey, a company owned by Mr. Rojas Cardona and Mr. Young. As detailed below, the Monterrey Resolution is neither an authorization nor a permit, but a resolution issued by SEGOB stating that the machines operated by the Claimants in their casinos were not games of change and did not involve betting. Therefore, these were not games regulated by the LFJS or its Regulations. It is difficult to imagine a casino that exclusively offers games not involving chance or betting, but this is essentially what the Claimants are alleging in this proceeding, because otherwise, they would have to admit that their casinos were unlawful.

5. According to their own statements, once the constitutional challenge against the Regulations was decided, the Claimants attempted to obtain their own permit. They initially attempted to purchase a company called Eventos Festivos, which had a permit to operate 20 casinos. The Claimants allege that the transaction had already been accepted, a share purchase agreement had been signed and a non-refundable deposit of one million dollars had been paid. However, one day before the deadline for closing the transaction, they decided against the purchase and partnered with the company E-Mex in order to move the operation of its casinos under E-Mex's permit.

6. This decision was made with knowledge of several significant risks that no prudent investor would have assumed. These include: (i) that the owner of E-Mex, Mr. Rojas, had participated in unlawful activities; (ii) Mr. Rojas had forced his former partner, Mr. Young, out of the business, who, incidentally, was who introduced Mr. Burr to the casino business in Mexico; (iii) the company that the Claimants retained to investigate Mr. Rojas' background had recommended not doing business with him; (iv) E-Mex had a considerable debt with an investment fund called BlueCrest and had breached its payment obligations;[1] and (v) a declaratory judgment of

[1] Memorial, ¶ 94.

insolvency for E-Mex would mean losing the permit under which the Claimants' Casinos operated.[2]

7. According to the Claimants, in 2008, an agreement was reached with E-Mex pursuant to which E-Games (owned by some of the Claimants) would become E-Mex's operator and could therefore operate the Claimants' 5 casinos under its permit in exchange for royalty payments. As stated by the Claimants, this partnership was temporary since the plan was for BlueCrest to purchase E-Mex and leave the operation of the permit to E-Games. However, this transaction never took place; BlueCrest filed a commercial action against E-Mex in an attempt to recover its money and, a few years later, E-Mex was declared bankrupt and lost its permit.

8. The Claimants obviously were aware of the danger that the dispute between E-Mex and BlueCrest posed to its operation and, consequently, sought to obtain a ruling from SEGOB that recognized E-Games as an "independent operator" of the E-Mex permit. It should be noted here that there is no such thing as an "independent operator" under the Law or its Regulations. In fact, the definition of "operator" presumes the existence of a partnership or a contractual relationship between the permitholder and the operator. At any rate, in May 2009, SEGOB issued an *oficio* [official letter] to E-Games recognizing E-Games as an operator of E-Mex's permit (the 2009-BIS Oficio), which the Claimants have characterized as a recognition of its "independent operator" status.

9. At the same time, the relationship between E-Mex and E-Games quickly deteriorated due to a dispute over royalty payments and because, according to the Claimants, E-Mex had pledged the Claimants' gaming machines as collateral for the BlueCrest loan. This dispute eventually led to a domestic arbitration proceeding, which E-Games lost and was ordered to pay royalties, past-due interest, and damages.

10. The Respondent maintain that the origin of this dispute is the poor relationship between E-Mex and E-Games and the actions taken by E-Games to continue operating its casinos under the E-Mex permit, most likely without its knowledge. Indeed, when E-Mex discovered that E-Games was still acting as the operator of its permit, it filed an amendment to an *amparo* (Amparo 1668) challenging the issuance of the 2009-BIS Oficio by SEGOB and all the effects and actions arising from its issuance. The Sixteenth Court granted the *amparo* and ordered SEGOB to declare it null and void ["*insubsistente*"].

11. The SEGOB had initially voided only the 2009-BIS Oficio, but shortly thereafter E-Mex complained that SEGOB failed to satisfactorily comply with the *amparo* judgment. The Sixteenth Court agreed and ordered SEGOB to void all actions arising from the 2009-BIS Oficio. The SEGOB then canceled a series of *oficios* including the August 2012 *oficio* that granted E-Games its permit (Permitholder Oficio) and the November 2012 *oficio*, which confirmed its permitholder status and assigned it a new permit number (of Permitholder-BIS Oficio). The subsequent closure of the casinos in April 2014 was a natural consequence of the Claimants' decision to continue to operate their Casinos without a valid permit.

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[2] Id., ¶ 95 where it states "[g] 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." [Emphasis added]

12. As can be seen, revoking the E-Games permit and closing the Casinos were not the result of a politically motivated conspiracy against the Claimants, as alleged by the Claimants. It was the result of a court order issued in an *amparo* action filed by E-Mex. Not only did SEGOB not act independently, it had no other choice but to comply with the order issued by the Sixteenth Judge who decided the Amparo 1668.

13. The Claimants complain of all sorts of irregularities in the *amparo* proceeding and the different legal remedies filed by the parties thereunder. Their grievances include, among others: (i) that the Sixteenth Judge admitted a third amendment to the *amparo* challenging the 2009-BIS Oficio; (ii) the Collegiate Tribunal's review of the decision to admit the third amendment to the *amparo* action; (iii) SEGOB's compliance with the amparo ruling; (iv) the Collegiate Court's decision regarding SEBOG's compliance with the amparo ruling; and (iv) the Supreme Court's decision to reject the appeal filed by E-Games.

14. All of this is nothing more than an attempt to re-litigate issues that domestic courts have already decided. What the Claimants are seeking is for this Court to act as a court of appeal on issues that have already been decided against them. However, and as it will be further explained below, they are doing it through a claim for expropriation to avoid the high threshold for a denial of justice claim, which is essentially what they are alleging.

15. In relation to the legal arguments, the Claimants' Memorial includes a claim for damages related to two potential casinos in Cabo and Cancun and an online casino. It is well established that a Tribunal has no jurisdiction to decide claims for alleged violations of Articles 1105 and 1110 of the NAFTA relating to activities or assets that do not fall under the definition of an "investment" established by Article 1139. Having a protected investment, as per the definition in Article 1139 of the NAFTA, is a prerequisite for submitting a claim under Articles 1105 and 1110. The Claimants have failed to demonstrate that the casino projects in Cabo, Cancun, and the online casino qualify as an "investment" under Article 1139.

16. As to the remaining investments, the Respondent argues that the Claimants improperly attempted to file a claim without considering the denial of justice aspect of the minimum standard of treatment (MST). As detailed further below, the fair and equitable treatment (FET) standard under the NAFTA is one element of the MST under customary international law. The FET standard cannot be interpreted as an independent FET standard or a standard subject to a standard with a lower threshold than that established by the MST in accordance with customary international law.

17. All the alleged unlawful measures asserted by the Claimants are judicial measures or administrative actions arising from judicial measures. In the end, for the Claimants to establish an MST violation under Article 1105(1), they must prove that there was a denial of justice. If the Claimants are allowed to repackage a denial of justice claim as a "judicial expropriation," or a violation of an independent FET standard, the denial of justice rule under customary international law contained in Article 1105(1) would be rendered useless.

18. It is broadly accepted that a denial of justice claim only applies to a State's legal system as a whole and that the legal threshold for such a claim is extremely high. Under international law, international tribunals are not courts of appeal empowered to question decisions rendered by national courts, unless there is a denial of justice. In this context, a denial of justice is procedural

in nature, so there is no such thing as an "instantaneous" denial of justice due to an isolated court ruling.

19. More specifically, the three Parties to the NAFTA all agree that: i) the threshold for finding a denial of justice according to international law is very high; ii) a simple error or misapplication of domestic law does not amount to denial of justice in international law (international tribunals are not appellate courts for domestic judicial decisions); and iii) under the NAFTA and customary international law, a denial of justice is the only cause of action an investor has against actions attributable to a State's judicial organ.

20. The Claimants cannot meet the high threshold to prove a denial of justice based on the evidence they have provided. This explains why they have attempted to reframe the claim outside of denial of justice.

21. Moreover, the Claimants were required to first pursue domestic remedies before pursuing a NAFTA arbitration under the well-established rule of exhaustion of local remedies in international law. Even the jurisprudence cited by the Claimants confirms that the investors must first exhaust domestic remedies before filing a denial of justice claim for alleged judicial corruption or a lack of judicial independence.

22. The Claimants in this case chose not to seek domestic remedies regarding the alleged judicial corruption, bias, or lack of judicial independence. By failing to do so, the Claimants deprived the Respondent's judicial system of the opportunity to investigate these issues, let alone to correct its decisions if indeed there were any irregularities. In view of this, the Claimants' claims of denial of justice, lack of judicial independence, and impartiality must be dismissed.

23. As to the alleged judicial expropriation, the Respondent holds that under the NAFTA, judgments rendered by national courts acting as neutral and independent arbiters of the rights of litigants cannot give rise to a claim under Article 1110(1). This is a blatant attempt by the Claimants to reshape their denial of justice claim under a different legal threshold. The Claimants' alleged unlawful actions were carried out by the judicial or executive branch in good faith compliance with applicable court decisions.

24. In relation to Article 1102 of the NAFTA, the Claimants have also been unable to show that the Respondent gave less favorable treatment to its investments than the treatment given to national investments under similar circumstances. The Tribunal will soon see that the Claimants have not provided evidence of adequate comparables in "similar circumstances" in accordance with the multidimensional analysis referred to in investment arbitration case law. In this context, the multidimensional analysis of similar circumstances compels the Tribunal to analyze all circumstances, and not just the economic sector, to make the comparison. Additionally, the proper legal approach emphasizes the importance of the applicable legal regime and the specific measures in question.

25. As to the Claimants' claims based on the most favored nation (MFN) standard, the Respondent holds that Article 1103 is irrelevant in light of the application of Article 1105(1). The Claimants are once again trying to improperly introduce an independent FET standard.

26. As can be seen throughout this Memorial and the evidence in this proceeding, the Claimants are desperately attempting to convince the Tribunal in this arbitration that they were the target of political investigations, that the legal system in Mexico failed by not according them fair and

equitable treatment, or that they were victims of corruption. However, neither the facts nor the evidence submitted in this arbitration prove the theories that the Claimants have deliberately created for this arbitration. On the contrary, the facts in this proceeding show that the Claimants were victims of their own poor decisions and reckless business management.

27. As a final comment in relation to the legal arguments, the Respondent has included a sworn statement by Mr. Randall Taylor (Claimant in this proceeding) as an exhibit to this Memorial, which was submitted in a domestic legal proceeding in the United States. This sworn statement and its exhibits establish a wide range of claims against many other Claimants in this proceeding, including B-MEX, LLC and B-MEX II, LLC, Dan Rudden, John Conley, Erin Burr, and Gordon Burr. If any or all of the accusations made in the sworn statement by Mr. Taylor are true, then the Respondent will argue that the "clean hands" doctrine must apply to this case. Therefore, if it is shown that the Claimants' investments are tainted by illegality or by "dirty hands," then they would not enjoy any substantial protection under the NAFTA.

28. Finally, in relation to the claim for damages, even if the Tribunal were to determine that the Respondent is liable for one or more of the alleged violations (which we categorically deny), the Claimants' damages theory is fundamentally flawed. The Claimants' quantification of damages is highly speculative and cannot be reasonably relied upon to determine the compensation owed to the Claimants in case the State is found to be internationally liable.

29. First, the Claimants' damages experts estimate more than USD $156 million in damages attributable to casino "projects" that never operated and were not even close to commencing operations (Cabo, Cancun, and the Online Casino). The Respondent maintains that no protected investment exists in relation to these projects as per the definition in Article 1139 of the NAFTA. Regarding the online casino, there is no evidence of agreements with suppliers or investments in equipment or the platform that would serve as the foundation for the service. As to the Cabo and Cancun casinos, there are no investments other than an alleged loan made to the developers of the project (which consisted in the construction of a hotel, not a casino) and there is no evidence of the transfer of any funds and/or the amount reimbursed. In addition, the Claimants' damages experts value these investments using the discounted cash flow (DCF) methodology despite the fact that they never operated and, therefore, have no proven track record of profitable operations, as required in these cases.

30. Second, the Claimants' damages experts only quantify the damages caused by the alleged expropriation. Therefore, if the alleged expropriation claim is dismissed, then the Tribunal would have no other basis to determine the amount of the damages caused by any of the other alleged violations.

31. Third, the Claimants have not identified what damages they claim on their own behalf under Article 1116, and what damages are being claimed on behalf of each of an enterprise under Article 1117. The Claimants have also failed to offer any evidence of the damages they suffered as shareholders of the Juegos Companies and/or E-Games (*flow-through damages*). These damages are not equivalent to the damages suffered by the enterprise.

32. Finally, as detailed in the damages section, the calculation of the existing Casinos' fair market value is based on erroneous assumptions and other flaws that give rise to an exceedingly excessive estimate.

33. Based on the foregoing and for all the reasons that will be explained below, the Respondent's position is that the Claimants' claim must be dismissed in its entirety and the Claimants must be ordered to pay all costs and expenses related to this arbitration.

II. Facts

A. Ley Federal de Juegos y Sorteos *[Federal Games and Sweepstakes Law]*

34. The Federal Games and Sweepstakes Law *[Ley Federal de Juegos y Sorteos]* (LFJS) was published on December 31, 1947, in the Federal Daily Gazette *[Diario Oficial de la Federacion]* (DOF) and went into effect on January 5, 1948. The LFJS has never been amended or modified.[3]

35. Under Mexican law, games of chance and gambling are prohibited unless expressly authorized by the authorities. Article 1 of the LFJS prohibits "games of chance and gambling." In addition, Article 2 only permits chess, checkers, and other similar games, dominoes, dice, bowling, and pool, ball games, and races involving people, vehicles, and animals, along with sweepstakes. Any other game not included in the list set forth in Article 2 is considered prohibited under the LFJS.[4]

36. The LFJS also establishes that the Federal Executive is empowered, through the Secretariat of the Interior *[Secretaria de Gobernacion]* (SEGOB), to regulate, authorize, and oversee gaming and sweepstakes.[5] In addition, SEGOB is also authorized to issue Games and Sweepstakes permits and to establish the requirements and conditions that must be satisfied to obtain these permits.[6] The SEGOB is authorized to close down any establishment engaging in any prohibited games or sweepstakes without authorization. Finally, the LFJS establishes the penalties for violations, which include prison, fines, confiscation of devices, gaming objects, and money, as well as the possibility of dissolving the business or corporation that has committed the crime.[7]

B. Regulations to the Federal Games and Sweepstakes Law [*Reglamento de la Ley Federal de Juegos y Sorteos]*

37. On September 17, 2004, the Federal Executive issued the Regulations to the Federal Games and Sweepstakes Law *[Reglamento de la Ley Federal de Juegos y Sorteos]* (RLFJS or Regulations) for the purpose of regulating the LFJS provisions involving the authorization, control, oversight, and inspection of games and sweepstakes.[8] These Regulations have been amended twice: first in 2012 and again in 2013. It is important to note that neither the Regulations nor the LFJS were amended in 2009 over in 2010, as incorrectly stated in the Claimants' Memorial and the Third Witness Statement of Mr. Gordon G. Burr (Mr. Burr).[9]

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3 Exhibit RER-2, Expert Report from Mr. Lazcano, ¶ 36.

4 Exhibit R-030, LFJS, Article 1 and 2.

5 Exhibit RER-2, Expert Report from Mr. Lazcano, ¶ 37.

6 Exhibit R-030, LFJS, Article 3 and 4.

7 *Id.*, Article 12, 13 and 14.

8 Exhibit R-033, RLFJS 2013, Article 1.

9 See Memorial, ¶ 54 and Exhibit CWS-50, Third Witness Statement of Mr. Burr, ¶ 27.

38. Below is a summary of the main provisions of the Regulations and, to the extent that they are pertinent to this case, the changes introduced in 2012 and 2013 will also be discussed.

39. Article 3 establishes certain definitions. The following definitions are relevant to the present arbitration:

- *Operator*: Corporation [*sociedad mercantil*] with which the permitholder may enter into a contract or associate with for the purposes of exploiting its permit, pursuant to the provisions of these Regulations;
- *Permitholder*: the individual or legal entity to whom SEGOB has issued a permit to perform activities involving gambling or sweepstakes permitted under the LFJS and its Regulations:
- *Permit*: administrative act taken by SEGOB, which allows an individual or legal entity to engage in sweepstakes or gambling during a specific timeframe and limiting its scope to the terms and conditions determined by SEGOB, pursuant to the LFJS, its Regulations, and other applicable provisions;
- *Establishment*: open or closed facility in which gambling or sweepstakes take place with a valid permit issued by SEGOB under the LFJS and its Regulations;
- *Gambling*: all kinds of games in which bets are made, set forth in the LFJS and its Regulations, authorized by SEGOB, and
- *Chance*: The outcome of a game is determined by chance and not subject to the player's will.[10]

40. Article 4 of the Regulations gives SEGOB the authority to immediately suspend operations in facilities engaged in games prohibited by the LFJS and its Regulations or in sweepstakes or gambling without the proper permit.

41. Article 9 of the 2004 Regulations explicitly prohibited slot machines of any kind.[11] However, on October 19, 2012, the Regulations were amended to authorize slot machines provided they had the explicit permission from SEGOB to operate them.[12] A slot machine is defined as "an object or device of any kind through which the user, subject to chance, skill, or combination of both, makes a bet by inserting in a bill, coin, token, or any electronic payment device or similar object for purposes of obtaining a prize."[13]

42. On October 23, 2013, the Regulations were again amended, and slot machines of any kind were prohibited.[14] In addition, the definition of slot machines was modified as follows: "slot machines are understood as any device, through which the user, subject to chance, skill, or

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10 Exhibit R-033, RLFJS 2013, Article 3.

11 Exhibit R-031, RLFJS 2004, Article 9.

12 Exhibit R-032, RLFJS 2012, Article 9.

13 *Id*., Article 3(XII bis). [Emphasis added].

14 Exhibit R-033, RLFJS 2013, Article 12.

combination of both, makes a bet by inserting in a bill, coin, token, or any electronic payment device or similar object for purposes of obtaining a prize that is not previously determinable."[15]

1. Gambling permits

43. Article 20 of the Regulations establishes the authority of SEGOB to grant permits for engaging in gaming and sweepstakes. Permits for opening and taking bets are granted only to an establishment and operating different establishments under one permit is prohibited.

> Article 20.- The Secretary may issue permits to applicants to engage in gambling and sweepstakes as referred to by the Law and these Regulations, as follows:
>
> I. Only corporations that have been properly organized pursuant to Mexican laws may open and operate bet-taking at racetracks, greyhound racetracks, frontons, or may establish remote gambling centers or lottery halls; [Subsection amended DOF 10-23-2013]
>
> II. […]
>
> III. […]
>
> IV. […]
>
> The permit referred to in subsection I herein shall be issued to only one establishment. More than one establishment may not in any way operate under the same permit. [Paragraph added DOF 10-19-2012].[16] [Emphasis added]

44. To obtain a permit, the individual must file a written application with SEGOB attaching the information indicated in Article 21 of the Regulations. For permits referred to in Article 20(I) (*i.e.,* opening and operating gambling facilities) the applicant must also include the articles of incorporation of the company seeking to obtain the permit with their application and include information on the individuals and legal entities involved as shareholders of the applicant company. The information required for individuals who participate as members or shareholders in the applicant company are several, and include:

- name, nationality, and address;
- financial position statement, specifying the origin of the capital contributed to the company;
- financial or professional ties with other permitholder companies, and
- a credit report.[17]

45. The information required by SEGOB for legal entities includes:

- the articles of incorporation and all amendments thereto;

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[15] *Id.*, Article 12.

[16] *Id.*, Article 20.

[17] This list is not exhaustive. *See* Article 22 of the Regulations. Exhibit R-033, RLFJS 2013.

- general balance sheets, profit and loss statements, origin and use of funds and changes in net worth during the last five years;
- a list of names, nationality, and address of all Board of Directors members and statutory auditors;
- a list of the members or shareholders who, as of the application date, hold 10% or more of shares or equity interest representing the capital stock, including name, nationality, address, and
- the identity of beneficiaries.[18]

46. In addition to the above, Article 22 of the Regulations establishes that those persons who are advisors, statutory auditors, or officers at a CEO or similar level of the company applying for a permit must provide additional information.[19]

47. Based on the preceding provisions, one of the objectives of the Regulations is clearly to provide SEGOB with broad information on the individuals and legal entities that hold an interest in permitholder companies to maintain strict control over them. A series of obligations has also been imposed on permitholders to ensure that the authorities have sufficient information on the casino's operations and the identity of its members.

48. Article 29 of the Regulations establishes the obligations imposed on permitholders, which include the following:

- submit quarterly and annual financial statements to SEGOB (paragraph II);
- provide a copy of the valid insurance policy on equipment used for the activities outlined in the permit (paragraph III);
- report to the competent authorities and notify SEGOB of conduct or practice of any user that could potentially constitute a crime (paragraph IV);
- implement appropriate measures to guarantee safety (paragraph V);
- submit monthly revenue and federal contribution payment reports (paragraph VI), and
- Report the sale of any shares or equity interest or any changes to the percentage of equity interest of the members or shareholders or legal entities or its shareholders up to the final beneficiary, along with any amendments to the corporate bylaws. This applies to any change in the permitholder's shareholding structure or its shareholders, whether this is done through capitalizations, decreases in capital, spinoffs, mergers, or other corporate practices in which other corporations are involved with the permitholder, shareholders, members, or final beneficiaries, except for operations conducted through the stock exchange, in which the transaction does not imply a change in control of the permitholder (paragraph VII).[20]

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[18] This list is not exhaustive. *See* Article 22 of the Regulations. *Id*.

See Article 22 of the Regulations. *Id*.

[20] Exhibit R-033, RLFJS 2013, Article 29(II), (III), (IV), (V), (VI), and (VII).

49. Another highly relevant provision in this case is Article 31 of the Regulations, which establishes that permits are nontransferable and may also not be subject to any encumbrance, assignment, conveyance, or trade:

> ARTICLE 31.- Permits are nontransferable and may not be subject to encumbrance, assignment, conveyance, or trade.[21]

50. This is significant, because the Claimants refer to the purchase/sale of permits and licenses in several parts of their Memorial and in the witness statements of Mr. Gordon Gay Burr (Mr. Burr) and Mrs. Erin J. Burr (Mrs. Burr).[22] As stated by Mr. Alfredo German Lazcano (Mr. Lazcano) in his expert report, permits issued by SEGOB are totally and irreversibly linked to the permitholder.[23]

51. Moreover, the Regulations establishes that the maximum duration of a permit to open and take bets is from 1 to 25 years, but it does not establish a specific term.[24] The SEGOB has broad discretion to set the term of a permit, provided that it is within the minimum and maximum timeframes established by the Regulations.

52. Finally, Article 34 states that a permit will be discontinued when its term has expired, it has been revoked, or due to commercial insolvency, dissolution, liquidation, or extinction of the permitholder, or due to insolvency or death when the permitholder is an individual.[25] The importance of this last provision will become clear later on when discussing the relationship between E-Games and E-Mex and the commercial insolvency proceedings that led to E-Mex losing its permit.

2. The "operator" of a permitholder

53. Article 30 of the Regulations regulates the "operator" of the permitholder. In order to operate its permit through a third party (i.e., an operator), the permitholder and the proposed operator must execute a joint venture, service, or similar agreement, and apply for and obtain the respective authorization from SEGOB. This application and the respective documentation must be submitted by the permitholder.

54. The application with SEGOB must meet certain requirements and be accompanied by a series of documents, including the abovementioned agreement or legal instrument between the operator and the permitholder.[26] Furthermore, the proposed operator must file a statement with SEGOB agreeing to comply with the LFJS and its Regulations and to not assign its rights in the agreement

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21 *Id.*, Article 31.

22 *See*, for example, ¶ 62 of the Memorial, which refers to the purchase of a "license," or ¶ 65, which refers to the purchase of permits, or 79, which refers to the Claimants' efforts to purchase the Eventos Festivos permit.

23 Exhibit RER-2, Expert Report from Mr. Lazcano, ¶ 46.

24 Exhibit R-033, RLFJS 2013, Article 33. Exhibit RER-2 Expert Report from Mr. Lazcano, ¶ 50.

25 *Id.*, Article 30.

26 Exhibit RER-2, Expert Report from Mr. Lazcano, ¶ 45.

or contract to any third party and to not amend its shareholding structure unless it provides prior notice to SEGOB in terms of Article 29(VII) of the Regulations.[27]

55. The complete article is transcribed below for the convenience of this Arbitration Tribunal:

> ARTICLE 30.- The permitholder must apply for authorization from the Secretariat to use its permit in conjunction with an operator via some form of joint venture, services, or similar agreement, whose application must include the following:
>
> I. A signed copy of the draft of the agreement or legal instrument the parties intend to execute whereby the operator will act in such capacity;
>
> II. The information and documentation referred to in Article 22(I), (II), (III), and (IV) of these Regulations with regard to the operator, and
>
> III. A statement from the operator on its commitment to the Secretariat to adhere to the provisions of the Law and the Regulations, and to:
>
> a) Not assign its rights under the agreement or contract to any third party;
>
> b) Not amend its shareholder structure in first or subsequent tiers up the final holder or beneficiary, unless it notifies the Secretariat in accordance with Article 29(VII) of these Regulations, and
>
> c) Not execute any agreement that will allow a third party to operate the establishment.
>
> The Secretariat will not authorize the agreement or instrument referred to herein when such agreement or instrument allows the operator to assume corporate or administrative control of the permitholder corporation or is the final beneficiary of the permitholder corporation.
>
> The Secretariat will register those who have been approved to act as operators in the Games and Sweepstakes Database, and proof of registration will be issued to those operators who request it.
>
> The statement referred to in subsection III hereunder must be transcribed in the agreement executed by the permitholder and operator.[28]

56. The 2013 amendments to the Regulations clarify that the operator must submit a statement agreeing to refrain from executing any agreement that would allow any third party to operate the establishment and it must also be included as a representation in the agreement executed between the permitholder in the operator.[29] This situation was already prohibited because the RLFJS only allows a casino to be operated by the permitholder or together with the operator.

57. Finally, as stated by Mr. Lazcano, the concept of "independent operator" of a permitholder is not established in the LFJS or the Regulations.[30] In fact, the concept of an operator implies a

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27 Exhibit R-33, RLFJS 2013, Articles 30.

28 *Id*.

29 *Id.,* Article 30(III)(c) and the last paragraph.

30 Exhibit RER-2, Expert Report from Mr. Lazcano, ¶ 47.

contractual relationship between the permitholder and the operator, so an operator cannot exist independently from the permitholder.

> 47. There is no explicit mention of a different figure of the Permittee and Operator in the Gaming Regulations, and from its content, it is not possible to infer that there are figures other than those mentioned. The performance of an Operator independently of the Permittee that supports that status (i.e., the hypothesis on which the arguments of the Investors fall), directly and substantially contradicts the legal provision of the figure of Operator, due that its existence implies a joint operation between the latter and the Permittee. [31]

3. Remote gambling centers

58. Remote gambling centers are regulated in Chapter IV of the Regulations. A remote gambling center is understood as "an establishment authorized by SEGOB to take and receive bets at events, sporting competitions, and games authorized by the Law either abroad or within the country transmitted in real time and in both video and audio simultaneously."[32] Remote betting centers may be established at the same location as lottery halls.[33]

59. The establishments may also take bets through the Internet, telephone, or electronically. To do so, they must establish an internal control system, so all transactions are done through the abovementioned means. A written description of the rules and procedures must be prepared to ensure that the transactions are secure and to prevent manipulation of the gambling systems. The system must maintain a record including at least the account number and identity of the bettor and the date, time, transaction number, amount waged, and the requested selection. The SEGOB must approve the process for taking bets in advance.[34] The importance of this provision will become clear when discussing the virtual casino project mentioned by the Claimants later on in this Counter-Memorial.

4. Constitutional challenge 97/2004

60. On November 3, 2004, the Chamber of Deputies filed a constitutional challenge before the Supreme Court of Justice (Supreme Court) alleging that several provisions of the Regulations were unconstitutional, which was registered on November 4, 2004 under number 97/2004. The basis for the constitutional challenge was that the Chamber of Deputies believed that the Executive Branch had exceeded its authority when issuing the Regulations, because only the Legislative Branch had the power to issue general legal provisions in matters related to gaming and sweepstakes.[35]

61. On January 22, 2007, the Supreme Court ruled that the Regulations were constitutional, that the Federal Executive had not exceeded his regulatory authority, and that remote betting centers

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31 *Id.*, ¶ 47.

32 Exhibit R-033, RLFJS 2013, Article 76.

33 *Id.*, Article 77.

34 Exhibit R-033, RLFJS 2013, Article 85.

35 Exhibit R-034, Ruling from the Supreme Court of Justice on Constitutional Challenge 97/2004, p. 5.

and lottery halls were constitutional.[36] The Articles of the Regulations that were challenged remained in effect and applicable throughout the time in which the constitutional challenge was being decided.

C. Commencement of Claimants' Casino Operations

1. First steps

62. In his Third Witness Statement, Mr. Burr states that in the year 2004 he was introduced to Mr. Lee Young (Mr. Young), who operated a profitable video entertainment establishment – euphemism for casino– in the city of Monterey, Nuevo Leon. According to his testimony, Mr. Young was owner and member of a company called Juegos de Entretenimiento y Video de Monterrey, S.A. de C.V. (JEV Monterrey), which had obtained an authorization to operate this type of establishment, which the Claimants refer to as the "Monterrey Resolution." Mr. Burr added that he made several "due diligence" trips to Mexico to familiarize himself with different aspects of the Mexican market:

> 3. […] in August 2004, I was introduced to Lee Young ("Mr. Young"), an American citizen who was operating a profitable video entertainment facility, as they were called under the specifics of his operating authority, in Monterrey, Mexico, and was close to completing a second facility. Mr. Young had obtained an authorization to operate these types of facilities throughout Mexico pursuant to a validly issued Resolution issued by the Mexican Secretary of the Interior (Secretaría de Gobernación or "SEGOB") to a Mexican company called Juegos de Entretenimiento y Video de Monterrey, S.A. de C.V. (I will refer to this company as "JEV Monterrey" and to the resolution as "Monterrey's Resolution"). The video gaming machines in Mr. Young's establishments were considered skill based according to Monterrey's Resolution and thus were subject to further inspection and approval by SEGOB […]
>
> 4. After my meeting with Mr. Young, I conducted several exploratory/due diligence visits to various gaming facilities around Mexico to learn more about how the industry operated. I also met with other key players, including machine manufacturers, to get their perspective on the Mexican gaming industry. Through these meetings, I quickly realized that what Mr. Young had told me was true—gaming operators were making substantial profits in Mexico and it was legal to operate such businesses there […][37] [Emphasis added].

63. This does not appear to be consistent with the facts for two reasons. The first is that the Monterrey Resolution was issued on March 5, 2005, and therefore it could not have been an issue discussed with Mr. Young in 2004, and much less analyzed by Mr. Burr. The second is that it is not clear how Mr. Young could have operated a "profitable video machine facility" in 2004 when the alleged "authorization" under which it was operating was issued in March 2005, as stated previously.

64. These inconsistencies need to be clarified by the Claimants, because they suggest that Mr. Young was operating illegally when he met Mr. Burr and, therefore, Mr. Burr could not have

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[36] *Id.*, pp. 98, 100-101, 125-126.

[37] Exhibit CWS-50, Third Witness Statement of Mr. Burr, ¶¶ 3-4.

concluded that "what Mr. Young told him was true"—that the gaming operators received substantial profits and it was legal to operate this type of business.[38]

65. Furthermore, the Claimants state that in May 2005, Mr. and Mrs. Burr met with Mr. Lee Young and Mr. Juan Jose Rojas Cardona (Mr. Rojas Cardona) and they hired two Mexican law firms to conduct an "extensive due diligence regarding all the documentation provided" and "to specifically assess whether JEV Monterrey was operating legally in Mexico."[39] By that time, the Monterrey Resolution already existed, but also the Regulations which, among other things, explicitly required a permit to operate a casino.

66. The Claimants justified their decision to disregard the Regulations arguing that the constitutionality of the Regulations was "under review before the Mexican Supreme Court and it was uncertain whether the 2004 Gaming Regulation would remain valid or not." This is why they "decided that the best course of action was to partner with JEV Monterrey to operate the Casinos pursuant to and under Monterrey's Resolution."[40] This justification is not supported nor acceptable.

67. The Respondent does not dispute that the Regulations were challenged through a constitutional challenge and that this legal proceeding was *sub judice* in 2005 (see Section II.B.4 *supra*) when the Claimants decided to invest in its Casinos. However, it is also a fact that the Regulations remained in effect and its provisions were applicable between the date in which the constitutional challenge was filed (November 3, 2004) and January 22, 2007, when the Supreme Court finally issued its decision. Therefore, it is also an undisputed fact that in order to operate one or more casinos in Mexico, the Claimants would have needed a permit and they made no attempt to obtain one; they preferred to operate them for several years through a legal device that will be explained below.

2. The Monterrey Resolution

68. The so-called Monterrey Resolution is not a permit or an authorization and must not be confused with either. It is an *oficio* issued by SEGOB on March 10, 2005 to the company JEV Monterrey, which states that the machines operated by this company were not within the scope of application of the LFJS because: a) the outcome of the game depended on the players ability and therefore it was not a game of chance, and b) there was no betting.[41] In short, the Monterrey Resolution stated that the machines operated by JEV Monterrey were not games prohibited under the LFJS and, therefore, did not require a special permit from SEGOB to operate.

69. The origin of this *oficio* is a written request dated September 8, 2004 submitted by JEV Monterrey to SEGOB, whereby it requested the issuance "of an opinion on the legal authority of such agency of the federal executive [*i.e.,* SEGOB] over the business activities of its principal [*i.e.,* JEV Monterrey]". JEV Monterrey argued that its business activities consisted in the "use,

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38 *Id.*, ¶ 4.

39 Memorial, ¶¶ 32-33.

40 *Id.*, ¶ 34.

41 *See* Exhibit C-94.

development, import, distribution, sale, lease, installation, transfer, or assignment of skill and ability machines [...] [that] do not imply chance or gambling in any of its forms."[42]

70. In order to justify its position, the company submitted a technical binder as documentary evidence describing the components used to operate the machines it marketed and operated, the mechanics of the game, the physical description of the machines and their components, among other characteristics.[43] This binder also contained a technical expert opinion prepared by Alfredo Trevino Mora, which concluded the following:

> From the procedure carried out during the present investigation, as well as the results derived therefrom, we proceed to conclude the following: All the machines subject to the present examination: A) have the same electrical, mechanical and electronic devices such that their functioning is the same. B) They have the same procedure for the development of. C) Are activated through a chip card. D) They do not have slot devices, that is, they do not receive or give out money. E) Have ele [sic] stop buttons that allow the player to infer the result of the Game, and therefore, are not considered random gaming machines. F) The outcome of the game depends on the player's ability and dextertity.[44]

71. The SEGOB inspected the facility and confirmed that the machines operated as described by JEV Monterrey and, shortly thereafter, issued the following opinion in the following *oficio*:

> IT IS OUR OPINION THAT THE PETITIONING COMPANY "JUEGOS DE ENTRETENIMIENTO Y VIDEO DE MONTERREY S.A. DE C.V." DOES NOT REQUIRE A PERMIT ISSUED BY THE SECRETARIAT OF THE INTERIOR TO INSTALL AND OPERATE ITS NATIONAL ENTERTAINMENT CENTERS, as it uses "Aristocrat mkv series 1 & 2" and Ainsworth cristal series that operate the same game […] gaming machines such as those that were subject to review or essentially similar to them, their establishment and use are only regulated by provisions applicable to videogame and similar machines set forth by State and Municipal authorities where the aforementioned Entertainment Centers are intended to operate pursuant to this resolution.[45] [Emphasis added]

72. As can be seen, the Monterrey Resolution authorized nothing, especially not the operation of a casino. Said Resolution reference another type of business. The Monterrey Resolution was based on the idea that these establishments were video arcades, where the players' skill determined the outcome of the game and no betting was involved, which is inconsistent with the description of the machines operated by the Claimants that they themselves have provided.

73. For example, Mr. Burr stated in his Third Witness Statement that "[a]fter a significant change in the law in 2010" they installed machines from the main manufacturers and that it was their "philosophy to set the payback rate at a high level" on each machine so that their customers "would

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42 *Id.*, p. 1.

43 *See Id.*, p. 2.

44 Exhibit C-94, p. 3.

45 Exhibit C-94, p. 6.

win and enjoy their time in the Casinos."[46] It is obvious that the ability to adjust the "payback rate" of a machine is inconsistent with the idea that the outcome of the game depends on the player's ability. It is also important to note that neither the LFJS nor the Regulations were amended in 2010, as stated by Mr. Burr.

3. Joint venture agreements with JEV Monterrey

74. According to the Claimants, approximately one year after the initial contact between Mr. Burr and Mr. Young in 2004, the Juegos Companies and JEV Monterrey executed a series of joint venture agreements to operate the Claimants' Casinos under the Monterrey Resolution.

75. The first agreement was executed by JEV Monterrey and Juegos de Video y Entretenimiento de Mexico, S. de R.L. de C.V. (JVE Mexico) on June 13, 2005, to operate the casino located in Naucalpan, State of Mexico. Approximately 1 year later, on June 30, 2006, the rest of the Juegos Companies executed their respective joint venture agreement with JEV Monterrey.[47] The terms of these subsequent contracts were equivalent to those of the original contract executed in June 2005 with JVE Mexico.

76. The purpose of these contracts was to establish a joint venture to install and operate entertainment centers with videogame machines under the Monterrey Resolution.[48] In exchange for the right to operate the Casinos under the Monterrey Resolution, the Juegos Companies agreed to pay JEV Monterrey 15% of the net taxable income of all gaming machines (after paying all prizes and applicable gambling taxes). Once the Juegos Companies' investments were paid off, the percentage would increase to 30%.[49]

77. These joint venture agreements were negotiated by Mr. Alfredo Moreno Quijano, as the representative of the Juegos Companies, and Arturo Rojas Cardona, Francisco Salazar, and Juan Jose Rojas Cardona, representing JEV Monterrey.[50]

D. The Claimants' operational transition to a formal permit

1. The transaction with Eventos Festivos

78. The Claimants state in their Memorial that in 2008 they decided to explore the possibility of obtaining their own permit and stop operating under the Monterrey Resolution.[51] They initially attempted to obtain a permit by acquiring the company Eventos Festivos de Mexico, S.A. de C.V. (Eventos Festivos), which had a permit that allowed it to open a total of 20 establishments.[52]

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46 Exhibit CWS-50, Third witness statement of Mr. Burr, ¶ 27.

47 Exhibits C-95, C-97, C-98 and C-99.

48 Exhibit C-95, pp. 6-7.

49 *See* clause four of the *joint venture agreements*, Exhibits C-95, C-96, C-97, C-98, and C-99.

50 Exhibit R-035, Answer in Arbitration 58/2010 between E-Mex and E-Games, May 9, 2011, ¶ 4.

51 Memorial, ¶ 77.

52 The Eventos Festivos permit covered 20 establishments, of which apparently four were already operating and one more would be opening before August 30, 2008. *See* Exhibits C-250, p. 25 and C-249, p. 2.

According to the Claimants, obtaining this permit would have allowed them to continue operating its five existing Casinos plus the casinos in Cabo and Cancun.[53] However, they have not explained why this would not have been possible under the "Monterrey Resolution" or what the advantages of becoming a permitholder were over operating as they had been operating until then.

79. The Claimants state that they had already negotiated the terms of the deal, executed a stock purchase agreement with Eventos Festivos (SPA, Exhibit C-250) and paid a nonrefundable deposit of one million dollars.[54] According to the evidence provided by the Claimants, the SPA was executed on February 21, 2008, and established the purchase price of the stock at $28.5 million dollars.[55] The closing date would be no later than April 2, 2008.[56]

80. Mr. Burr also stated that they had negotiated with Eventos Festivos for it to request authorization with SEGOB to change the address of some of the authorized establishments under the permit so that, once the deal had been completed, the Claimants could continue operating the Casinos they already had.[57] Eventos Festivos applied for the change of domicile with SEGOB for 10 establishments,[58] and on February 29, SEGOB authorized the changes via *oficios* DGAJS/SCEV/0132/2008 and DGAJS/SCEV/0133/2008.

81. So, by the end of February 2008, everything was ready so that the Eventos Festivos permit would allow: the operation of the existing casinos owned by Eventos Festivos; the operation of the Claimants' existing facilities (Naucalpan, Villahermosa, Ciudad de Mexico, Cuernavaca, and Puebla); and to also the opening of additional casinos in Los Cabos, Cancun, or any other place authorized by SEGOB in the future.[59]

82. For reasons that are still unclear, the Claimants decided not to close this deal, forego their one-million-dollar deposit, and to partner up with someone who, according to them, had a questionable background and who had forced his original partner, Mr. Young, out of the business. The following section goes into more detail on these issues.

2. The Claimants' decision to transfer operations to the E-Mex Permit

83. According to the Memorial, at the beginning of 2008, when E-Games was about to close the deal with Eventos Festivos, Advent International (Advent), a US private equity firm with a significant presence in Latin America, and BlueCrest Capital (BlueCrest), a British-US hedge fund, approached Mr. Burr to discuss the possibility of a potential deal that involved the purchase

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53 Memorial, ¶ 79.

54 *Id.*, ¶ 78.

55 Exhibit C-250, pp. 1-4.

56 *Id.*, p. 18.

57 Exhibit CWS-50, Third Witness Statement of Mr. Burr, ¶ 35.

58 Exhibit C-251.

59 Exhibit R-036. Screenshot of the change of establishment authorizations granted to Eventos Festivos, p. 2.

of permit number DGAJS/SCEVF/P-06/2005 that was issued to E-Mex (the E-Mex Permit).[60] It is not very clear to the Respondent what Advent and BlueCrest's intentions were because the Claimants have not offered any documentary evidence of this potential deal. They simply provide a rough description of it in their Memorial relying on the witness statements of Mr. and Mrs. Burr.

84. The Respondent would like to pause here to clarify (and remind the Arbitration Tribunal) that the sale or transfer, assignment, or trade of permits is prohibited under the Regulations (see paragraph 49, *supra*). This means that Advent and BlueCrest's plans likely involved the purchase of E-Mex (and not its permit) because otherwise the plan would have been illegal.

85. At any rate, the Claimants maintain that in April 2008, one day prior to the closing date of the deal with Eventos Festivos and with seemingly everything all set to conclude it, they decided instead to transfer their operations under the E-Mex Permit as "operators" thereof, because this was one of the conditions of the deal between Advent/BlueCrest and E-Mex.[61]

86. The Claimants explain that they decided to abandon the transaction with Eventos Festivos and transfer their operations to the E-Mex Permit because:

- the E-Mex Permit allowed them to operate a wide range of machines that would be much broader in comparison with other Mexican permits at that time, including the Eventos Festivos permit;[62]
- unlike the Eventos Festivos permit, the E-Mex permit had no geographical restrictions as to the locations of the casinos, and[63]
- the E-Mex Permit would allow for the operation of 50 remote gambling centers and 50 lottery halls.[64]

87. Regarding the first point, Mrs. Burr stated that the E-Mex Permit would allow "Class-III Vegas Style" machines while the Eventos Festivos permit only allowed "Class-II Bingo Style" machines.[65] Mrs. Burr has not offered any evidence on the type of machines operated by the Claimants and their existing casinos and/or whether these machines could operate under the Eventos Festivos permit. Furthermore, the Respondent would like to remind this Arbitration Tribunal that the Claimants had been operating under the Monterrey Resolution up to that point, which was based the idea that the Claimants' machines were basically videogames that did not involve chance or betting, which appears to be inconsistent with Mrs. Burr's testimony.[66]

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60 Memorial, ¶ 80.

61 Exhibit CWS-50, Third Witness Statement of Mr. Burr, ¶ 41.

62 Memorial, ¶ 80.

63 *Id.*, ¶ 80.

64 Memorial, ¶ 80.

65 Exhibit CWS-51, Third Witness Statement of Mrs. Burr, ¶ 41.

66 The Respondent has not overlooked that based on the public information from SEGOB, in November 2012, Eventos Festivos received authorization to install slot machines, *i.e.,* the installation of slot machines is also not an insurmountable restriction. Exhibit R-037. Screenshot of the Eventos Festivos authorization to install slot machines.

Furthermore, as described in paragraph 77 *supra* regarding the joint venture with JEV Monterrey, the Claimants started and maintained their business dealings with the Rojas Cardona brothers.

88. The Claimants have also not explained or offered any evidence to show that they had changed the machines in their Casinos or that there were plans to purchase new machines that they were unable to operate under the Monterrey Resolution and/or the Eventos Festivos permit. Therefore, the first explanation to prefer the E-Mex permit over the Eventos Festivos permit appears to be unsupported.

89. Regarding the second point on geographic restrictions, Mrs. Burr states that they wanted to ensure that the permit they acquired would allow them to continue operating their five existing Casinos and open two additional casinos in Cabo and Cancun.[67] However, as stated in previous paragraphs, around the time when the SPA with Eventos Festivos was executed, the company [Eventos Festivos] had already applied and obtained authorization from SEGOB to change the address of the establishments authorized under its permit, which would have allowed the five existing casinos to operate. It is therefore clear that this second explanation does not offer any support to their decision to operate under the E-Mex Permit.

90. As to the third point –*i.e.*, that the E-Mex Permit allowed for the operation of more facilities than the Eventos Festivos Permit– it must be noted that, according to the E-Games operating agreement that was ultimately executed with E-Mex, E-Games would be allowed to operate up to 7 establishments. There is no evidence whatsoever that the potential agreement with Advent/BlueCrest would have allowed E-Games to open additional casinos. In fact, there is no evidence of the agreement that the Claimants allegedly were negotiating or had negotiated with Advent/BlueCrest.

91. In should also be noted here that the Eventos Festivos permit would have allowed E-Games to operate up to 13 casinos in addition to those they already had, and there is no evidence that the Claimants had any plans to expand their operations beyond the seven casinos under the E-Mex agreement. Therefore, this is also not a reasonable explanation for deciding to operate under the E-Mex Permit.

92. The Claimants have not offered a reasonable explanation for preferring operator status under the E-Mex Permit over becoming a permit holder by purchasing Eventos Festivos. The decision is even stranger if one considers that the Eventos Festivos stock purchase agreement, –i.e., the SPA– had already been executed, while the agreements between Advent/BlueCrest and E-Mex and between Advent/BlueCrest and the Claimants had not. It is unclear why the Claimants preferred the possibility of operating under the permit of a third party (whether E-Mex or Advent/BlueCrest) than the certainty of obtaining their own.

93. E-Games' decision to choose the alleged Advent/BlueCrest offer over the deal with Eventos Festivos is also surprising because, as a permitholder, it would have had the freedom to manage its permit and establish and operate casinos wherever they wanted, subject to the restrictions imposed by the LFJS and its Regulations. By contrast, as an E-Mex operator, they would have

[67] Exhibit CWS-51, Third Witness Statement of Mrs. Burr, ¶ 40.

been subject, not only to the restrictions imposed by the LFJS and its Regulations, but also the terms and conditions of the agreement with E-Mex.

94. If we add to this that Mr. Burr had full knowledge that E-Mex was controlled by Mr. Rojas Cardona[68] and that he knew that Mr. Rojas Cardona had forced Mr. Young out of the casinos in Monterrey, the decision appears even more unreasonable:

> 38. Part of the proposed transaction also involved moving our operations under EMex's permit, which was controlled by Pepe Rojas Cardona ("Rojas"). The decision to move under E-Mex's permit did not come without some trepidation. Several months earlier, I had learned that Rojas had forced Mr. Young out of the casino business and had taken control of Mr. Young's casinos in Monterrey.[69]

95. Mr. Julio Gutierrez's witness statement confirms the foregoing:

> 14. […] I remember that, at the beginning, Mr. Burr was not very convinced about transferring the operations of Compañías Juegos to the E-Mex permit, since he had been informed that Mr. Rojas Cardona was disputing the control of JEV Monterrey with Mr. Lee Young and its partners and, furthermore, he had been informed by the investment fund BlueCrest Capital ("BlueCrest") about certain debts of E-Mex that could not be paid by such company.[70]

96. But these do not appear to have been the only red flags Mr. Burr ignored. Mr. Burr also knew or should have known that E-Mex had a considerable debt with BlueCrest, as indicated by Mr. Julio Gutierrez in the preceding quote, and that if the deal with E-Mex was not successful: *i)* BlueCrest would demand the repayment of the debt (as it did): *ii)* E-Mex would likely be unable to pay it (as it did); and *iii)* E-Mex would be declared insolvent and lose its permit (as it did).

97. In fact, Msr. Burr's witness statement confirms that the Claimants had already identified the risk of E-Mex's being declared insolvent in the event negotiations with E-Mex were unsuccessful:

> 50. As previously mentioned, this was always the backup plan we had as we were moving under E-Mex's permit because we did not want to leave anything subject to chance. We believed that our situation was analogous to Petolof's because our Casino operations had always been lawful and SEGOB-approved and we knew there was the possibility that BlueCrest could force E-Mex into bankruptcy if negotiations failed.[71] [Emphasis added]

98. This is significant because, as pointed out in the legal framework section (*supra*), the Regulations identify insolvency ["concurso mercantil" in Spanish] as grounds for revoking the permit and, therefore the Claimants knew or should have known that E-Mex's declaration of insolvency would have put the entire operation at risk. Everything indicates that this was a known risk that they assumed voluntarily.

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[68] According to what he said in the Complaint, Mr. Rojas Cardona was the primary representative of E-Mex. However, his brother, Mr. Arturo Rojas Cardona, was the company's majority shareholder.

[69] Exhibit CWS-50, Third Witness Statement of Mr. Burr, ¶ 38.

[70] Exhibit CWS-52, Witness Statement of Mr. Gutierrez, ¶ 14.

[71] Exhibit CWS-51, Third Witness Statement of Mrs. Burr, ¶ 50.

99. Mr. Burr also mentions in his witness statement that he hired a world-renowned firm (Prescience) to investigate Mr. Rojas Cardona, and after concluding its investigation, it recommended not to do business with him:

> 38. Part of the proposed transaction also involved moving our operations under EMex's permit, which was controlled by Pepe Rojas Cardona ("Rojas"). The decision to move under E-Mex's permit did not come without some trepidation. Several months earlier, I had learned that Rojas had forced Mr. Young out of the casino business and had taken control of Mr. Young's casinos in Monterrey. Given this information, I hired Prescience, LLC ("Prescience"), a global private intelligence company founded by former CIA agent Mike Baker, which specialized in doing in-depth investigations for businesses, to investigate who Rojas was. As a result of their investigation, Prescience advised us to separate from Rojas in a business-like manner. Therefore, when BlueCrest told us they wanted to acquire Rojas's permit and combine with us to create a huge casino company, we were interested but had serious reservations. We didn't want to have any dealings with Rojas directly, so BlueCrest and Advent acted as intermediaries.[72] [Emphasis added]

100. Notwithstanding, this clear warning by the investigation firm hired by Mr. Burr and his statement that "they had serious reservations" about the BlueCrest proposal, Mr. Burr decided to ignore Presciense's warnings and to put their "serious reservations" aside to do business with Mr. Rojas Cardona. This was also a risk that was known by the Claimants and that they assumed voluntarily.

101. It is contradictory to state, on the one hand, that the Claimants did not want any relationship with Mr. Rojas Cardona due to his business practices and questionable background and, on the other, to execute an agreement to operate their Casinos under his permit, which would inevitably associate them with E-Mex and Mr. Rojas Cardona.

102. Neither does it make sense the statement in Mr. Burr's witness statement regarding his decision to opt out of the Eventos Festivos deal and surrender the non-refundable one-million-dollar deposit at the insistence of Advent and BlueCrest. According to his witness statement, in order to ensure that his businesses complied with the LFJS, they decided to operate as an "independent operator of the E-Mex permit" until they were able to obtain full control of the permit (whatever this means, and which, in any event, would have been prohibited by the RLFJS). However, as Mr. Lazcano clearly states in his expert report, the concept of "independent operator" does not exist—only operators and permitholders exist.[73] In fact, as we will see below, this is the main reason why the Sixteenth District Administrative Court in the Federal District (Sixteenth Court) granted E-Mex an *amparo* against what the Claimants refer to as the "Independent Operator Resolution." This issue will be discussed below.

103. Mr. Burr also stated that his decision to operate under the E-Mex Permit was partially based on the fact that he knew that the other company, *i.e.,* Petolof S.A. de C.V. (Petolof), had successfully obtained the status of "independent operator:"

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[72] Exhibit CWS-50, Third Witness Statement of Mr. Burr, ¶ 38.

[73] Exhibit RER-2, Expert Report from Mr. Lazcano, ¶ 47.

> 39. At Advent and BlueCrest's insistence and as part of negotiations for the deal, we moved our operations under E-Mex's permit and obtained licenses for 7 dual function casinos under E-Mex's permit. This required that we disengage from the Eventos Festivos transaction and sacrifice our non-refundable deposit. I wanted to be sure that our businesses continued to operate in accordance with the law, so we insisted in our negotiations with Advent and BlueCrest that we would operate as an independent operator under E-Mex's permit until we could obtain full control of the permit. We knew this was possible because another casino operator in Mexico, Petolof, S.A. de C.V. ("Petolof"), had successfully done this.[74] [Emphasis added]

104. The idea is repeated in paragraph 49 of his Third Witness Statement:

> 49. Hence, when BlueCrest and Advent proposed to move us under E-Mex's permit, we did our research to find out what all of our options were. We would not have agreed to move under the E-Mex permit if it were not for the Petolof precedent, which we understood allowed us to completely separate from E-Mex. As a result, we walked away from the Eventos Festivos permit and forfeited our deposit. Since day one, we had prepared to separate our operations from E-Mex in the event that BlueCrest and Advent could not acquire E-Mex's permit.[75] [Emphasis added]

105. And also in Mrs. Burr's Third Witness Statement:

> 49. As previously mentioned, when we were moving under E-Mex's permit, our legal team explained to us that there was legal precedent we could use to separate our operations from E-Mex even if BlueCrest and Advent failed to acquire E-Mex's permit and our operations remained under it. Specifically, in 2008, SEGOB recognized the independent operator status of Petolof, S.A. de C.V. ("Petolof") based on the theory of acquired rights—that is, a casino operator, without being a permit holder itself, can acquire certain rights in connection with its prior, lawful casino operation under a third-party's permit, including the right to continue operating its casinos even after the original permit holder's permit has been revoked.
>
> 50. As previously mentioned, this was always the backup plan we had as we were moving under E-Mex's permit because we did not want to leave anything subject to chance. We believed that our situation was analogous to Petolof's because our Casino operations had always been lawful and SEGOB-approved and we knew there was the possibility that BlueCrest could force E-Mex into bankruptcy if negotiations failed.[76] [Emphasis added]

106. These statements are false, because Petolof did not obtain the resolution to which the Claimants refer until October 2008; in other words, several months after E-Games decided to transfer its operations under the E-Mex Permit. This is confirmed by the *oficio* issued to Petolof (dated October 28, 2008[77]) and by the Memorial itself:

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74 Exhibit CWS-50, Third Witness Statement of Mr. Burr, ¶ 39.

75 *Id.*, ¶ 49.

76 Exhibit CWS -51, Third Witness Statement of Mrs. Burr, ¶¶ 49-50.

77 Exhibit C-351, p. 1.

> 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.[78] [Emphasis added]

107. All of the above can be summarized in that the Claimants knowingly:

- Walked away from an agreed-upon transaction with Eventos Festivos and their million-dollar deposit;
- chose to continue their business as an operator of a permitholder (E-Mex) rather than acquiring their own permit by purchasing Eventos Festivos;
- chose to abandon the agreed-upon transaction with Eventos Festivos over a possible agreement between Advent/BlueCrest and E-Mex and a possible agreement between Advent/BlueCrest and the Claimants;
- assumed the risk of E-Mex losing its permit due to its debt with Advent/BlueCrest, in the event that the deal between those two parties was unsuccessful, and
- continued a business relationship with Mr. Rojas Cardona despite knowing that he had a questionable background, which was confirmed by the investigative agency they themselves hired.

108. For reasons that are unknown, the transaction between E-Mex and Advent/BlueCrest did not move forward and, according to Mr. Burr: "we were suddenly thrust involuntary into a relationship with Rojas."[79]

109. The Respondent intends to request documents related to this decision during the document production phase, because it is relevant for one of the lines of defense based on the Claimants' contributory fault, as will be explained further down. Therefore, the Respondent reserves the right to go into more detail and/or modify its position to the extent that the requested documents contain relevant information on this transaction.

E. Agreements between E-Mex and the Claimants

110. In 2008, the Claimants executed a series of agreements with E-Mex to operate up to seven casinos under the E-Mex Permit. The first was a transaction agreement between E-Mex and the Juegos Companies and JEV Monterrey, which was executed on April 1, 2008 (Transaction Agreement).[80] The second was an operating agreement between E-Mex and E-Games, which was executed 7 months later, on November 1, 2018 (Operating Agreement).[81] These two legal documents are discussed below.

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78 Memorial, ¶118.

79 Exhibit CWS-50, Third Witness Statement of Mr. Burr, ¶ 45.

80 Exhibit C-6.

1. Transaction Agreement

111. On April 1, 2018, the Claimants (through the Juegos Companies) signed a transaction agreement with E-Mex and JEV Monterrey, the purpose of which was:

- to terminate the existing joint ventures between the Juegos Companies and JEV Monterrey;
- agree to execute an operating agreement between E-Mex and the companies determined by the Claimants;
- acknowledge the Juegos Companies' rights to operate five establishments that were already open two additional establishments;
- grant releases to the Juegos Companies and JEV Monterrey;
- establish the obligation to pay E-Mex royalties; and
- acknowledge the Claimants' right to operate under another permit in the future, if they so decided.[82]

112. In turn, Clause 1.4(ii) and (iii) established the financial terms of the "New Operating Agreements,"[83] which would be executed at a later time. The financial terms included a grace period for the payment of royalties during May 2008 and established royalty payments to E-Mex in the amount of 10% of the "revenue" (*i.e.,* not profits) for a period of 12 months beginning on June 1, 2008. Upon expiration of this term, the royalties would increase to 11.25% of the revenue from June 1, 2009 and throughout the term of the New Operating Agreements.[84]

113. It should be noted that this Transaction Agreement was signed one day before the deadline for closing the Eventos Festivos transaction, which shows that the decision to become E-Mex's operator was made in haste and without having a formal operating agreement in place with E-Mex (the Operating Agreement was signed seven months later). Logic would seem to indicate that the Claimants would have had no reason to execute the agreement with Eventos Festivos and potentially sacrifice their deposit if they already had an agreement with both Advent/BlueCrest and E-Mex to operate their casinos under the E-Mex permit.

114. The Respondent also disputes certain claims related to the Transaction Agreement. For example, despite what the Claimants contend in the sense that the agreement "acknowledged the right to operate under another permit if they so decided," it is clear from the document that there was a temporary restriction on this right. Specifically, the agreement prevented the Claimants from operating under another permit and to market with third parties its rights and obligations to operate the seven facilities between the signing date of the agreement (April 1, 2008) and May 14, 2009:

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82 Memorial, ¶ 86 and Exhibit CW-52, Fourth Witness Statement of Mr. Gutierrez, ¶ 20.

83 Exhibit C-6, Clause 1.4(i), p. 22 There it states that "E-Mex agrees to execute the necessary operating agreements without limitation so that Grupo B-Mex [...] operates the Grupo B-Mex Entertainment Centers under the E-Mex Permit, including two the locations of which are still undecided."

84 *Id.*, p. 23.

> (iv) during the pe1iod between the date of this Agreement until May 14, 2009, Grupo B-Mex, including Grupo B-Mex Companies, will not have the ability to decide to cease operations of its facilities under the E- Mex Permit and operate under any other license, or to trade with third-parties (under the terms and conditions of the New Operating Contracts), its rights and obligations to operate the seven (7) venues under the E-Mex Permit, which is the subject of the New Operating Contracts, except in the following cases: (a) in the case of '"change of control group" or sale of E-Mex shares to third paiiies; and/or (b) in the case of adverse changes in the operation or status of E-Mex which might affect the validity of the E-Mex Permit, or situations that might create an imminent risk arising from a termination procedure thereof: and
>
> (v) in effect as of May 15, 2009 Grupo B-Mcx, including Grupo B-Mex Companies, will have the unrestricted authority to decide to cease operations of its facilities under the E-Mex Permit and operate under any other permit, and to trade with third-parties (under the terms and conditions of the New Operating Contracts), freely, unrestricted and discretionary in manner, their rights and duties to operate the 7 (seven) venues under the E-Mex Permit which is the subject of the New Operating Contracts.[85]

115. Finally, clause three (jurisdiction) states that anything related to the interpretation, performance, and enforcement of the Transaction Agreement, the parties agree to submit to "commercial arbitration at the Arbitration Center of Mexico, waiving their right to any other jurisdiction."[86]

2. Operating Agreement

116. On November 1, 2008, E-Games and E-Mex executed an Operating Agreement.[87] According to the Claimants, E-Games acquired rights and obligations through this agreement to operate up to 14 casinos in accordance with the E-Mex Permit and applicable laws –i.e., seven remote gambling centers and seven lottery halls– or up to seven dual-function gaming facilities. In exchange, E-Games agreed to pay royalties to E-Mex based the on the Casinos' revenue. The Claimants also stated that their attorneys in Mexico were deeply involved in the negotiations with E-Mex, and despite the fact that they would be operating as of that moment under the E-Mex Permit, they immediately took measures to separate themselves from E-Mex and investigate the possibility of operating under another permit, given the uncertainty surrounding the viability of the E-Mex Permit.[88] These statements deserve further scrutiny before moving on to a description of the Operating Agreement.

117. First, E-Games did not agree to pay royalties in the Operating Agreement, which incidentally was the agreement that E-Mex was supposed to submit to SEGOB so that E-Games

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85 *Id.*, p. 23.

86 *Id.*, p. 24.

87 Exhibit C-7.

88 Memorial, ¶ 87.

could obtain operator status.[89] The royalty payments were established in the Transaction Agreement. The Arbitration Tribunal may notice that Clause Four of the Operating Agreement referring to the "general and specific obligations" of the parties does not mention royalties.

118. Secondly, if the intention was "to separate themselves from E-Mex and investigate the possibility of obtaining their own independent permit," it would not make much sense to walk away from the option of purchasing Eventos Festivos. It would also not make much sense to partner up with E-Mex if, as stated by the Claimants, there were "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."[90] Any rational investor who faces this type of uncertainty and learns that their potential partner was involved in unlawful activities would have rejected the opportunity and would have decided for a safer option, *e.g.,* the transaction with Eventos Festivos. Especially if, as they claim, they had already anticipated future disputes with the person who would become their partner.

119. The first clause of the Operating Agreement establishes the nature and purpose of the agreement, which was to exploit different establishments as "operator" under the E-Mex Permit. It is important to mention that the agreement specifically states that the selection of the cities where the casinos would be established was in the hands of E-Mex as the Permitholder. This means that E-Games was not able to decide the location of the casinos without E-Mex's approval:

> FIRST. - NATURE AND PURPOSE
>
> "THE PERMIT HOLDER" agrees to enter this contract with "THE OPERATOR," who agrees to enter this CONTRACT OF OPERATION FOR EXPLOITATION THROUGH THE FIGURE OF THE OPERATOR OF VARIOUS ESTABLISHMENTS BASED ON "THE PERMIT".
>
> Operation of "THE PERMIT", which is the purpose of the CONTRACT, must be subject to and executed pursuant to the conditions and scope set forth in the same FEDERAL PERMIT and all its amendments, observing as applicable the stipulations of Article 30 of the Regulations of the Federal Law of Games and Drawings; this same operation for purposes of this instrument is not generic but specific to the operation of of [sic] establishments in cities or states as expressly directed by "THE PERMIT HOLDER".[91] [Emphasis added]

120. Other clauses relevant to this case are:

- the Second Clause, which states that the term of the agreement "will be the same as the duration of "THE PERMIT" including its extensions;
- the Sixth Clause, which states that E-Games agreed to "comply with the [LFJS] and its Regulations," and includes the obligation to submit the revenue report and payment of

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[89] E-Games stated that the agreement governing its operator status is dated November 1, 2008, as opposed to Exhibit C-6, which shows a different date, April 1, 2008. *See* Exhibit R-035, Answer in Arbitration Proceeding 58/2010 between E-Mex and E-Games, May 9, 2011, p. 6.

[90] Memorial, ¶ 87.

[91] Exhibit C-7, p. 14.

the corresponding contributions to SEGOB in accordance with Article 29 of the Regulations,[92] and

- the Twelfth Clause, which states that in the event of a dispute requiring the interpretation or performance of the obligations in the contract, the parties would submit to arbitration under the Arbitration Rules of the CAM.

121. This last point is relevant because there was indeed a dispute between E-Mex and E-Games regarding royalty payments that was submitted to arbitration under the CAM and was decided in favor of E-Mex. This will be addressed later on in this document.

3. Oficio dated December 9, 2008 - DGAJS/SCEV/00619/2008

122. On November 11, 2008, a few days after the execution of the Operating Agreement, E-Mex submitted a document to SEGOB notifying its intention to exploit its permit with E-Games as its operator.[93] On December 9, 2008, SEGOB responded with oficio DGAJS/SCEV/00619/2008, whereby it informed E-Mex that it had satisfied the requirements set forth in Article 30 of the Regulations and authorized the use of its permanent with the company E-Games as its operator (Operator Oficio).[94]

123. It should be noted that E-Mex did not request SEGOB to authorize E-Games as its "independent operator" based on the precedent that, according to the Claimants, their attorneys had already identified. And this makes sense because the Regulations assumes that a contractual relationship or partnership exists between the permitholder and its operator, which can be appreciated from the definition of operator, which is again transcribed below for the convenience of the Arbitral Tribunal:

> Operator: Corporation with which the permitholder may contract or partner for the purposes of exploiting its permit, pursuant to the provisions of these Regulations.[95] [Emphasis added]

124. It is clear from this definition that an operator cannot exist without a contractual relationship or partnership with the permitholder, and therefore, an "independent operator" of a permitholder cannot exist. It is also clear that one of the requirements in Article 30 for obtaining operator status is precisely to prove to SEGOB that this contractual relationship or partnership with the permitholder does exist. This is confirmed in paragraph 88 of the Memorial, which states: "[m]ore 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*"; and in the expert report from Mr. Lazcano:

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92 Id., Clause Six, pp. 17-08 and Clause Twelve, p.19.

93 Exhibit C-8.

94 *Id*.

95 Exhibit R-033, RLFJS 2013, Articles 3.

> 45. The Operator request must be accompanied by the contract or agreement that the Permittee and the potential Operator intend to enter into.[96]

125. It is also worth noting that the Claimants did not inform SEGOB of the alleged unlawful activities engaged in by Mr. Rojas Cardona despite having the duty to report them. In Mexico, "[a]nyone who is aware of an act that likely constitutes a crime is required to report it to the Public Prosecutor."[97] Instead, they decided to remain silent and enter into a partnership with the Rojas Cardona brothers.

126. Finally, it is observed that the joint venture agreements between the Juegos Companies and JEV Monterrey were terminated in April 2008 with the execution of the Transaction Agreement (Exhibit C-6). The Claimants must explain under which permit or agreement they operated their Casinos between April 2008 and the "operator" authorization SEGOB issued on December 9, 2009.

4. Oficio dated February 13, 2009 - DGAJS/SCEV/0059/2009

127. On January 12, 2009, E-Mex informed SEGOB of the address of the five establishments that it would operate together with E-Games in Villahermosa, Cuernavaca, Puebla, Naucalpan, and Mexico City (previously the Federal District).[98] On February 13, 2009, SEGOB responded with *oficio* DGAJS/SCEV/0059/2009 authorizing E-Mex to exploit its permit jointly with E-Games through the establishments located at the following addresses:

- Avenida Jardines de San Mateo No. 8, Colonia Santa Cruz Acatlan, C.P. 53150, Naucalpan de Juarez, Estado de Mexico (under the trade name "Palmas Naucalpan").
- Avenida Periferico s/n en el inter Europlaza Colonial Carrizal, C.P. 86038. Villahermosa, Tabasco (under the trade name "Palmas Villahermosa").
- Avenida San Jeronimo No. 243, Colonia Rincon del Pedregal, Delegacion Alvaro Obregon, Mexico, Distrito Federal (under the trade name "Kash D.F.").
- Avenida Vicente Guerrero No. 1, Colonia Lomas de la Selva, Cuernavaca Morelos, (under the trade name "Palmas Cuernavaca").
- Arroyo Xonaca No. 1006, Local 213-214, Colonia Barrio alto Puebla, Puebla (under the trade name "Kash Puebla").[99]

F. E-Mex Commercial Action ("juicio mercantil")

128. According to information provided by the Claimants, E-Mex had a significant debt of USD $75 million with Advent/BlueCrest and were "fully aware that BlueCrest could lead E-Mex to

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96 Exhibit RER-2, Expert Report from Mr. Lazcano, ¶ 45

97 Federal Code of Criminal Procedure, Article 222.

98 Exhibit C-252.

99 *Id*.

bankruptcy and, in fact, BlueCrest [...]commenced bankruptcy proceedings to declare E-Mex insolvent."[100]

129. According to the information contained in Exhibit C-349, BlueCrest commenced commercial summary proceedings before Civil Court No. 45 in the Federal District, now Mexico City, to recover the amount owed. In addition, BlueCrest initiated bankruptcy proceedings before the Mexican courts to declare E-Mex insolvent and seek repayment of the debt, however, the material result of this proceeding was the declaration of commercial insolvency rendered by Mexican courts on January 31, 2013,[101] which put the E-Mex Permit at risk of revocation by SEGOB.

G. The Claimants plan a way to exploit the E-Mex Permit independently from and without E-Mex's knowledge, which was eventually declared unlawful by the Mexican Courts

1. The "Safeguards" planned by the Claimants had a high risk of being challenged by the permitholder, E-Mex

130. Mr. Gutierrez states that, at the beginning, E-Games had no "setbacks at all", but shortly after obtaining authorization as an operator, towards the end of 2008 and mid-2009, E-Games clashed with E-Mex. The causes of the conflict, according to Mr. Gutierrez, were that: *i)* E-Mex failed to pay its debt with BlueCrest; *ii)* E-Games discovered that E-Mex had pledged its gaming machines as collateral for that loan, and *iii)* [they disagreed] as to the way in which the royalties that E-Games had to pay to E-Mex pursuant to the Operating Agreement should be calculated.[102]

131. Mr. Gutierrez also says that, "at that time", Mr. Burr's priority was obtaining an autonomous and independent permit from SEGOB. And, in this context, Mr. Gutierrez and his firm advised the Claimants to follow-up what he called "protection measures E-Games they could take before SEGOB" so that they would not be affected by E-Mex.[103] The three protection measures referred to by Mr. Gutierrez are the following: *oficio* DGAJS/SCEV/0194/2009 dated May 8, 2009, and *oficios* DGAJS/SCEV/0260/2009 and DGAJS/SCEV/0260/2009-BIS, both dated May 27, 2009, all of which are explained below:

a. Oficio DGAJS/SCEV/0194/2009, dated May 8, 2009

132. On May 7, 2009, E-Games requested SEGOB to recognize it as E-Mex's operator.[104] This was unnecessary because E-Mex had already filed a request for E-Games to be recognized as its operator and SEGOB had already granted that request. The Respondent assumes that this [new

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101 Exhibit R-040, Judgment from the Second Unitary Court of the Fourth District dated January 31, 2013 (declaration of commercial insolvency).

101 Exhibit R-040, Judgment from the Second Unitary Court of the Fourth District dated January 31, 2013 (declaration of commercial insolvency).

102 Exhibit CWS-52, Fourth Witness Statement of Mr. Gutierrez, ¶ 20.

103 *Id,* ¶ 23.

104 Exhibit C-9.

request] was a consequence of the dispute between E-Mex and E-Games, but it will wait for the opportunity to request documents before taking a definitive position on this point.

133. The day following the submission of the request, SEGOB issued the requested certification and referenced the *oficios* sent to E-Mex on December 9, 2008 and February 13, 2009:

> This administrative authority hereby certifies, for all legal and administrative purposes that are admissible, that it recognizes the society Exciting Games, S. de R.L. de C.V. as the function of operator for the permit holder Entretenimiento de México, S.A. de C.V., for the use of the permit DGAJS/SCEVF/P-06/2005, dated on May 25, 2005, and its subsequent modifications.
>
> The aforementioned is certified by virtue of the fact that the society permit holder Entretenimiento de Mexico, S.A. de C.V fulfilled all of the requirements stated in Aarticle 30 of the Federal Law on Games and Lotteries, maintaining thus the official letters DGAJS/SCEV/00619/2008, dated December 09, 2008, and DGAJS/SCEV/0059/2009, dated February 13, 2009.[105]

134. The Claimants argue that this *oficio* is different from the previous two *oficios* because it was issued directly to E-Games, but it has not explained why it considered necessary to request it in the first place.[106] The *oficio* dated May 8, 2009 does not have the extraordinary nature the Claimants ascribes to it. The SEGOB issued the *oficio* pursuant to Article 30 of the Regulations, which states that an operator's certificate will be issued upon request from a company acting as such.[107]

b. Oficio DGAJS/SCEV/0260/2009, dated May 27, 2009

135. On May 27, 2009, SEGOB issued *oficio* DGAJS/SCEV/0260/2009 (Oficio 0260/2009) whereby it ruled that E-Games had complied with its obligation to submit revenue reports and pay contributions, pursuant to Article 29 of the Regulations. Mr. Gutierrez characterize this *oficio* as an "exceptional measure," because, in accordance with Article 29 of the Regulations, the permitholder is responsible for submitting this information to SEGOB. He also states that, by this action, SEGOB recognized E-Games' rights as an independent entity:

> 24. The second relevant measure was the submission and receipt of the report on income and payment of shares directly from E-Games to SEGOB, recognized in an official resolution dated May 27, 2009.12 This measure was exceptional since according to section 29, subsection VI of the Regulation, the person responsible for complying with the disclosure of such information would have been the permit holder E-Mex, who had indirectly been submitting information on E-Games to SEGOB through the permit holder nature. In principle, SEGOB would only have received information from the permit holder, not from the operator, but given the disagreement between E-Mex and

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105 Exhibit C-9.

106 Memorial, ¶ 91.

107 Article 3, paragraph 3 of the RLFJS: "The Department will register those operators that have authorized to act as such in the Gaming and Sweepstakes Database, and will issue certificates to those operators who petition it." Exhibit R-033, RLFJS. Exhibit R-04, Petition dated May 7, 2009 whereby E-Games requested a certificate of its operator status.

> E-Games and the threats from the former, the fact that SEGOB recognized E-Games' rights as an independent entity from EMex- and allowed it to exceptionally perform its obligations to SEGOB directly, was a first step in recognizing the operator's acquired rights based on Mexican law.[108] [Emphasis added]

136. It is surprising for Mr. Gutierrez to characterize as "exceptional" the fact that SEGOB allowed E-Games to directly submit the contribution payment reports, since it was the company itself who, through a filing submitted in February 2009, informed SEGOB that it was directly submitting the reports because the operator was required to do so in accordance with clause five of the Operating Agreement.[109]

137. Mr. Gutierrez also states that up to May 27, 2009, when Oficio DGAJS/SCEV/0260/2009-BIS (2009-BIS Oficio) was issued, E-Mex had been submitting the monthly reports to SEGOB. This statement is false, since there is evidence that it was E-Games that had been submitting the contribution payment reports in previous months. For example, Oficio DGAJS/SCEV/00124/2009, dated March 18, 2009, whereby SEGOB acknowledges that E-Games had satisfied the requirement.

138. SEGOB specifically stated that, the fact that the operator had submitted its reports, did not imply that SEGOB had recognized E-Games in any capacity other than operator of the E-Mex permitholder:

> Therefore, pursuant to Articles […], this authority acknowledges the "contributions" payment report referred to by the Operator, and therefore this report is deemed to have been received and exhibited in terms of the respective permit, and has been added to the files of this Directorate for all applicable legal and administrative purposes; without recognizing any status, other than operator, to manage only five of the establishments authorized to Entretenimiento de Mexico […].[110] [Emphasis added]

139. Finally, it must be clarified that Oficio 0260/2009, which Mr. Gutierrez has characterized as exceptional, does not recognize E-Games as an independent entity. This is his own (and inaccurate) interpretation of the document's text. The only thing the *oficio* states is that E-Games' duty to submit the revenue report set forth in Article 29 of the Regulations and clauses five and six of the Operating Agreement executed with E-Mex "has been satisfied."[111]

c. Oficio DGAJS/SCEV/0260/2009-BIS, dated May 27, 2009

140. On May 18, 2009, E-Games requested SEGOB to recognize its rights to operate alleging that "it has met the legal requirements for vested rights *["derechos adquiridos"]* and therefore will exercise these rights alongside and independently from the permitholder."[112] In response to this request, on May 27, 2009, SEGOB issued *oficio* DGAJS/SCEV/0260/2009-BIS (the 2009-

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108 CWS-52, Fourth Witness Statement of Julio Gutiérrez Morales, ¶ 24.

109 Exhibit R-042, E-Games petition dated February 18, 2009.

110 Exhibit R-043, Oficio DGAJS/SCEV/00124/2009, dated March 18, 2009.

111 Exhibit R-044, Oficio DGAJS/SCEV/0260/2009 (not bis), dated May 27, 2009.

112 Exhibit R-045, E-Games Petition, dated May 18, 2009.

BIS Oficio). The Claimants claim that this *oficio* granted them the legal status of "independent operator", which translated into the right for "E-Games to operate casinos independently from any E-Mex permit."[113]

141. In their Memorial, the Claimants explain that the "independent operator" status was based on a precedent from 2008, whereby SEGOB authorized a company called Petolof to continue to use another company's permit because it had vested rights.[114] The Claimants point to the alleged similarities between their case and the Petolof case. However, as it will be explained in Section II.T *infra*, the Petolof case has significant differences that the Claimants should have identified or quite possibly did identify and decided to move forward with their plan regardless. At any rate, the 2009-BIS Oficio makes no reference to the Petolof Case nor does it state that the Petolof case was used as a reference.

142. The Claimants, with the advice of their attorneys,[115] made a high-risk business decision to design a plan to obtain an independent operator oficio, the success of which depended on E-Mex's not learning of the existence of the 2009-BIS Oficio, to avoid a potential challenge before the courts. The Claimants' were successful in their strategy until 2012, when E-Mex found out about it and immediately resorted to legal action.

H. The Dispute between E-Games and E-Mex for royalty payments

143. The Claimants' acknowledged that there was a contractual dispute regarding the calculation of royalty payments E-Games was supposed to pay to E-Mex. It appears that the dispute arose because E-Games believed that the royalties should be calculated on the basis of the after-tax revenues, while E-Mex believed that they should be calculated based on pre-tax revenues:

> 98. Third, there was a contractual disagreement regarding E-Games' payment of royalties to E-Mex. 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. 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. Unhappy with the court's order and E-Games' compliance with it, E-Mex sent a notification attempting to unilaterally terminate the Operating Agreement with E-Games on December 23, 2009. By the agreement's terms, E-Mex could not unilaterally terminate the Agreement. This further soured E-Games' relationship with EMex, while at the same time underscoring the great risk for E-Games and Claimants to continue to operate under E-Mex's permit.[116]

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113 Memorial, ¶ 106

114 Memorial, ¶ 118.

115 Memorial, ¶ 84 ("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").

116 Memorial, ¶ 98.

144. Because of this disagreement, on September 20, 2010, E-Mex filed for local arbitration with the CAM against E-Games, demanding royalty payments pursuant to the "Operating Agreement" and the termination of the Operating Agreement:[117]

> (a) Royalty payments from the operation of the Entertainment Centers, [calculated] as 11.25% of their revenue operating revenue.
>
> (b) Payment of past-due interest for overdue royalty payments at an annual rate of 9% pursuant to Article 2395 of the Civil Code (which applies by extension to the Commercial Code).
>
> (c) A declaration terminating the Operating Agreement.
>
> (d) A declaration ordering each party to "pay its own costs, various fees, and an equitable portion of the arbitrators' and CAM arbitration fees.[118]

145. As for E-Games, it argued that it was not required to pay any consideration because no consideration was ever agreed upon. In addition, it alleged that in order for E-Mex to demand the payment of any consideration, first "it would have had to perform its explicit duties of loyalty, communication, and diligence, and also its implied duties of administering, advising, managing, and acquiring the necessary equipment to operate the Entertainment Centers under the Permit, and of course, it would have to directly perform the obligations inherent upon a Games and Sweepstakes permitholder set forth in the Regulations related to the operation of Entertainment Centers, which did not occur."[119]

146. On December 19, 2012, the CAM arbitration centre issued its award terminating the Operating Agreement executed between E-Mex and E-Games. The CAM centre also ordered E-games to pay E-Mex:

> (a) $23,097,353.10 pesos for royalties from December 2009 to August 2012.
>
> (b) $1,566,371.88 pesos in past-due interest accrued until August 21, 2012.[120]

147. Furthermore, the CAM centre ordered E-Games to pay E-Mex royalties from September 1, 2012 until the date of the award, i.e., December 19, 2012. [121,122]

148. On October 11, 2013, E-Mex and E-Games executed a settlement agreement arising from the CAM arbitration, whereby the award issued by the CAM centre was enforced.[123] This date is significant because by then SEGOB had revoked the E-Games permit in compliance with Amparo

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117 Exhibit CWS-52, Fourth Deposition of MR. Gutierrez, ¶ 43 and Memorial ¶ 99. It is important to note that royalties were established in the Transaction Agreement and not the Operating Agreement as stated by the Claimants.

118 Exhibit C-356. ¶ 53.

119 Exhibit R-035. Answer in Arbitration 58/2010 between E-Mex and E-Games, Monday, May 09, 2011. ¶ 39.

120 Exhibit C-356, p. 107. Third Resolution.

121 Exhibit C-22, p. 25.

122 Exhibit C-356, p. 107. Fourth Resolution.

123 Exhibit C-22.

judgment 1668/12, but the District Court Judge had not yet ruled on the judgement enforcement and SEGOB had not closed the Casinos.

149. The recitals section of the settlement agreement from the CAM arbitration also states that on March 25, 2013, SEGOB ruled that E-Mex could only operate three establishments directly and could not authorize additional [facilities].[124] It also states that as a consequence of this decision, E-Mex was unable to operate the establishments it was allowed to operate because they had already been authorized "to [E-Games] among other operators, under its former Operator."[125] It also explains that E-Mex and E-Games were involved in several different disputes that gave rise to administrative, civil, commercial, and criminal litigation, along with amparo and nullity proceedings and concluded that: "in order to offset the damages arising from the disputes between the parties, the purpose of this agreement is for E-Mex to recognize the [E-Games] permit and for E-Games to pay the compensation owed and damages caused."[126]

150. In the settlement agreement from the CAM arbitration, E-Games agreed to pay E-Mex 175 million pesos, which included the damages determined by the CAM centre ($40 million pesos); costs and expenses arising from the arbitration proceeding ($11 million pesos); and damages ($123 million pesos). At the exchange rate for October 11, 2013[127] (i.e., the signing date of this agreement) the total amount was equal to USD $13.5 million dollars.[128]

151. The payment of this debt was subject to a payment plan, secured by a pledge consisting in "all equity interest in [E-Games]" which would be recorded in the E-Games Special Member Log and in the Public Commercial Registry.[129]

152. Pursuant to the settlement agreement from the CAM arbitration, the parties also agreed to inform SEGOB that E-Mex and E-Games had reached an agreement related to the E-Games permit (DGAJSISCEVF/P-0612005-BIS) and to not provide a copy of the agreement to the authorities:

> 9. SEGOB Communication. In a period of no longer than 10 (ten) business days, EMex is obligated to communicate to the Ministry of the Interior (SEGOB) that it concluded a transaction with Egames related to Permit DGJS/SCEV/1426/2012 with alphanumeric code DGAJS/SCEVF/P-06/2005-BIS. A copy of this instrument shall not be submitted due to its confidential nature. Egamcs shall not submit a copy of this agreement, but rather, in the event, shall only confirm the existence of this agreement.[130]

153. The Respondent is unaware whether the parties to the settlement agreement in the CAM arbitration ever performed their respective obligations. Mexico reserves the right to analyze these

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124 *Id.*, p. 26.

125 *Id.*, p. 26.

126 *Id.*, p. 26.

127 Exhibit R-038. The FIXED exchange rate on that date was $13.0514 pesos/USD.

128 Exhibit C-22, p. 9.

129 *Id.*, pp. 29-30.

130 *Id.*, p. 32.

facts in more detail and to modify its position if the Claimants provide documents to clarify these facts and the circumstances surrounding them during the document production phase.

I. E-Games receives its own permit and continues to operate its Casinos under the same terms as the E-Mex Permit

154. As will be explained in Section II.H supra, E-Games had a poor business relationship with E-Mex practically since the beginning and, among the consequences of this poor relationship, is the arbitration proceeding commenced by E-Mex against E-Games at the CAM for royalty payments. However, this is merely one example of several that show the tension-filled relationship between the two companies. According to Mr. Gutierrez, hostilities reached a boiling point on December 28, 2009. E-Mex unilaterally sent the letter to E-Games notifying it of its intention to terminate the operating agreement between both companies.[131]

155. On December 28, 2009, E-Games petitioned SEGOB to refrain from revoking the *oficios* recognizing its status as operator and conducting any inspections or suspending operations of the Casinos it operated.[132] On July 21, 2010, SEGOB confirmed E-Games' status as operator of the E-Mex Permit for seven casinos and requested documentation to substantiate its compliance with the Regulations.[133]

156. E-Games did not satisfy the request made by SEGOB in the July 21, 2010 *oficio* until October 26, 2010. E-Games also requested, once again, for SEGOB to confirm the operation and use of the E-Mex Permit, despite the insolvency proceedings against E-Mex.[134] On December 8, 2010, SEGOB immediately informed E-Games that it had satisfied the requirement and confirmed its status as operator (not as "independent operator" as alleged by the Claimants)[135] of the seven casinos. Finally, SEGOB emphasized that E-Games had the right to apply for a permit to continue operating in the event that the E-Mex Permit was revoked when E-Mex was declared commercially insolvent, as established by the Regulations. According to the Claimants, this was "a formal invitation to file for its own independent permit."[136] However, SEGOB clarified that the *oficio* was not to be taken as a preauthorization and therefore it would rule on the application in accordance with applicable law.[137] The SEGOB established a simple situation: anyone can file for a casino permit pursuant to Articles 20 and 21 of the Regulations. This was not a "formal invitation."

157. On February 22, 2011, E-Games filed for a permit with SEGOB.[138] As stated by the Claimants in the Memorial, E-Games had requested to be a permitholder "in the same conditions

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131 Exhibit CWS-52, Fourth Witness Statement of Mr. Gutierrez, ¶ 28.

132 Exhibit C-12.

133 *Id*.

134 Exhibit C-13.

135 Memorial, ¶ 130.

136 *Id.*, ¶ 130.

137 Exhibit C-13. ("Given the case, this is not a preauthorization and this authority will make all appropriate decisions in accordance with the law").

138 *See* Exhibit C-14.

as E-Mex's permit in Resolution DGAJS/SCEVF/P-06/2005 [E-Mex Permit]."[139] Therefore, E-Games use the pertinent provisions of the Regulations as a basis, along with all *oficios* issued by SEGOB since December 2008 that had recognized it as operator of E-Mex. E-Games included the 2009-BIS Oficio among these *oficios*, which it obtained without the knowledge of E-Mex as permitholder:

> That by means of this instrument and pursuant to articles… ; as well as order number DGAJS/SCEV/00619/2008, dated December 9, 2008; number DGAJS/SCEV/0059/2009, dated February 13, 2009; number DGAJS/SCEV/0194/2009, dated May 8, 2009; number DGAJS/SCEV/0260/2009, dated May 27, 2009; number DGAJS/SCEV/0260/2009-BIS, dated May 27, 2009; number DGAJS/SCEV/0321/2010, dated July 21, 2010, and number DGAJ/SCEV/550/2010, dated December 10, 2010, each and every one of them issued by this General Deputy Directorate of Gambling and Lottery of the Ministry of the Interior (SEGOB), before you with all due respect I hereby appear to request in accordance with the aforementioned legal principles, the PERMIT described herein…[140] [Emphasis added]

158. On May 12, 2011, SEGOB requested several documents and information that E-Games had failed to provide in order to apply for a permit in accordance with the Regulations. In total, SEGOB identified 28 deficiencies in E-Games application.[141] Therefore, SEGOB asked E-Games to submit all the information in order to satisfactorily evaluate its application.

159. Several months later, on November 18, 2011, SEGOB decided via official notice DGAJS/SCEV/546/2011 that E-Games had satisfied the requirements of the Regulations to continue operating the Casinos according to the E-Mex Permit.[142] However, regarding its application to obtain a permit, SEGOB decided to suspend the application until E-Mex was declared commercially insolvent. The Claimants allege that SEGOB's decision to delay their application "seemed motivated by a policy cronyism rather than a transparent enforcement of the [Regulations]."[143] This is a baseless allegation. SEGOB explained that its decision was based on the fact that the establishments were registered under the E-Mex Permit and if authorized, it would increase the number of establishments under the E-Mex Permit, which violated the public policy implemented to avoid the increase of authorized facilities:

> Regarding the request of the petitioner to continue operating the establishments that it currently has authorized under the capacity of operator of the permit DGAJS/SCEVF/P-06/2005 issued in favor of the company Entretenimiento de México S.A. de C.V., it should be noted that since the permit holder has not set up the declaration of bankruptcy,

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139 Memorial, ¶ 131; CER-3, ¶ 62.

140 *See*, Exhibit C-14, p. 1.

141 *See Exhibit R-046.*, Exhibit R-046, Oficio DGAJS/SCEV/0232/2011, dated May 12, 2011 whereby SEGOB requests that E-Games provide complete documentation in order to evaluate is permit application.

142 Exhibit C-352, p. 4. However, E-Games had still not satisfied all requirements, "they still do not have the opinion outlined in the statute, which […] must be filed for purposes of curing or justifying such defect, once the…legal status of the permitholder has been resolved."

143 Memorial, ¶ 133.

> and therefore the ground for revocation provided for Article 151, Section V is not updated; this Authority is not able to issue a final decision regarding the process of changing the status from operator to permit holder that concerns us. The above in view of the fact that such establishments are part of the Remote Betting Centers and Number Sweepstakes Rooms for which the aforementioned permit holder has a permit, so it is not appropriate for this Deputy Directorate General to decide at this time on the reasons given, since the number of establishments would be increased, which is contrary to the policy of not encouraging the increase in the number of authorized establishments at present. Therefore, the change of status requested should result in equal or lesser number of those existing to date within the universe of said permit, and this can only happen until the update of the revocation of permit DGAJS/SCEVF/P-06/2005 issued in favor of the company Entretenimiento de México S.A. de C.V.[144] [Emphasis added]

160. So, because E-Mex had not yet been declared commercially insolvent and the fact that the Respondent had established a policy to avoid an increase in the number of casinos, it would not rule on the E-Games permit application until E-Mex was effectively declared commercially insolvent.

161. On August 15, 2012, SEGOB issued Oficio DGJS/SCEV/0827/2012 (Permitholder Oficio) in which it decided E-Games' application to become a permitholder.[145] In the Permitholder Oficio, SEGOB stated that on June 14, 2012, E-Games reported that E-Mex had been declared commercially insolvent ["concurso mercantil"] on March 5, 2012 and that bankruptcy proceedings had commenced. On August 13, 2012, two days after issuing the Permitholder Oficio, SEGOB commenced an administrative proceeding against E-Mex and its permit. Under these circumstances, SEGOB changed E-Games' status and authorized it to use the E-Mex Permit for seven casinos. Notably, SEGOB acknowledged the vested rights it held on the E-Mex Permit due to the *oficios* issued to E-Games, among them the 2009-BIS Oficio.

> IT IS RESOLVED:
>
> FIRST. Ownership of the acquired rights is determined and recognized, on the use and exploitation of the permit Number DGAJS/SCEVF/P-06/2005, dated on May 25, 2005, and its amendments, in favor of "Exciting Games S. de R.L. de C.V." in terms of the documents … DGAJS/SCEV/0260/2009-BIS, dated on May 27, 2009, …, which specifically refer to (7) seven Remote Betting Centers and (7) Number Drawing Rooms. Recognized rights that cannot be infringed, regardless of any prior or precedent contractual relationship.
>
> Stressing that the acquired rights are naturally limited to the terms and conditions of the DGAJS/SCEVF/P-06/2005 permit, dated on May 25, 2005, and their amendments, which constitute as the origin and limit of their rights and obligations.

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144 Exhibit C-352. Exhibit C-366. Actually, SEGOB's response is consistent with the press release referenced in the Compliant, which stated that "After the fire in the Casino Royale in Monterrey, Nuevo Leon, where 52 people lost their lives, the Director of SEGOB [Blake Mora] said "we're going to continue regulating the industry by not granting more permits." In an interview…Blake Mora said SEGOB is reviewing all casinos and gambling houses throughout the country, with the purpose of detecting any irregularities in their operations or to update their operating information."

145 Exhibit C-254.

…

> THIRD… it decides to decree the change of status or legal status in favor of Exciting Games S. DE R.L. DE C.V., so it is granted and determined for all legal effects and with all formalities, in its favor, the status of holder of a federal permit in terms of games and raffles, under the same terms and conditions of the rights and obligations of exploitation and operation of permit DGAJS/SCEVF/P-06/2005, and its modifications, with respect to Seven Remote Gambling Centers and Seven Lottery Number Rooms.[146] [Emphasis added]

162. The SEGOB had ruled that E-Games' rights and obligations as permitholder were the same as those in the E-Mex Permit: "[…] the acquired rights are naturally limited to the terms and conditions of the [E-Mex Permit], and its amendments, which constitute as the origin and limitation of their rights and obligations."[147]

163. A few months later, on November 7, 2012, E-Games petitioned SEGOB to confirm the Permitholder Oficio.[148] E-Games requested the general director of the DGJS to issue a new *oficio* to provide more certainty because the Permitholder Oficio had been signed by the deputy director. E-Games agreed with the Permitholder Oficio, but had only asked the Director for a new *oficio* to "provide legal certainty:"

> REQUEST:
>
> SOLE. Along these lines, my principal hereby fully submits to the general contents of the [Permitholder Oficio]. However, and concerning the proper grounds of competency of the Deputy Director of Permit Authorizations, I hereby request that You, for the sole purpose of providing legal certainty to referenced action, and pursuant to Article 6 of the Federal Law of Administrative Procedure currently in effect, adopt the contents of the [Permitholder] Oficio, and pursuant to the referenced law, cure it and have the Directorate of Games and Sweepstakes follow suit with regard to the proper grounds of the issuing official's competency, in the understanding that the remaining content of the foregoing Oficio would prevail.[149] [Original Emphasis]

164. Consequently, on November 16, 2012, SEGOB issued another *oficio* confirming the content and terms of the Permitholder Oficio as requested (Permitholder-BIS Oficio).[150] The SEGOB stated that there had been no illegality because the deputy director who signed the Permitholder Oficio was authorized to sign it. The SEGOB stated:

> I allow myself to inform you that content of the [Permitholder Oficio] satisfies the formal and substantive requirements of a valid government action…; accordingly, there is no deficiency that requires curing. However, and to provide legal certainty to your principal, "Exciting Games, S de R.L. de C.V.," this Directorate of Games and

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146 *Id.*, pp. 6-7.

147 *Id*., p. 6.

148 Exhibit R-047, E-Games petition dated November 7, 2012 whereby it requests that the Permitholder Oficio be corrected and issued by the General Director of Gaming and Sweepstakes.

149 *Id.*, p. 3.

150 Exhibit C-16.

> Sweepstakes again and directly acknowledges the legal effects of the [Permitholder Oficio] as issued for all applicable legal purposes, pursuant to the authority granted to the Directorate of Games and Sweepstakes set forth in Article 2(B)(XII) in relation to Article 15 Ter of the Internal Regulations of the Secretariat of the Interior.[151]

165. It is important to highlight that the E-Games permit was granted through the Permitholder Oficio, because it was there where SEGOB authorized a "status change" for E-Games and granted it title of the rights to use and operate the E-Mex Permit. This conclusion is reinforced by the fact that SEGOB used applicable provisions as a legal basis for issuing the permits.[152] Even if the Permitholder Oficio does not expressly reference the term permitholder, the characteristics given allow for the conclusion that the E-Games permit was established by the Permitholder Oficio, which was confirmed by the Permitholder-BIS Oficio in all its terms.

1. The E-Games Permit

166. As described in the preceding section, E-Games filed for and received a permit under the same terms and conditions as the E-Mex Permit. E-Games benefited from its status as operator, which is authorized by SEGOB in several *oficios,* including the 2009-BIS Oficio. In practical terms, the Permitholder Oficio the transfer or part of the E-Mex Permit (with only seven casinos). These were the terms under which E-Games filed for its permit on February 22, 2011and therefore the terms under which SEGOB issued the Permitholder Oficio and [153] is confirmed in the Permitholder-BIS Oficio:

Oficio DGJS/SCEV/0827/2012	**Oficio DGJS/SCEV/1426/2012**
(Permitholder Oficio)	(Permit-BIS Oficio)
[i]t decides to decree the change of status or legal status in favor of Exciting Games S. DE R.L. DE C.V., so it is granted and determined for all legal effects and with all formalities, in its favor, the status of holder of a federal permit in terms of games and raffles, under the same terms and conditions of the rights and obligations of exploitation and operation of permit DGAJS/SCEVF/P-06/2005, and its modifications, with respect to Seven Remote Gambling Centers and Seven Lottery Number Rooms.[154] [Emphasis added]	It is hereby decided that there will be a change of legal status for Exciting Games, S. de R.L. de C.V., so it is given and determined for all legal purposes and all formalities the condition of holding a federal permit for gaming and lotteries under the same terms and conditions of the rights and obligations of exploitation and operation of the permit DGAJS/SCEVF/P-0612005, as amended, regarding (7) Seven Remote Gambling Centers and (7) Seven

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151 *Id.*, p. 1.

152 The Permitholder Oficio was issued pursuant to, among others, Article 4 of the LFJS and Article 2, paragraph 3, of the RLFJS.

153 Memorial, ¶ 131.

154 C-254, pp. 6-7.

> Lottery Number Rooms under permit No. DGAJS/SCEVF/P-06/2005 Bis.[155]

167. The E-Games and the E-Mex permits shared the same number except for the suffix "BIS" at the end for E-Games:

E-Mex Permit	E-Games Permit
DGAJS/SCEVF/P-06/2005	DGAJS/SCEVF/P-06/2005-Bis

168. The Claimants state that the *oficio* dated November 16, 2012 "grants E-Games an independent permit in the same terms and conditions as E-Mex Permit, including the duration of the permit for a period of 25 years."[156] Therefore, Claimants argue that the permit is valid until 2037.[157] These allegations are completely inaccurate.

169. Claimants argue that the permit "does not precisely indicate when it comes into effect, and ties its duration to the duration of E-Mex permit."[158] However, if the Permitholder Oficio was not clear as to its term, E-Games could have included this clarification in its petition dated November 7, 2012, when it requested confirmation of the permit. In fact, specifying when the permit would go into effect in relation to its duration was not necessary, because, in the words of the Claimants, the permit's duration was linked to "the duration of the [E-Mex Permit]."[159]

170. The Permit-BIS Oficio is not an independent permit. To the contrary, the text of this document clearly establishes that the permit was a <u>continuation</u> of the E-Mex Permit under the same terms, conditions, and legal scope:

> [a] permit to be granted the same rights and obligations under identical conditions in which it had been operating along with modifications made thereto, i.e., authorizing it to <u>continue performing their activity in the same terms, conditions, legal scope and materials</u> of permit number DGAJS/SCEVFIP-06/2005 and the modifications it holds.[160] [Emphasis added]

171. If the permit received by E-Games was granted as a continuation of the E-Mex Permit, under the same terms, the duration must also be the same for E-Games. The E-Mex Permit does not state that it is valid for 25 years, but instead specifies its validity, i.e., from May 25, 2005 and expires on May 24, 2030:

- TERMS

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155 Exhibit C-16, p. 6.

156 Memorial, ¶ 153.

157 *Id.*, ¶ 155.

158 *Id.*, ¶ 153.

159 *Id*.

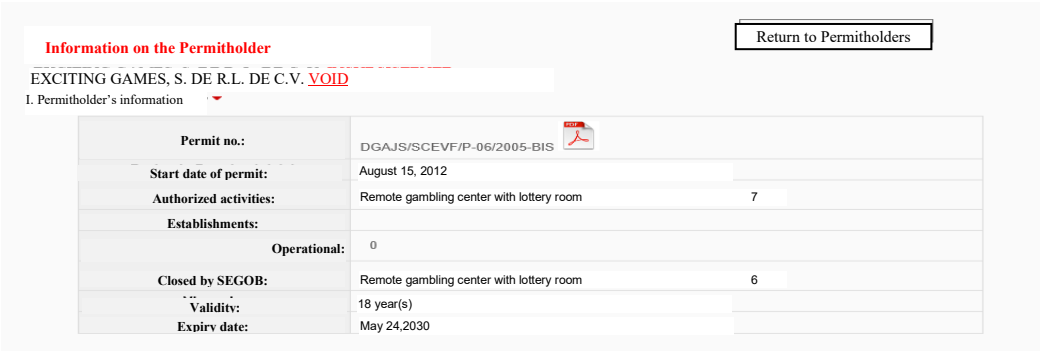
160 Exhibit C-16, p. 6.

A) EFFECTIVE TERM

May 25, 2005 and expires on May 24, 2030

The effective term of this permit begins on the date of its issuance.[161]

172. Therefore, E-Games would have a valid permit until May 24, 2030 and not until 2037 as incorrectly stated. This is also substantiated by SEGOB website, which still has information posted relating to the E-Games permit:[162]



Information on the Permitholder

Return to Permitholders

EXCITING GAMES, S. DE R.L. DE C.V. VOID

I. Permitholder's information

Permit no.:	DGAJS/SCEVF/P-06/2005-BIS	
Start date of permit:	August 15, 2012	
Authorized activities:	Remote gambling center with lottery room	7
Establishments:		
Operational:	0	
Closed by SEGOB:	Remote gambling center with lottery room	6
Validity:	18 year(s)	
Expiry date:	May 24,2030	

2. The E-Games Permit was related to the 2009-BIS Oficio, which in turn originated form the E-Mex Permit

173. The Claimants have dedicated an entire section of their Memorial to an attempt to show the lack of "procedural or legal correlation between the E-Games' independent operator permit and the E-Games' independent permit."[163] The Claimants believe that their analysis shows "failures within SEGOB and in the Mexican judiciary and their highly inconsistent treatment of E-Games' permit."[164]

174. With the help of their expert, Mr. Gonzalez, the Claimants state that "there are two requirements for there to be a logical or procedural connection between one government action or resolution and another: (1) a SEGOB action or resolution must predate another; and (2) the former SEGOB action or resolution must be either the cause or justification for the subsequent act or resolution."[165] Based on this approach, Mr. Gonzalez identifies three potential scenarios to determine whether or not there is a logical progression between the E-Games' independent operator status and its permitholder status.[166] The three *oficios* analyzed in these three scenarios

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161 Exhibit C-235, p. 1.

162 Exhibit R-048.Screenshot of the information posted by SEGOB on the E-Games permit.

163 Memorial, Section P.

164 *Id.*, ¶ 162.

165 *Id.*, ¶ 163.

166 *Id.*, ¶ 164 ("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

Footnote continued on next page

are, in chronological order: a) the 2009-BIS Oficio ,[167] b) the Permitholder Oficio, and c) the Permitholder-BIS Oficio.[168]

175. As to the relationship between the 2009-BIS Oficio and the Permitholder Oficio, Claimants acknowledge that the 2009-BIS Oficio was a justification for the Permitholder Oficio:

> [T]he 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.[169] [Emphasis added]

176. The relationship between both *oficios* is also confirmed because the 2009-BIS Oficio was included as one of the legal grounds used by E-Games in their permit application filed on February 22, 2011 (see paragraph 157 *supra*). The Respondent agrees with this conclusion by the Claimants: the Permitholder Oficio was a consequence of the 2009 Oficio-BIS.

177. Concerning the relationship between the Permitholder Oficio and the Permitholder-BIS Oficio, the Claimants' expert concludes that "there is no logical or procedural correlation between the August 15, 2012 Resolution and the November 16, 2012 Resolution."[170] In the Claimants' opinion, the latter was an "independent resolution" that "was not dependent on the August 15, 2012 Resolution or any prior SEGOB resolutions."[171] In support of their position, the Claimants reference an excerpt from the Permitholder-BIS Oficio, omitting not only the context of the *oficio* but also its origin.[172]

178. The Respondent maintains that there is a clear and direct link between the Permitholder Oficio and the Permitholder-BIS Oficio, which allows for the conclusion that the latter is a consequence of the former. As explained in paragraphs 161- 165 *supra*, the nexus between both *oficios* is obvious.

179. After the Permitholder Oficio was issued, E-Games submitted a new application on November 7, 2012 (see paragraph 163 *supra*).[173] The following stands out from the application:

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). […].").

167 2009 Oficio-BIS.

168 Permitholder Oficio-BIS.

169 Memorial, ¶ 166.

170 *Id.*, ¶ 174.

171 Memorial, ¶ 170.

172 *Id.*, (" 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").

173 Exhibit R-047, E-Games Petition, dated Wednesday, November 7, 2012.

- E-Games did not request a change in the scope of the Permitholder Oficio. On the contrary, it confirmed its scope ("my principal hereby fully submits to the general contents of the DGAJS/SCEV/0827/2012 Oficio").[174]
- E-Games' sole request was that the General Director of Games and Sweepstakes reissue the *oficio* ("cure it and adopt it"), since the previous *oficio* was issued by the Deputy Director, "in the understanding that the remaining contents of the [Permitholder] Oficio [would prevail]"[175] [Emphasis added].

180. The Claimants state that E-Games' petition was to request its own independent permit under a different permit number.[176] This is incorrect as shown in the preceding paragraph. But it is also false that "SEGOB analyzed *de novo* E-Games' request for an independent and autonomous permit."[177] Upon reading the Permitholder-BIS Oficio, it can be concluded that the purpose of the *oficio* was not to issue a new resolution but to confirm the Permitholder Oficio and assign a different number to the E-Games permit:

> I hereby inform you that the contents of order DGAJS/SCEV/082712012 dated August 15, 2012 meets the requirements of substance and form for a valid administrative act …, therefore there is no fault to be rectified. However, in order to give legal certainty to your client "Exciting Games, S. de R.L. de C.V.", on a new account and directly, the Directorate General of Gaming and Lotteries, based on the powers of the Directorate General of Gaming and Lotteries set out in articles 2, paragraph B), section IX, section 12 XII, in relation to the 15th of the Internal Regulations of SEGOB, and 2nd, the third paragraph of the Federal Regulations on Gaming and Lotteries, the term of the order DGAJS/SCEV/0827/2012, dated August 15, 2012, in the terms in which it was issued, for the respective legal purposes.[178] [Emphasis added]

181. The Claimants support their claim that this resolution was separate from the Permitholder Oficio with an excerpt from the Permitholder-BIS Oficio.[179] The Claimants' conclusion would make sense if you use an isolated and out-of-context approach. In fact, from a comprehensive reading of the Permitholder-BIS Oficio it is plain to see that it is clearly related to the Permitholder Oficio, given that the former intended to confirm the terms of the latter by stating the following: "the content of Oficio DGAJS/SCEV/0827/2012, dated August 15, 2012, remains in effect under the terms that it was issued." [Emphasis added]

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174 *Id.*, ¶ 3.

175 *Id.*, ¶ 3.

176 Memorial, ¶ 170.

177 *Id*.

178 Exhibit C-16.

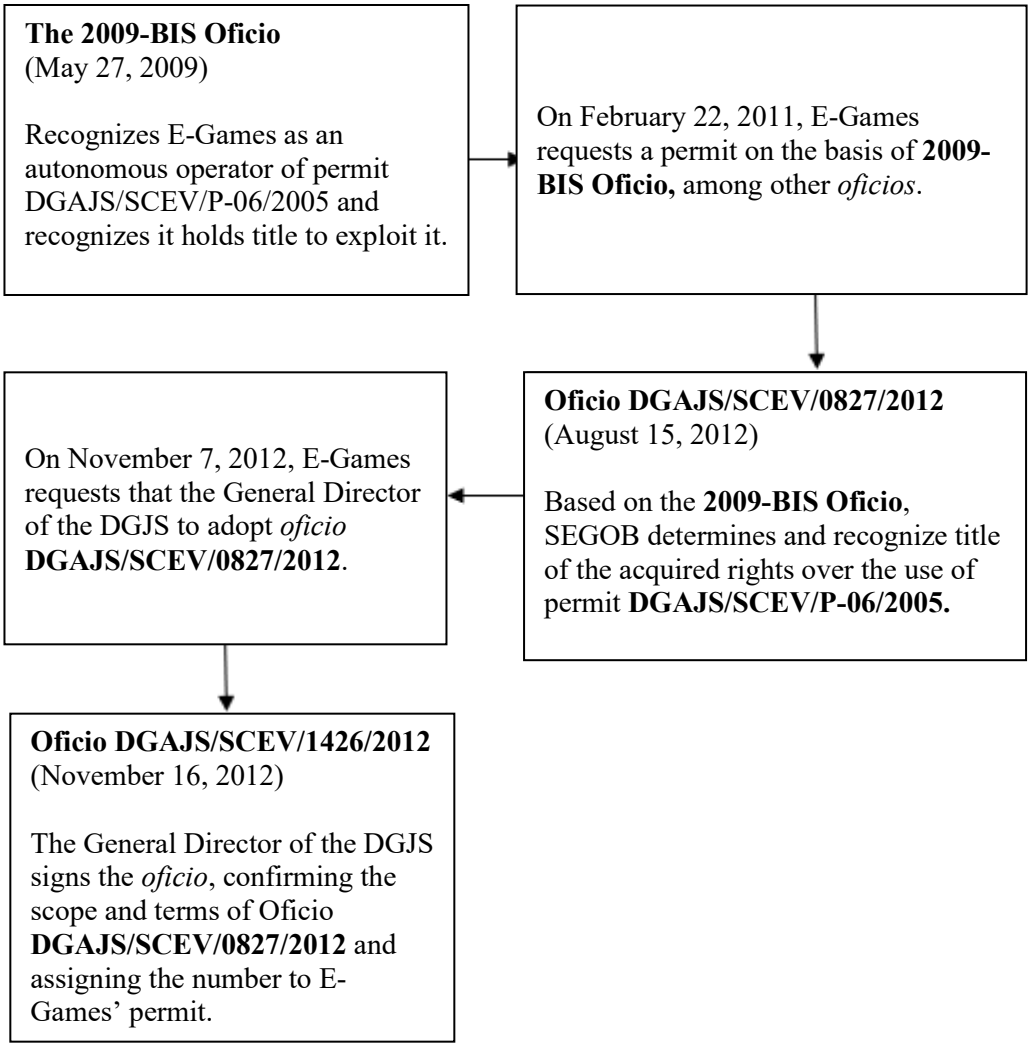
179 Memorial, ¶ 171. The excerpt of the Permitholder Oficio-BIS referenced by the Claimants states: "In this regard, we must clarify that the resolution that gave rise to the first petition from your principals was not the status change stated in … [the resolution] dated August 15, 2015, but rather the permit application pursuant to Articles 10, 21, 21, and other related and applicable Provisions of the Federal Gaming Law, as noted in your writing dated June 26,2 012, filed with officials on the same day…"

182. In view of the foregoing, the Respondent maintains that the Permitholder-BIS Oficio was a consequence of the Permitholder Oficio, since E-Games had expressly requested the General Director of the DGJS to issue a new *oficio* without changing the scope of the preceding *oficio*. In effect, SEGOB issued the Permitholder-BIS Oficio, confirming the terms of the Permitholder Oficio.

183. The Claimants allege that there is no relationship between the 2009-BIS Oficio and the Permitholder-BIS Oficio. However, there is a correlation between them because, as stated above, the Permitholder-BIS Oficio was nothing but a continuation and confirmation of the Permitholder Oficio, which was explicitly issued because of the 2009 Oficio-BIS, among other reasons. In addition, the document filed by E-Games on November 7, 2012,[180] which gave rise to the Permitholder-BIS Oficio, clarified that it was not seeking a change in conditions other than those set forth in the Permitholder Oficio. In fact, as explained above, E-Games had expressed its agreement with the scope of such *oficio*. E-Games only requested that the General Director of the DGJS be the one to issue the *Oficio*, because the Permitholder Oficio had been issued by a DGJS Deputy Director.

184. The sequence of relationship between the foregoing oficios can be seen as follows:

[180] Exhibit R-047, E-Games Petition, dated November 7, 2012.



185. Mr. Lazcano, the Respondent's expert, agrees that there is a clear nexus between Permitholder Oficio, Permitholder-BIS Oficio and the 2009 Oficio-BIS:

> [t]he recognition of E-Games as the "holder" of the E-Mex Permit by means of Oficio DGAJS/SCEV/0827/2012 [Document #14] and later as Permittee of the E-Games Permit that emerges from *Oficio* DGJS/SCEV/1426/2012 [Document #15], are concatenated procedures and have a direct causal relationship with the Operator's legal status and the fulfillment of obligations that, at the request of E-Games itself, had been granted with the *Oficio* DGAJS/SCEV/0260/2009-BIS [Document #12]. Otherwise, E-Games should have submitted a request without any reference to the relationship it had with the E-Mex Permit, accompanying all the documents and requirements established in Articles 21 and 22 of the Gaming Regulations, but it did not do so.[181] [Emphasis added]

[181] Exhibit RER-2, Expert Report from Mr. Lazcano, ¶ 106.

3. E-Games even argued in at least two legal proceedings that there was a nexus between the 2009-BIS Oficio and the permit it received in 2012

186. The Claimants failed to mention in their Memorial the two actions they commenced after obtaining their own permit in 2012. As described in this section, E-Games references not only the nexus between its permit and the E-Mex permit but also its nexus with the 2009-BIS Oficio in at least two legal actions filed by E-Mex before the Mexican courts. This nexus with the 2009-BIS Oficio was precisely what the Mexican courts ruled in Amparo 1668/2011, and resulted in the revocation of the E-Games permit (see Section II.L, *infra*).

a. Administrative Action 9606-12-11-02-3.

187. On December 14, 2012, E-Games filed an administrative action *[demanda de juicio contencioso administrativo]* (JCA) against Oficio DGJS/SCEV/1391/2012, dated November 8, 2012 before the federal Tax and Administrative Court *[Tribunal Federal de Justicia Fiscal y Administrativa]* (TFJFA).[182] In this *oficio*, SEGOB denied its authorization for an establishment in the State of Veracruz, because the bond that was submitted [with the application] was for the Puebla Casino (located in San Andres Cholula), which also lacked authorization. E-Games assumed that one of the amendments to the E-Mex permit applied to it and argued that it did not require authorization, only prior notice of the operation. In support of its position, E-Games argued the relationship between 2009-BIS Oficio and the Permitholder-BIS Oficio:

> "FACTUAL SUPPORT OF THE CLAIM:
>
> I.- [The SEGOB] notified permitholder Entretenimientos de Mexico, S.A. de C.V. via oficio DGAJS/SCEV/00619/2018 dated the ninth of December of the year two thousand eight, that it authorized the use of permit DGAJ/SCEVF/P-06/2005, dated the twenty-fifth of May of the year two thousand five, and its amendments, through [E-Games] as OPERATOR; and all its amendments…
>
> ...
>
> IV .- [The SEGOB], via oficio DGAJ/SCEV/0260/2009-BIS, dated the twenty-seventh of May of the year two thousand nine, acknowledged that [E-Games] itself had substantiated that the conditions and requirements set forth in applicable law to operate the permit directly had been satisfied…
>
> V.- Based the foregoing oficios… [E-Games] has vested rights, which today belong to its collective rights and patrimony, that allow it to operate seven lottery halls and an equal number of gambling centers, that is, fourteen establishments.
>
> …
>
> IX.- On the fifteenth of August of the year two thousand twelve, the Directorate of Games and Sweepstakes issued oficio DGAJS/SCEV/0827/2012, whereby it acknowledged my principal's vested rights relating to permit DGAJS/SCEVF/P-06/2005 and its amendments.

[182] Exhibit R-049. Action for Annulment - E-Games Brief 14Dec2012 Exp. 9606-12-11-02-3.

> X.- Currently, the corporation I represent operates a total of six facilities (of the fourteen it has authorized) and I inform you that my principal was recently granted the permit containing alphanumeric code DGAJS/SCEVF/P-06/2005-BIS.[183]
>
> [Emphasis added]

b. Administrative Action 1080/13-11-03-1

188. On February 18, 2013, E-Games commenced a JCA before the TFJFA concerning Oficio DGJS/SCEV/PT-06/2012, dated November 23, 2012.[184] SEGOB had issued a permit to E-Games to install and operate slot machines at authorized establishments. E-Games argued in its complaint, among other things, that the terms of this *oficio* could result in an interpretation that would restrict its rights as a permitholder by failing to consider the terms and conditions of the E-Mex Permit, which had been transferred to E-Games, including its amendments:

> From the analysis done of the content of permit DGAJS/SCEVF/P-06/2005-Bis [E-Games permit], it is clear that my principal enjoys all rights arising from permit DGAJS/SCEVF/P-06/2005 [E-Mex Permit] and its amendments.[185]

189. As in the JCA 9606-12-11-02-3, E-Games believed it was important to highlight the nexus between the E-Mex Permit and the E-Games permit to support its position. To this effect, E-Games linked the relevant *oficios* that tied them together, including the 2009 Oficio-BIS, the Permitholder Oficio, and Oficio Permitholder-BIS:

> "FACTUAL SUPPORT OF THE CLAIM:
>
> 1.- [The SEGOB] notified permitholder Entretenimientos de Mexico, S.A. de C.V. via oficio DGAJS/SCEV/00619/2018, dated the ninth of December of the year two thousand eight, that it authorized the use of permit DGAJ/SCEVF/P-06/2005, dated the twenty-fifth of May of the year two thousand five, and its amendments, through [E-Games] as operator
>
> …
>
> 5.- The Deputy Director of Games and Sweepstakes of the Secretariat of the Interior issued oficio DGAJS/SCEV/0194/2009, dated the twenty-seventh of May of the year two thousand nine, ordered my principal to prepare the revenue and contributions payment report, pursuant to Article 29(VI) of the Regulations to the Federal Games and Sweepstakes Law and to continue preparing them while they are in effect, within the timeframes and frequency set forth by applicable laws.
>
> 6.- On the twenty-seventh of May of the year two thousand nine, [SEGOB] issued oficio DGAJ/SCEV/0260/2009-BIS acknowledging that [E-Games] had vested rights to use permit DGAJS/SCEVF/P-06/2005 [i.e., Oficio 2009-BIS]

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183 *Id.*, pp. 2-3.

184 Exhibit R-050. Action for Annulment - E-Games Brief 18Feb2013 Exp. 1080-13-11-03-1.

185 *Id.*, p. 11.

> 7.- On the fifteenth of August of the year two thousand twelve, the [SEGOB] issued oficio DGAJS/SCEV/0827/2012, whereby it changed [E-Games'] status from operator to permitholder [i.e., the Permitholder Oficio].
>
> 8.- On the twenty-second of November of the year two thousand twelve, the now Bureau of Games and Sweepstakes issued an oficio whereby it confirmed the decision contained in the oficio referenced in the immediately preceding paragraph, deciding to issue alphanumeric code DGAJS/SCEVF/P- 06/2005-BIS [i.e., the Permitholder-BIS Oficio] to the permit my principal would operate.[186] [Emphasis added]

190. In both administrative actions, E-Games acknowledged and used the nexus between the 2009-BIS *Oficio*, the Permitholder *Oficio*, and *Oficio* Permitholder-BIS to its benefit. The Claimants cannot now ignore the fact that the 2009-BIS *Oficio* was in fact the basis for the Permitholder and Permitholder BIS *Oficios*.

J. The alleged systematic, unlawful, and discriminatory interference by the Respondent in E-Games' Casinos from 2011-2013 is baseless, and the Claimants have deliberately omitted context

191. The Claimants erroneously allege that while they were in the process of applying for their permit, "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."[187] However, as will be explained below, the Respondent had commenced a general review of all casinos throughout the country beginning in 2011. Therefore, the claim that there was any systematic, unlawful, or discriminatory interference with the Claimants' casinos is false. There is no evidence to support this allegation.

192. The Claimants specifically state that "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 inspection."[188] However, this statement takes out of context that the Respondent had begun to act in accordance with the applicable legal framework to legalize casino operations throughout the country and to weed out the irregularities that existed at that time. The purpose of the Claimants' statement is to give the Arbitration Tribunal the erroneous impression that the Respondent intended to specifically harm the Claimants.

193. On August 25, 2011, a deadly fire occurred inside the Royale Casino located in the city of Monterey, Nuevo Leon. A group of individuals entered the casino, physically assaulting and robbing the people inside of their belongings, and then they set the place on fire with the people still inside. In the aftermath, 52 people died after being trapped inside.[189] A few hours earlier,

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186 *Id.*, p. 2.

187 Memorial, ¶ 188.

188 *Id.*, ¶ 189.

189 Exhibit R-051. "Terror y Barbarie" en un casino de Monterrey *[Terror and Brutality in a Monterrey Casino]"*, dated August 26, 2011.

another casino in Saltillo, Coahuila, was attacked with a grenade.[190] Both attacks generated a lot of media attention. As a result of these events, SEGOB commenced a review of "all casinos and gambling houses in the country, in order to detect irregularities in their operation or update their gaming data."[191]

194. Even before the tragic events of Nuevo Leon and Coahuila, SEGOB started taking several actions to put order in the industry. In an interview, the then SEGOB Undersecretary of the Interior, Juan Marcos Gutierrez, stated that "the 'Programa de Diligencias Administrativas para la Actualizacion y Normalizacion de Expedientes' *[Program for Administrative File Review and Standardization]* began on July 6, [2011]. This plan includes the appearance of the 27 permitholders operating throughout the country."[192] Likewise, a report prepared by SEGOB in September 2011, describes several different actions taken between September 2010 and June 2011, which include:

- 73 inspections of casinos, racetracks, and greyhound tracks, which gave rise to 3 closures and fines.
- 84 facilities with "slot" machines were shut down and 238 "slot" machines were seized.[193]

195. Finally, SEGOB report states that in September 2011 59 inspection orders were issued, of which 24 had been executed. Six casinos were closed down as a result of these inspections.[194]

196. The Claimants recount that on August 26, 2011, their casinos were the subject of inspections by the Tax Administration Service *[Servicio de Administracion Tributaria]* (SAT), and 73 machines were seized.[195] However, after the events that took place at the Casino Royale, SEGOB was not the only entity that took action to identify irregularities in casinos throughout the country. The SAT conducted audits pursuant to their tax and foreign trade verification powers. The enforcement of the law by the authorities or the exercise of their powers to fulfill their duties does not mean that there was any systematic, unlawful, or discriminatory interference with the Claimants' casinos.

197. The Claimants refer to the temporary suspension of the casino in Mexico City on June 19, 2013 by local authorities in an attempt to continue with their unfounded theory that the Claimants were victims of systematic harassment.[196] However, the Claimants have not offered any evidence to show that the reasons given by authorities to shut down their casino (i.e., civil protection

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190 *Id.*

191 Exhibit C-366.

192 Exhibit R-052. SEGOB summons 27 casino owners in Mexico on September 24, 2011.

193 Exhibit R-053. Report on the Overall Situation of Gaming and Sweepstakes Permitholders and the 'Casino Royale' case in Monterrey, Nuevo Leon (September 2011). Slide 8.

194 *Id.,* slide 9.

195 Exhibit CWS-50, Third Witness Statement of Mr. Burr, ¶ 93 and Exhibit CWS-51, Third Witness Statement of Mrs. Burr, ¶ 100.

196 Memorial, ¶ 194.

violations) had been "fabricated."[197] At any rate, the Claimants resorted to legal action and obtained a court order to restart the casino's operations.[198] Furthermore, if, in the opinion of the Claimants, the actions taken by local authorities were based on corruption,[199] they could and should have reported these facts to the authorities. Finally, the Claimants do not offer any evidence to substantiate a link between the events that took place in 2011, 2013, and the closing of the Claimants' casinos on April 24, 2014.[200]

K. The accusations made by the Claimants concerning the alleged political motives against E-Games are baseless

198. The Claimants allege that the loss of the Permitholder-BIS Oficio was politically motivated and began with the change of the governing party in the federal government.[201] The President of Mexico was Felipe Calderon Hinojosa, of the (PAN), until November 2012, and Enrique Peña Nieto, of the (PRI) was President from December 1, 2012 until November 30, 2018.

199. The Claimants argue that since the beginning of the new administration there were orders "from the highest levels of government, including Mrs. Gonzalez Salas ("Ms. Salas"), who President Peña Nieto appointed," to attack them.[202] The Respondent rejects these baseless accusations in their entirety. The Respondent has obtained witness statements from three former SEGOB officials who came in with the new administration and had direct knowledge of different aspects of the E-Games case between 2013 and 2015. All three categorically deny receiving any instruction or intending to cause any harm to the Claimants:

- **Marcela Gonzalez Salas** (DGJS General Director): "I never received instruction or had the slogan to affect E-Games or any other particular … during my management of Director-General, I was tasked with regularizing the sector in general, with actions as those cited, and the impetus for creating a new regulatory framework."[203] [Emphasis added]
- **Jose Raul Landgrave** (General Director of Constitutional Proceedings): "The acts that I performed in this case were consistent with the standards that we applied in all the matters related to games and raffles. There was no moment before, during or after complying the amparo sentence that I received an instruction different than the defense of SEGOB. Thus, I reject allegations that imply that I acted under pressure or guided by "the highest levels of the Peña Nieto's administration", implementing illegal, discriminatory and arbitrary measures with the objective to damage E-Games.2 In no

197 *Id.*, ¶ 195.

198 *Id.*, ¶195.

199 *Id.*, ¶ 195.

200 *Id.*, ¶ 196.

201 *Id.*, ¶¶ 198-211.

202 *Id.*, ¶ 200. The Complainants repeat this argument in different ways throughout their Memorial, such as in ¶ 233.

203 Exhibit RWS-1, Witness Statement of Mrs. Marcela Gonzalez Salas, ¶ 13.

moment I received instructions to damage E-Games."[204] [Emphasis added, footnote omitted]

- **Marcos Garcia Hernandez** (DGJS Deputy General Director of Regulation and Verification): "During the time that I worked in the DGJS, we adopt a policy of reviewing the legal operation of all the casinos in the country, carrying out many inspections of verifications to various permit holders and operators, I have to specify that I never received any instruction to go against a permit holder in specific. The instruction was always to give compliance with the LFJS and its Regulation."[205] [Emphasis added]

200. The Claimants point to the following actions to support their baseless accusations:

- In January 2013, Mrs. Gonzalez Salas, who had been appointed in January 2013 as the DGJS General Director, stated in a media piece that the E-Games permit was "illegal."
- Mrs. Gonzalez Salas never agreed to hold any meetings with the Claimants to explain why they thought that they were being treated unfairly.
- In February 2013, SEGOB posted on the DGJS website that E-Games' activities relied on the E-Mex Permit.[206]

201. It should be noted that the Claimants have also complained that the previous PAN administration's delay in the issuance of the E-Games permit was politically motivated.[207] It is simply not credible that two different administrations headed by rival political parties had political reasons to harm the Claimants. These are clearly baseless accusations made deliberately for this arbitration proceeding.

1. On the interview held in January 2013 and meetings with SEGOB

202. The Claimants reference an interview given by Mrs. Gonzalez Salas a few days after joining the DGJS,[208] as evidence of the "political motives" against the Claimants. Mrs. Gonzalez Salas states in her witness statement: "I recall the interview, and I recall that my commentary concerned its irregularity, since the actions taken for granting it were questionable, since they transformed two operators into two permit holders."[209]

203. Beyond any political motives adverse to the Claimants, Mrs. Gonzalez Salas actually joined the DGJS with the mission to "review and provide order to the Games and Sweepstakes

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204 Exhibit RWS-2, Witness Statement of Mr. Jose Raul Landgrave, ¶ 24.

205 Exhibit RWS-3, Witness Statement of Mr. Marcos Garcia Hernandez, ¶ 10.

206 Memorial, ¶¶ 201, 208-209.

207 *Id.*, ¶ 197.

208 Exhibit C-17.

209 Exhibit RWS-1, Witness Statement of Mrs. Marcela Gonzalez Salas, ¶ 9.

industry in Mexico through a documentary analysis of the existing permits and operators."[210] However, Mrs. Gonzalez Salas does acknowledge that, when joining the DGJS, the E-Mex, E-Games, and Producciones Moviles cases were in the press. However, even if Mrs. Gonzalez Salas paid any particular attention to a permitholder, it was E-Mex, as she describes in her witness statement:

> In fact, a few days after I was sworn as General Director, several press releases were published in media on certain permits to open casinos granted by the outgoing panista administration, in which they referred particularly to the case of the companies Entretenimientos de México, S.A. de C.V. (E-Mex), Exciting Games S. de R.L. de C.V. (E-Games) and Producciones Móviles S.A. de C.V. (Mobile Productions).
>
> The press releases also specifically referred to Juan José Rojas Cardona, better known as the "Zar de los Casinos", who, through the permissionary E-Mex, operated casinos. In addition, he was credited with various cases of corruption and fraud. During the first year of my management, we took special care with the authorizations given to the Rojas Cardona family, for the particular media attention to the permit holder E-Mex and public claims on corruption and fraud.[211] [Emphasis added]

204. In addition, the Claimants state that, according to Mr. Burr, Mrs. Gonzalez Salas never met with them "despite their repeated attempts at securing meetings with her."[212] This statement is inaccurate. According to Mrs. Gonzalez Salas' witness statement, she did meet with Mr. Burr:

> I met with Mr. Gordon Burr at his request, at DGJS offices located in Denmark 84, floor 4, in the company of David Garay and Hugo Vera, Head of the Government Unit and Deputy Director-General of DGJS, respectively. At that meeting we discussed the insubsistence of the EGames permit, where I mentioned that such action was part of the fulfillment of a court order. We also addressed the issue of reopening closed casinos… The follow-up to that meeting was led by Hugo Vera, Deputy Director General of DGJS, who continued to attend representatives of E-Games.[213] [Emphasis added]

205. Mrs. Gonzalez Salas adds that, aside from this meeting, E-Games representatives were assisted on multiple occasions by SEGOB officials.

> I also recall that Mr. Burr met several times with David Garay, Holder of SEGOB Governance Unit (who unfortunately died). In my administration, permit holders and operators were always served, as it was part of our work as a public service servant. [214] [Emphasis added]

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[210] I remember that when the Secretary of the Interior, Mr. Miguel Angel Osorio Chong, ask me to join the DGJS administration, it was clear to me that there were some things that warranted immediate attention due to their relevance and high-profile impact on national security.

[211] Exhibit RWS-1, Witness Statement of Mrs. Marcela Gonzalez Salas, ¶¶ 4-5.

[212] Memorial, ¶ 208. The Claimants make a similar claim in paragraph 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").

[213] Exhibit RWS-1, Witness Statement of Mrs. Marcela Gonzalez Salas, ¶ 14.

[214] *Id.*, ¶ 15.

1. The updated information on the E-Games Permit found on the DGJS website

206. The Claimants state that SEGOB updated its website where it linked the E-Games permit with the E-Mex permit, "in direct contradiction to SEGOB's prior resolutions recognizing that the two companies operated independently of one another."[215] Mrs. Gonzalez Salas explains that the change was made because by merely reading the E-Games and E-Mex permits, one could see the relationship between the two and it was decided to group them together for the benefit of the public when viewing the website.[216]

207. Mrs. Gonzalez Salas' witness statement does not signal any "political motives" for acting against E-Games but merely proves the nexus between the E-Games and E-Mex permits. As stated previously, the E-Games permit was issued under the same terms as the E-Mex Permit concerning seven casinos.

2. The alleged political motives behind an internal communication from the Secretariat of the Economy and the alleged personal incentive of Mrs. Gonzalez Salas to harm E-Games

208. The Claimants believe that an internal memo from the Directorate of Legal Counsel on International Trade *[Direccion General de Consultoria Juridica de Comercio Internacional]* (DGCJCI) proves that SEGOB already intended to terminate the E-Games permit.[217] This is false.

209. The part of the memo highlighted by the Claimant reads: "The DGJS informed us that the Bis Permit was cancelled because that permit had been granted at the end of the previous administration on an irregular basis."[218] Despite the uncertainty on the exact date on which the memo was prepared, it is assumed that it was prepared in 2014 (after filing the NOI) as stated by the Claimants.[219] More specifically, it was prepared at some point after August 25, 2014, since the document states "Last August 22…"[220]

210. The Claimants identify inaccuracies in the memo and the absence of greater context,[221] which is enough to not take the memo literally. However, as explained in Section II.L *infra*, by August 2014, the E-Games permit had been revoked as a consequence of the ruling in Amparo 1668/2011, which was rendered on January 31, 2013. In this context, the statement that the permit had been issued "irregularly", could have been simply a reference to the nexus between the E-Games permit with the 2009-BIS Oficio, which was declared unconstitutional.

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215 Memorial, ¶ 209.

216 Exhibit RWS-1, Witness Statement of Mrs. Marcela Gonzalez Salas, ¶ 10.

217 Memorial, ¶ 211.

218 Exhibit C-261, p.1.

219 Memorial, ¶ 211; footnote 509.

220 *See,* Exhibit C-261, p.2

221 Memorial, ¶ 211.

211. Finally, the Claimants attempt to involve Mrs. Gonzalez Salas' family, arguing that canceling the E-Games permit would benefit her husband,[222] who allegedly worked for Grupo Caliente, another permitholder, and the Hank Rhon family.[223] Mrs. Gonzalez Salas has denied the statements:

> My husband and I have particular roots in the State of Mexico, because we have worked for many years for the benefit of that State, as has the Hank Rhon family. It is true that we know them as a family of important political participation. Even Jorge Hank's father was Governor of the State of Mexico and Head of Government in Mexico City. They are well-known political characters, not only in the state, but in the country at large. However, it is incorrect to point out that my husband had any ties to Grupo Caliente. …
>
> I have more than 45 years working in the public service and in my entire career I have never been charged with non-compliance with my obligations. I therefore categorically deny that I have obtained a benefit on my behalf or that of my husband for my work at DGJS or any other position I have held.[224] [Emphasis added]

212. As will be seen in the following section, instead of "political motives" against the Claimants, the E-Games permit was revoked as a result of the Claimants own actions, when they decided to associate themselves with E-Mex and operate their casinos under its permit fully aware of the risks that that entailed. As will be seen in the following sections, when these risks materialized, the Claimants sought to artificially separate themselves from their partner in order to continue operations. They requested the 2009-BIS Oficio and when E-Mex found out about it, it successfully challenged it via an amparo action and the DGJS was required to comply with the resulting ruling. The Claimants are seeking to blame the Respondent for its own bad decisions through baseless arguments founded on nonexistent "political motives."

L. E-Mex finally learns of the 2009-BIS Oficio and challenges it through Amparo 1668/2011

213. The Claimants allege a series of irregularities in Amparo 1668/2011, which led to the revocation of the E-Games permit. In their opinion, "[a]ll 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."[225]

214. Amparo 1668/2011 began with an amparo action brought by E-Mex on December 30, 2011 against several government actions, which eventually included the 2009-BIS Oficio.[226] The case was decided and reviewed by several instances of the Federal Judiciary. It was originally assigned to the Sixteenth District Administrative Court in the Federal District (Sixteenth Court), and a reviewing body, the Seventh Collegiate Administrative Court of the First Circuit (Seventh

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222 *Id.*, ¶ 238.

223 *Id.*, ¶ 232.

224 Exhibit RWS-1, Witness Statement of Mrs. Marcela Gonzalez Salas, ¶¶ 20- 21.

225 Memorial, ¶ 257.

226 Exhibit C-268.

Collegiate Court) intervened on several different occasions. Even the Federal Supreme Court intervened at one point.

215. Amparo 1668/2011 was a complicated case, not only because of the courts involved but also due to the number of parties who intervened. Aside from E-Mex and E-Games, the case involved Producciones Moviles and SEGOB. Several actions were appealed aside from the 2009-BIS Oficio. However, the Claimants always had access to legal recourses to defend its interest throughout Amparo 1668/2011. The courts that intervened weighed the arguments submitted by the Claimants (and the other parties) and at the end the courts settled the dispute. As stated by Dr. Mijangos, due to the complex issues and viewpoints that were constantly developing, it is normal for a court ruling to generate different opinions, but "the fact that certain position of an *amparo* judge is not fully shared does not, for that reason alone, reveal that the criteria is wrong or erroneous."[227]

216. Since the judgment from Amparo 1668/2011 was unfavorable to the Claimants, they point to alleged "judicial irregularities and undue political influences that permeated the Amparo 1668/2011."[228] However, the Claimants failed to provide any evidence to substantiate these alleged "political influences." In fact, it is obvious in certain cases that their position changes according to whether or not they obtained a favorable decision to their claims.[229] Furthermore, the argument on these alleged judicial irregularities is nothing more than a way to relitigate arguments that were made to the Mexican courts that were weighed and decided at that time. However, as will be shown in this section, the actions taken by the Mexican courts were proper, lawful, and devoid of the irregularities alleged by the Claimants.

217. As detailed in the following paragraphs, the decisions made by the Judicial Branch which culminated in revoking the E-Games permit, including the admission of the third E-Mex amended claim and the revocation of the 2009-BIS Oficio and Permitholder-BIS Oficio, were based on the law and on case law, so even when the Claimants do not agree, they are legally correct. [230]

218. The Claimants present several arguments relating to Amparo 1668/2011, which will be responded to throughout the following sections:

- The decisions made by the Sixteenth Court and the Seventh Collegiate Court regarding the admission of E-Mex's amended complaint were correct.
- The ruling in Amparo 1668/2011 that the 2009-BIS Oficio was unconstitutional and the revocation of its consequences was correct.

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227 Exhibit RER-1, Expert Report from Dr. Mijangos, ¶ 35.

228 Memorial, ¶ 260.

229 This is true of the decisions issued by the Sixteenth Court. On the one hand, when a judgment was rendered against the Claimants, such as when the 2009-BIS Oficio was revoked in the judgment from Amparo 1668/2011, dated January 31, 2013 (Exhibit C-18), they allege that "the decision is improper and was probably the result of corruption" (Memorial ¶ 255). However, when the same Sixteenth Court ruled that SEGOB had exceeded its authority in complying with the judgment by also revoking the E-Games permit (ruling dated October 14, 2013, Exhibit C-24), the Claimants highlight the manner in which it analyzed SEGOB's actions (Memorial, ¶ 309).

230 Exhibit RER-1, Legal Report from Dr. Mijangos, ¶¶ 292-293.

- The Motion for Reconsideration was correctly decided by the Supreme Court and the Seventh Collegiate Court.
- The rulings in Amparo 1151/2012 were not binding for Amparo 1668/2011.

1. The decisions made by the Sixteenth Court and the Seventh Collegiate Court regarding the admission of E-Mex's amended complaint were correct

a. The Sixteenth Court admitted E-Mex's third amendment to its complaint because it could not identify any manifest and unquestionable legal grounds of inadmissiblity and the Seventh Collegiate Court reviewed and confirmed that decision.

(1) Relevant facts

219. On June 5, 2012, E-Mex filed a third amended Amparo complaint,[231] challenging, among other actions, the constitutionality of the 2009-BIS Oficio and "[a]ll the effects and consequences."[232] E-Mex indicated that it learned of the 2009-BIS Oficio on May 15, 2012 through another Amparo action,[233]in which they were notified of some *oficios* issued by SEGOB, including the 2009-BIS Oficio.

220. On June 6, 2012, the Sixteenth Court admitted E-Mex's third amendment to its complaint. However, on June 14, 2012, SEGOB filed a complaint against this decision, arguing that E-Games' amended complaint had been untimely filed.[234] The complaint was assigned to the Seventh Collegiate Court under number 68/2012.

221. The SEGOB identified two dates in which, in its opinion, E-Mex had learned of the 2009-BIS Oficio: i) on March 27, 2012 when the Third Court delivered a copy of the E-Games amparo action to E-Mex, which contained a reference to the 2009-BIS Oficio; and ii) April 25, 2012, when E-Mex received copies of the case file for Amparo 356/2012 which, according to SEGOB, included the 2009-BIS Oficio.

222. Despite having identified these two dates, SEGOB based its arguments solely on the second one. SEGOB argued that E-Mex had received a copy of the case file (which, it claimed, included a copy of the 2009-BIS Oficio) on April 25, 2012, and therefore, the term for filing the third

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231 Previously, two amended Amparo complaints were filed on January 18 and March 29, 2012.

232 Exhibit C-269, p. 004.

233 The other Amparo action was 356/2012 before the Third District Administrative Court in the Federal District (Third Court). E-Games instituted this Amparo against SEGOB and E-Mex was included as an aggrieved third party.

234 Pursuant to the Amparo Law (Article 21), the term for filing an amended complaint is 15 business days as of the day following that upon which the person has been served notice of, or when the person learns of or reveals having knowledge of the challenged government action.

amendment to its complaint expired on May 18, 2012. Consequently, it took the position that E-Mex's third amendment to the amparo complaint was untimely and, therefore, inadmissible.[235]

223. On August 8, 2012, the Seventh Collegiate Court rendered its judgment confirming the decision by the Sixteenth Court to admit E-Mex's amended complaint.[236] The Seventh Collegiate Court noted that it was unable to locate the motion dated April 18, 2012 in which E-Mex had allegedly requested certified copies of the case file in the Amparo 356/2012 case file. Neither could it find any record from the Third Court ordering the delivery of the copies. Therefore, the Seventh Collegiate Court determined that:

> There are no manifest or unquestionable grounds for inadmissibility with respect to the filing of the amended complaint, because there is no evidence that irrefutably corroborates the date in which the plaintiff acquired knowledge of said oficio for the purposes of determining whether the amendment to the complaint was timely filed.[237] [Emphasis added]

224. As will be explained below, the standard used to assess whether to reject or admit an amendment to a complaint, like the Amparo action itself, is [the existence of] manifest and unquestionable grounds for inadmissibility at the time in which the document is submitted.[238]

(2) Analysis of the Sixteenth Court and Seventh Collegiate Court proceedings.

225. In the Memorial, the Claimants assert that E-Mex had knowledge of the 2009-BIS Oficio prior to the date upon which it claims to have learned about it. Specifically, they claim that E-Mex had learned of the *oficio* on one of three dates:[239]

- On March 27, 2012, when the Third Court served notice on E-Mex that it was an aggrieved third-party in Amparo 356/2012. The Claimants allege that the E-Games complaint in Amparo 356/2012 included a copy of the 2009-BIS Oficio and that, according to Mexican law, it must be presumed that when a party is summoned to trial it has access to the entire case file.
- On April 9, 2012, when E-Mex filed its first motion in Amparo 356/2012. The Claimants allege that when E-Mex appeared at trial 356/2012, there is no doubt that it had access to the entire case file. They also argue that E-Mex stated in a motion filed on that date, that E-Games hid information from the Court, for which it had to have reviewed the entire case file.

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235 The grounds for inadmissibility argued by SEGOB are established in Article 73(XII) of the Amparo Law ("XII.- Against an implied consent of government action, which is understood as when an amparo action is not filed within the timeframes set forth in Articles 21, 22, and 218").

236 Exhibit C-271.

237 *Id.,* p. 16.

238 Exhibit RER-1, Expert Report from Dr. Mijangos, ¶ 52.

239 Memorial, ¶¶ 290-291. In addition, the Claimants allege that E-Mex learned of the May 27, 2009 Resolution on April 25, 2012 when certified copies of the case file for Amparo action 356/2012 it had requested were delivered.

- On April 12, 2012, when E-Mex filed a motion in Amparo 1668/2011, stating that it had access to the Amparo 356/2012 case file and had read the complaint in its entirety.[240]

226. Based on the above, the Claimants hold that there were clear and evident grounds for inadmissibility (i.e., untimely filing of the third amended complaint) and therefore the Sixteenth Court should have ruled that the third amendment to the complaint was inadmissible as of the date of submission.

227. However, the Respondent maintains that the Sixteenth Court correctly admitted E-Mex's third amendment to its complaint. Pursuant to the Amparo Law, three things can occur upon the filing of an amendment to a complaint: *i)* the amendment is admitted; *ii)* the complaint is returned to the filing party to correct any irregularity or satisfy a requirement that has been omitted (order), or *iii)* it is not admitted (rejected), when there are evident and undeniable grounds for inadmissibility when the amendment is filed.[241]

228. The Supreme Court has interpreted the applicable standard by defining "evident" as something that is obviously and absolutely clear and "undeniable" means certainty and conviction of a fact because it is certain and obvious.[242]

229. Therefore, in order to meet this standard, it is not enough to presume or to have a certain degree of certainty as to the grounds for inadmissibility. The judge must be completely certain about its inadmissibility, as indicated by Dr. Javier Mijangos:

> [t]he threshold of analysis is not that of a mere indication, or of a certain degree of plausibility. The threshold for arising is that of conclusive proof, that is, of absolute conviction on the part of the court. In other words, **if the judge has even a margin of doubt as to whether the same has arisen, it must then proceed to dismiss the ground for inadmissibility and conduct a substantive study of the act of authority**. The risk of the opposite position is simply too high within a State governed by the rule of law: preventing individuals from being able to defend themselves against the arbitrary action of the authority, because of a technical obstacle whose existence has not even been proven as such.[243] [Underlined added and original bold]

230. Grounds for inadmissibility prevents the judge from analyzing whether the rights of the party requesting a judge to intervene have been violated. Given the impact that a decision like this could have on a person's due process rights, the standard is extremely high and can only succeed if it is been fully proven.[244]

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240 *Id.*, ¶ 269.

241 Exhibit RER-1, Expert Report from Dr. Mijangos, ¶ 51.

242 *Id.*, ¶ 54.

243 *Id.*, ¶ 90.

244 *Id.*, ("[T] the arising of a cause for inadmissibility translates, beyond a technical issue, into a statement that the judge will not be able to analyze whether or not a certain act violates the fundamental rights of the complainant who is appearing. Therefore, in order to ensure that these technicalities are not contrary to the right of access to

Footnote continued on next page

231. The Supreme Court has ruled that, in order to consider grounds for inadmissibility as "evident" and "undeniable" when the court is weighing whether or not to admit a complaint or amended complaint, the following conditions must be present:[245] *i)* the grounds for inadmissibility must be evident and undeniable based solely on the complaint or amendment to the complaint and its exhibits, and *ii)* it is indispensable that the basis for inadmissibility cannot rebutted by any evidence that the parties may obtain throughout the proceeding.

232. Regarding the first condition, the Claimants allege that the grounds for inadmissibility can be found in the case file of another Amparo (Amparo 356/2012), and they assure that when the third amendment of the complaint was filed, the Sixteenth Court already had a copy of case file 356/2012, and therefore, it could have corroborated the dates in which E-Mex allegedly learned of the 2009-BIS Oficio.[246] However, these grounds did not follow from the amendment filed by E-Mex as required by the first condition identified by the Supreme Court.

233. In any case, it is inaccurate to state that case file 356/2012 had already been included in the case file for Amparo 1668/2011 of the Sixteenth Court when the third amendment to the complaint was filed, as alleged by the Claimants. The document referenced by the Claimants in support of their position is, in reality, a document from the Third Court ordering production of the copies that E-Mex had requested the day before.[247] The document does not prove that the copies had been sent to the Sixteenth Court.

234. The dates identified by the Claimants also fail to satisfy the second condition, i.e., that they cannot be rebutted by evidence or arguments submitted by the parties throughout the preceding, because when the Sixteenth Court admitted the amendment it had an express declaration that E-Mex had learned of the 2009-BIS Oficio on May 15, 2012. Therefore, even if there were indications that the amended complaint had been untimely filed, there were doubts concerning whether the untimeliness could be rebutted during the proceeding and therefore, it could not reject the amendment.

235. Therefore, the grounds for inadmissibility invoked by the Claimants failed to satisfy any of the conditions necessary for inadmissibility, so the decision by the Sixteenth Court to admit the third amended complaint filed by E-Mex was correct.[248] Dr. Mijangos has also concluded that, considering E-Mex statement regarding the date in which it learned of the 2009-BIS Oficio and the Claimants' position regarding the three dates in which E-Mex had knowledge of the Oficio, the Sixteenth Court's decision was also correct:

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effective judicial protection provided for in Article 17 of the Constitution and in paragraphs 8 and 25 of the American Convention on Human Rights12, it is necessary, on the one hand, that they respond to a logic within the system of the amparo proceeding that justifies not carrying out a substantive analysis of the act and, on the other hand, that they only arise when they are fully proven." [Emphasis added]). ¶ 89.

245 *Id.*, ¶¶ 55-57.

246 Memorial ¶ 270.

247 Indeed, the ruling issued by the Third Court on April 19, 2012 (Exhibit C-369) is in response to the motion filed by E-Mex on the preceding day (Exhibit C-369) and not a motion from the Sixteenth Court. This can be corroborated in the judgment issued in Amparo proceedings 1668/2012 (Exhibit C-18, p. 167).

248 Exhibit RER-1, Expert Report from Dr. Mijangos, ¶¶ 62-65.

> [I]t is possible to advise that, at the time of filing the extension of the claim, the Judge had an express statement - with explanatory elements in this regard - that the document was timely, so that, given the existence of two opposing positions, the extension could not simply be dismissed. Even if the judge had indications that it was untimely, **it is clear that there is a margin of doubt, in the sense that the untimeliness could be rendered null and void during the trial**, so according to the precedents of the Supreme Court of Justice, the judge should have proceeded with the admission.[249] [Original Emphasis]

236. The Claimants also point out that the Seventh Collegiate Court's decision in the complaint was improper because: *i)* it did not take into account the evidence submitted by SEGOB, *ii)* the ruling did not consider the other dates identified by SEGOB as dates in which E-Mex acquired knowledge of the 2009-BIS Oficio (principle of completeness), and *iii)* did not conduct an ex-officio analysis of the grounds for inadmissibility.[250]

237. As to the evidence offered by SEGOB, the Claimants allege that the Seventh Collegiate Court erred by refusing to admit the evidence,[251] however, they immediately dismiss this argument and alleging that it was of no consequence because that information was already in the record.[252] The Seventh Collegiate Court did not reject the evidence offered by SEGOB, rather it pointed out that "only the proofs submitted to the corresponding judge will be taken into account, except for those intended to prove the existence of any inadmissibility consideration."[253] There is no evidence whatsoever that the Seventh Collegiate Court failed to take any evidence into account based on this rule and there is also no conclusive evidence that the 2009-BIS Oficio was actually included on the dates alleged by SEGOB.

238. Finally, the Claimants state that the Seventh Collegiate Court did not conduct an ex officio analysis of the grounds for inadmissibility.[254] The Respondent does not share this view. The decision by the Seventh Collegiate Court was correct when analyzing the grounds for inadmissibility submitted by SEGOB (i.e., the delivery of the copies from the Amparo 356/2012 case file to E-Mex on April 25, 2012).

239. Dr. Mijangos believes that the judgment rendered by the Seventh Collegiate Court is correct, noting:

> [T]he core conclusion of the Collegiate Tribunal in the motion of complaint is correct**: at that point in time, the cause for the inadmissibility due to untimeliness of the official communication of May 27, 2009 was neither manifest nor unquestionable**, since in fact, at the time the initial resolution was issued with respect to the extension,

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249 *Id.*, ¶ 64.

250 Memorial ¶¶ 275-276.

251 *Id.*, ¶ 275.

252 *Id.*, ¶ 275 ("Despite this, this evidence was already included in the case file of Amparo 1668/2011 dated June 22, 2012").

253 Exhibit C-281, p. 1.

254 Memorial, ¶ 276.

> there was no reliable evidence that E-Mex would have had knowledge of the official communication on a date prior to such it stated[255] [Original Emphasis]

240. However, as noted by the Claimants,[256] the admissibility of the amendment to the complaint could still be analyzed in the Amparo judgment based on the evidence to be submitted [by the parties]. As explained below, the Sixteenth Court again analyzed this point.

b. In the judgment of Amparo 1668/2011, the Sixteenth Court once again analyzed the third amended complaint but did not find any grounds for inadmissibility, and the Seventh Collegiate Court reviewed and confirmed the judgment.

241. On August 30, 2012, E-Games submitted new grounds for inadmissibility of the third amendment filed by E-Mex alleging that E-Mex acquired knowledge of the 2009-BIS Oficio on May 9, 2011.[257] According to E-Games, it filed a motion in the arbitration proceeding against E-Mex, which included the 2009-BIS Oficio, and this demonstrates that E-Mex had knowledge of the 2009-BIS Oficio prior to May 15, 2012.[258]

242. On January 31, 2013, the Sixteenth Court issued its judgment in Amparo 1668/2011.[259] Before deciding on the merits of the claim, the Sixteenth Court stated:

> Prior to an in-depth study of the matter, it is necessary to analyze the causes of impropriety that the parties assert, or, the causes reported ex officio, taking into account that the development of the amparo trial is a procedural assumption that should be studied, in accordance with article 73, last paragraph, of the Amparo Law.[260] [Emphasis added]

243. The Sixteenth Court analyzed a total of 10 different grounds for inadmissibility, of which six were *ex-officio*,[261] two were provided by E-Games,[262] and two were submitted by SEGOB.[263] Of the six grounds for inadmissibility identified *ex-officio*, the Sixteenth Court determined that they had merit and accordingly dismissed several measures challenged by E-Mex in its amparo action. The Sixteenth Court determined that the grounds for inadmissibility submitted by E-Games and SEGOB were meritless. It is important to take this context into account, because the Claimants

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255 Exhibit RER-1, Expert Report from Dr. Mijangos, ¶ 69.

256 Memorial ¶ 280.

257 E-Games motion in Amparo Action 1668/2011 (August 30, 2012) (Exhibit 18 contained in CER-2).

258 In addition, E-Games made reference to the fact pointed out by SEGOB in the grievance that E-Mex learned of the 2009-BIS Oficio when it received certified copies of the Amparo proceedings 365/2012 on April 25, 2012. However, it was not the main reason for its motion.

259 Exhibit C-18.

260 *Id*., p. 20.

261 *Id.*, pp. 20-58.

262 *Id.*, pp. 59-63.

263 *Id.*, pp. 63-72.

state that the Sixteenth Court was required to analyze the grounds for an admissibility once again and *ex-officio*, which clearly occurred in this case.[264]

244. Regarding the grounds for inadmissibility submitted by E-Games, the Sixteenth Court analyzed them and ruled accordingly. On the alleged delivery of the 2009-BIS Oficio with its motion dated May 9, 2011 in the domestic arbitration proceeding, the Judge noted that:

> […] when checking the records sent with respect to said ruling, there is no mention of challenged official document, and consequently, there is no certainty that the claimant was fully and directly informed of said act. [Emphasis added]. [265]

245. In addition, the Sixteenth Court reviewed the case record from Amparo 356/2012[266] and decided the following:

> [Although there is proof that E-Mex received a certified copy of file 365/2011on April 25, 2012,], there is no certainty that it also received copies of the exhibits that were produced separately, which included the [2009-BIS Oficio], and therefore this court believes that the date when the copies of the case file were delivered cannot be used as the start date for calculating the fifteen days to file an amparo action if the page numbers of the delivered records are not specified and copies of the exhibits located in a separate binder were never delivered. So, again, there is no certainty that the plaintiff had direct, accurate, and full knowledge of the challenged action.[267] [Emphasis added]

246. In view of the foregoing, the Sixteenth Court concluded that the date that should be considered as the date E-Mex learned of the 2009-BIS Oficio was May 15, 2012, when the document was delivered because that is the only date in which there complete certainty that E-Mex learned of the 2009-BIS Oficio. Based on this date, the Court ruled that the amendment to the complaint filed by E-Mex was within the established legal timeframe.[268]

247. E-Games, E-Mex, Producciones Moviles, and SEGOB all appealed the amparo judgment for different reasons, resulting in the filing of multiple motions for review, which were assigned again to the Seventh Collegian Court.

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264 Memorial, ¶¶ 298-299.

265 Exhibit C-18, pp. 62-63.

266 *Id.,* pp. 60-61. ("In order to confirm [whether E-Mex had actual knowledge of the 2009-BIS Oficio on May 15, 2012 in amparo 365/2012], it is important to consider the facts contained in the records of the amparo 365/2012 case file, from which is noted: [1. Amparo complaint filed by E-Games on February 13, 2012 Writing. 2. Ruling dated February 14, 2012, by the Third Court admitting the E-Games amparo complaint. 3. Ruling dated March 27, 2012, naming E-Mex as an aggrieved third party. 4. Motion from E-Mex filed on April 10, 2012, appearing at the amparo proceeding, and a petition by E-Mex on April 18, 2012, requesting copies of the amparo 365/2012 case file. 5. Confirmation that E-Mex received the certified copies on April 25, 2012. 6. Oficio from SEGOB, in which it filed, among other documents, the 2009-BIS Oficio. 7. Notice to E-Mex of the 2009-BIS Oficio on April 15, 2012.]")

267 *Id.,* p. 62.

268 *Id.,* p. 63.

248. On February 19, 2003, E-Games filed its motion,[269] which included three arguments on inadmissibility that, in its opinion, were not properly analyzed by the Sixteenth Court. Except for the first argument, the other two had already been analyzed by the Sixteenth Court:

- E-Games claimed that the third amendment to the complaint filed by E-Mex was inadmissible because E-Mex lacked standing to appeal the 2009-BIS Oficio, since E-Mex was no longer a permitholder after having been declared commercially insolvent on December 5, 2011.[270]
- E-Games insisted that the date to be used to dismiss E-Mex's amendment to the complaint was April 25, 2012, which is when E-Mex obtained a copy of the entire case file of Amparo 356/2012.
- E-Games also insisted in that it had delivered a copy of the 2009-BIS Oficio to E-Mex on May 9, 2011, in an arbitration proceeding in which both companies were parties.

249. The Seventh Collegiate Court rendered its judgment on July 10, 2013,[271] confirming the judgment from Amparo 1668/2011. Regarding E-Games' arguments on the inadmissibility of the third amendment to the complaint, the Seventh Collegiate Court ruled as follows:

- Regarding E-Mex's lack of standing, the court decided that, aside from being declared commercially insolvent by a court, the revocation of the E-Mex permit arising from the commercial insolvency, had to have been the result of an administrative proceeding as set forth in the RLFJS.[272] Therefore, SEGOB was responsible for commencing and deciding this administrative proceeding in accordance with the LFJS and the RLFJS, and the court could not "replace the administrative authority's original powers" established by law.[273]
- Regarding the argument that E-Mex received certified copies of the Amparo file 356/2011, which included the 2009-BIS Oficio, the court indicated that it had reviewed the case file for that amparo action and concluded that "prior to the delivery of the certified copies of the entire record in case file 356/2011-II [sic], the [2009-BIS Oficio]

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269 Exhibit C-283.

270 Id., pp. 1-8. Lack of standing is another basis for inadmissibility established by the Amparo Law (Article 73(V) - "An amparo action is not admissible: Against actions that do not affect the legal interests of the aggrieved party")

271 Exhibit R-100, Judgment on Motion for Review 107/2013, dated July 10, 2013. The Claimants cite this document as Exhibit C-20.

272 Article 152 of the RLFJS ("In order to impose any of the penalties referred to in preceding Articles, the [SEGOB] must provide prior notice to the offending party of the commencement of an administrative proceeding, so that the offending party may offer the evidence it deems appropriate and makes all defenses available under the law, pursuant to applicable provisions").

273 Exhibit 27 contained in CER-2, Judgment from the Seven Collegiate Court (Motion for Review 107/2013) (July 10, 2013), p. 75.

had not yet been added to the record, because that ocurred on the following tenth of May when the certified copy was submitted by the [SEGOB]"[274] [Emphasis added].

- The Seventh Collegiate Court was also unable to verify that E-Games had delivered a copy of the 2009-BIS Oficio to E-Mex on May 9, 2011 in the domestic arbitration proceeding. The Court noted that it had reviewed the case file of Amparo 1668/2011 and confirmed that "there is no document that can substantiate any specific date in which [E-Mex] was notified of [the 2009-BIS Oficio], because only a general reference is made to the oficio in those documents."[275]

250. Finally, the Seventh Collegiate Court also rejected another argument by E-Games on the inadmissibility of the E-Mex complaint. According to E-Games, the 2009-BIS Oficio was no longer effective when the Oficio Permitholder-BIS was issued. However, E-Games never submitted the Permitholder-BIS Oficio into evidence. The Seventh Collegiate Court decided not to analyze this argument since E-Games had failed to prove that the grounds for inadmissibility were obvious "from an objective finding." The Seventh Collegiate Court concluded that, although the analysis on the grounds for inadmissibility must be done *ex-officio*, the argument for inadmissibility must have some evidentiary support. Since E-Games had failed to offer any evidence to support its argument, it was ruled inadmissible:

> In response to [the E-Games argument], it is appropriate to point that even though, pursuant to the final paragraph of Article 73 of the Amparo Law, the analysis on the grounds for inadmissibility must be done ex officio, since this is an issue of public policy, which could be done by the original court or upon review (unless there is an express ruling in the judgment rendered by the trial court) and to that effect it is possible that evidence that may prove this point be admitted and weighed on appeal; however, when discussing arguments of inadmissibility that are not obvious or are objectively verifiable, merely claiming that an action cannot be exercised without supporting evidence in the record precludes its analysis.[276] [Emphasis added]

251. The Claimants now seek to minimize an error that can only be attributed to E-Games and unlawfully transfer their responsibility to the Respondent by claiming that the courts should have acted *ex officio* when analyzing the argument.[277]

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274 *Id.,* p. 118-119. The Seventh Collegiate Court concluded that "it is not feasible to rule that [E-Mex] had knowledge of [the 2009-BIS Oficio] when it received copies of the entire case file of amparo 365/2011-II, when the court clerk certified that the documents requested were delivered on [April 25, 2012], and as was said previously, the oficio in question was not added to the file until the tenth of May and notified on the fifteenth, so it is absolutely impossible to believe that [E-Mex] knew on the date alleged by the appellant that it had not been added to the record" [Emphasis added]. *Id.,* p. 120

275 *Id.,* p. 120.

276 Exhibit R-100, Judgment on Motion for Review 107/2013, dated July 10, 2013, pp. 133 -134. The Claimants cite this document as Exhibit C-20.

277 Memorial, ¶ 299.

2. The ruling declaring the unconstitutionality of the 2009-BIS Oficio in the Amparo 1668/2011 and the revocation of its consequences were legally correct

a. The Sixteenth Court ruled that the 2009-BIS Oficio was unconstitutional and ordered SEGOB to revoke it.

252. On January 31, 2013, the Sixteenth Court rendered its judgment in Amparo 1668/2011 ruling that the 2009-BIS Oficio is unconstitutional because it granted a status that was not included in the RLFJS. In that regard, the Sixteenth Court ruled:

> [f]rom the provisions cited by the responsible authority in the challenged order [Oficio 2009-BIS], there is neither evidence of the concept of a direct agent of a permit nor of the acquisition of rights of exploitation of a permit without the intervention of a concessionaire, by complying with the obligations under article 29 of the Federal Gambling and Lottery Law.
>
> […]
>
> [t] the violation of the legal guarantee is evident before the claimant [E-Mex] , because the authority recognized the legal acquisition for the exploitation of a permit, without legal basis, but just pointing out that it is a result of acquired rights, by complying with the obligations of the agent set forth by the Federal Gambling and Lottery Law and its Regulation, without precisely indicating the legal provisions applicable to this case and without reconciliation between the reasons given and the applicable regulations, reflecting incorrect substantiation and justification of the challenged order.
>
> Consequently, considering the proposed arguments are well founded, the Nation's Supreme Court of Justice Support and Protect [sic] [la justiciar de la Unión Ampara y Protege] Entretenimiento de Mexico, S.A. De C.V., against order DGAJS/0260I2009-BIS dated May 27, 2009. to the effect of declaring it groundless and issue a new one to rule, in a founded and justified manner, on the matter requested on May 18, 2009.[278]

253. On February 19, 2013, E-Games appealed the judgment and filed a motion for review. E-Mex, Producciones Moviles, and SEGOB also appealed the ruling in Amparo 1668/2011. The Seventh Collegiate Court decided these appeals through a Review Proceeding 107/2013 (Review 107/2013).

254. E-Games appealed the judgment on February 19, 2003 via a motion for review. E-Mex, Producciones Moviles, and SEGOB also appealed the judgment from Amparo 1668/2011. The Seven Collegiate Court decided these appeals through Motion for Review 107/2013 (Review 107/2013).

255. It is important to point out that E-Games did not challenge the ruling rendered by the Sixteenth Court on the on unconstitutionality of the 2009-BIS Oficio. The main argument made by E-Games was that E-Mex lacked standing to challenge the 2009-BIS Oficio through Amparo 1668/2011. E-Games argued that because E-Mex had been declared commercially insolvent on December 5, 2011, the E-Mex Permit, which was linked to the 2009-BIS Oficio, had been

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[278] Exhibit C-18, ¶¶ 200-202.

extinguished in accordance with the RLFJS.[279] The Seventh Collegiate Court dismissed E-games' argument holding that, despite being declared commercially insolvent, the E-Mex Permit had to be revoked in an administrative action commenced by SEGOB pursuant to the RLFJS.[280]

256. On July 10, 2013, the Seventh Collegiate Court confirmed the judgment rendered by the Sixteenth Court as to the unconstitutionality of the 2009-BIS Oficio. As a result of the decision by the Seventh Collegiate Court, SEGOB was ordered to revoke the 2009-BIS Oficio and issue another *oficio* that was consistent with the guidelines determined by the Sixteenth Court.

257. On July 19, 2013, SEGOB issued a ruling declaring the 2009-BIS Oficio null and void and rejecting E-Games' application of May 18, 2009, which led to the issuance of the 2009-BIS Oficio. The new resolution responding to the E-Games application stated: "[t]here are no legal grounds for an independent operator of a permit or an operator who acquired the legal exploitation of a permit based on acquired rights and without the intervention of the permit holder" (First attempt at compliance)."[281] The SEGOB served E-Games notice of this attempt to comply ruling on July 24, 2013.[282]

258. The Claimant states that the Sixteenth Court failed to notify E-Games of this first attempt to comply, which would constitute a due process violation.[283] The Respondent denies that any such violation occurred. The SEGOB did notify E-Games of the ruling of July 24, 2013, as confirmed in Exhibit C-272.[284] In fact, E-Games appealed the ruling through a JCA commenced before the TFJFA on August 23, 2013, as described in Section II.M.3.b, *infra*. Therefore, it is inaccurate to argue that the Claimants suffered any due process violation.

259. E-Mex complained of the First compliance attempt in its submission of August 23, 2013,[285] and requested the Sixteenth Court to rule that the judgment had not been fully complied with. E-Mex argued that the only way its constitutional rights would be restored was not only to annul the 2009-BIS Oficio, but also "every subsequent resolution that has been made in the same sense, whether as a consequence or simply using the same criteria".[286] E-Mex specifically referred to the

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279 Article 34(IV) of RLFJS states that "[p]ermits are terminated due to…commercial insolvency."

280 Article 152 of the RLFJS states that "In order to impose any of the penalties referred to in preceding Articles, the [SEGOB] must provide prior notice to the offending party of the commencement of an administrative proceeding, so that the offending party may offer the evidence it deems appropriate and makes all defenses available under the law, pursuant to applicable provisions."

281 Exhibit C-272, p. 003.

282 Exhibit C-23, p. 10.

283 Memorial, ¶ 303.

284 Exhibit C-23, p. 10.

285 Exhibit C-21, pp. 12-13.

286 *Id.*, p. 12.

oficios that arose from the 2009-BIS Oficio, such as the Permitholder Oficio and Permitholder-BIS Oficio, whereby SEGOB granted title of the E-Mex Permit to E-Games.[287]

260. On August 26, 2013, the Sixteenth Court ruled that SEGOB did not comply with the judgment, because it was required to annul not only the Oficio-BIS but also any other government action produced as a consequence of said oficio:

> On the other hand, the judgement cannot be considered as fulfilled with respect to the order DGAJS/SCEV/260/2009-BIS dated My twenty-seven of two thousand nine, rendered ineffective, in which the harmed third party [E-games] is acknowledged as indepdent operator of the federal permit related to gaming and lottery number DGAJS/SCEVF/-06/2005, since the responsible authority must not forget that by ruling said permit as unsubstantiated, it is also obligated to render ineffective all other act or acts that have been issued as its consequence, on the understanding that it should evaluate if in its records appear various orders based on said permit, and that being the case, proceed to declare their lack of substantiation.[288] [Emphasis added]

261. The Claimants' argue that SEGOB attempted to cause injury to E-Games' interests.[289] However, the fact that SEGOB did not revoke the Oficio Permitholder-BIS via the First attempt to comply shows that SEGOB had no intention to. It was not until the Sixteenth Court ordered all actions arising from the 2009-BIS Oficio to be declared null and void that SEGOB voided the E-Games permit.

262. The Sixteenth Court also warned SEGOB of the applicable penalties if its failure to comply with the judgment continued:

> The authority directly responsible should be prevented from continuing to act with a [illegible] or, in case of non-compliance with the protection ruling, with acts [illegible] that are not entirely satisfactory based on article [illegible] of the Amparo Law. the court proceedings will be sent to the acting Collegial Administrative Circuit Court, in order to set in motion the proceedings for suspension to the effect of article 107, paragraph XVI, of the Federal Constitution, **and disclose matters to the corresponding District Court, for the crime of failure to comply with the Amparo judgment.**[290] [Original Emphasis]

263. Two days later, on August 28, 2013, SEGOB issued a new ruling in compliance with the Sixteenth Court's order. In this second attempt to comply, SEGOB ruled:

> the nature and linkage between [the 2009-BIS Oficio] and other the various DGAJS/SCEV/0232/2011; DGAJS/SCEV/546/2011; DGAJS/SCEV/0827/2012;

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[287] The E-Mex petition mentions that "it is not enough that the [SEGOB] has only annulled oficio DGAJS/SCEV/260/2009-BIS to consider that my principal has been restored to the full enjoyment of its rights that were infringed since several resolutions were issued by the government defendant based on such oficio, especially DGAJS/SCEV/827 dated August 15, 2012, which again acknowledged [E-Games] had vested rights to the permit of my principal, and [Permitholder-BIS Oficio], which "enhanced" the foregoing by granting [E-Games] title to a permit under identical conditions as ours […], *See* Exhibit C-21, p. 13.

[288] Exhibit C-23, p. 012.

[289] Memorial, ¶ 256.

[290] Exhibit C-23, p. 014.

> DGJS/SCEV/1373/2012; DGJS/SCEV/1374/2012; DGJS/SCEV/1426/2012, DGJS/SCEV/PT-06/2012, is thus revealed, since their contents vent issues that emanated from it, holding direct and immediate relation with it, that's to say, with what is the subject matter of the substance of the enforcement and in strict compliance provided on the date August 26, 2013, issued by the Sixteenth Court […], leave the resolutions DGAJS/SCEV/0232/2011; DGAJS/SCEV/546/2011; **DGAJS/SCEV/0827/2012** [Permitholder Oficio]**;** DGJS/SCEV/1373/2012; DGJS/SCEV/1374/2012; **DGJS/SCEV/1426/2012** [Permitholder-BIS Oficio], DGJS/SCEV/PT-06/2012 unsubstantiated […] .[291] [Emphasis added]

264. The Claimants argue that on August 26, 2013, the Sixteenth Court ordered all resolutions based on the 2009-BIS Oficio to be revoked but failed to order SEGOB to respond to all the applications that led to those resolutions.[292] First, it would most likely be futile to petition SEGOB for a response to these applications because all of them would have been denied. In other words, SEGOB would have most likely denied E-Games permit, because the permit application filed on February 22, 2011, was based, among others, on the 2009-BIS Oficio.[293] Second, the Claimants are again attempting to use this arbitration to make arguments that they failed to make when they had the opportunity to do so during Amparo 1668/2011. For example, on September 10, 2013, E-Games filed a complaint against the decision dated August 26, 2013, whereby the Sixteenth Court ordered all *oficios* based on the 2009-BIS Oficio to be declared null and void. E-Games argued that the Sixteenth Court had illegally extended the effects of the Amparo 1668/2011 judgment but failed to include any argument like the one submitted in its Memorial.[294]

a. Non-Compliance Complaint 82/2013

265. On October 14, 2013, the Sixteenth Court ruled that SEGOB exceeded its compliance with the judgment from Amparo 1668/2011 by determining that the Oficio Permitholder-BIS originated from the 2009-BIS Oficio.[295] Accordingly, the Sixteenth Court filed a non-compliance complaint with the Seventh Collegiate Court to decide on whether SEGOB had exceeded its authority or failed to comply. The non-compliance complaint was recorded under number 82/2013 (Non-Compliance Complaint)

266. On February 19, 2014, the Seventh Collegiate Court decided the Non-Compliance Complaint[296] and determined that SEGOB did not acted in excess of the [Amparo ruling] because Oficio Permitholder BIS was based on the 2009-BIS Oficio:

> In such way, the collegiate court considers that the [Permitholder Oficio] was based on the declared unconstitutional [the Oficio 2009-BIS], and on the basis of it, the [Oficio Permitholder-BIS] was issued and Permit DGAJS/SCEV/P-06/2005-BIS was granted

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291 *See*, Exhibit C-289, pp. 11, 17.

292 Memorial, ¶ 306.

293 Exhibit C-14, p. 14.

294 Exhibit R-055. Grievance filed by E-Games against the ruling dated August 26, 2013 issued by the Sixteenth Court on September 10, 2013.

295 Exhibit C-24, pp. 63-64.

296 Exhibit C-290.

> to operate seven remote betting centers and seven raffles rooms, derives from a procedural sequel, that is, from acts concatenated together involving the application of [Ofcio 2009-BIS declared unconstitutional.[297]
>
> [I]t is therefore incorrect to consider that the DGAJS/SCVEF/P-06/2005-Bis is autonomous and independent from the original permit granted to [E-Mex], in which [E-Games] has operator character, as the quality of independent permit holder authorizing the latter in the resolutions DGAJS/SCEV/0827/2012 and DGAJS/SCEV/1426/2012, and the consequent permit assigned to it (DGAJS/SCVEF/P-06/2005-Bis), are only final consequences of the primary recognition that was made in the resolution claimed, in respect of having acquired rights with respect to the DGAJS/SCVEF/P-06/2005 permit, as well as being a direct and autonomous operator of its permit holder.[298]
>
> It is therefore considered that contrary to the esteemed by [Sixteenth Court], it is necessary to leave without effect any act carried out under the DGAJS/SCVEF/P-06/2005-Bis permit, as is the case with the DGAJS/SCEV/1426/2012, which contains permit SGAJS/SCVEF/P-06/2005-BIS, to operate seven remote betting centers and seven raffles rooms to the direct and autonomous ownership of [E-Games] because it derives and is fully concatenated with the [Oficio 2009-BIS] held unconstitutional resolution."[299]
>
> [Emphasis added]

267. As a result, on March 10, 2014, the Sixteenth Court ruled that the judgment in Amparo 1668/2011 had been duly complied with.[300] SEGOB did not exceed its authority when complying with the Amparo1668/2011judgment. This event is a juridical fact for purposes of this arbitration proceeding.

b. Analysis of the actions by the Sixteenth Court and Seventh Collegiate Court.

268. The Claimants allege that there were several irregularities during the compliance stage of the Amparo 1668/2011judgment:

- The Claimants believe that the Amparo only protects the filing party from the measures that were expressly challenged because otherwise, legal certainty will be affected, and therefore, the concept of "fruit from tainted acts" cannot be imposed on the principles of an amparo action.[301]
- The Seventh Collegiate Court failed to observe the principle of consistency and changed the cause of action because it found that the concept of "acquired rights" had been declared unconstitutional in the judgment from Amparo 1668/2011. However, the

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297 *Id.*, p. 95.

298 *Id.*, pp. 99-100.

299 *Id.*, p. 100.

300 Exhibit C-291.

301 Memorial, ¶¶ 317-318.

judgment only rules that this concept is not found in the Amparo Law, not that it is unconstitutional.[302]

- E-Games was not able to defend the validity of the Oficio Permitholder-BIS in a trial with the formalities of a proceeding, depriving it of this right.[303]
- The Permitholder-BIS Oficio is not a consequence of the 2009-BIS Oficio and therefore should not have been revoked. [304]
- The revocation of the E-Games permit by SEGOB is not credible and proof of corruption.[305]
- The Sixteenth Court had procedural options that would have been more efficient in administering justice than the Non-Compliance Complaint, such as a motion for an ex-officio clarification or a renewed order of compliance from the Supreme Court.[306]

269. The Respondent will now respond to each of these arguments.

(1) The revocation of the 2009-BIS Oficio and its consequences ensures that the effects of the action ruled unconstitutional are eliminated and allows for an efficient legal system

270. The Claimants confirm that the Amparo 1668/2011judgment was "clear and precise" in that it only granted Amparo protection regarding the 2009-BIS Oficio, and therefore none of those oficios resulting from this oficio should have been revoked.[307]

271. The Sixteenth Court conceded the amparo with respect to the 2009-BIS Oficio because that was the government measure that E-Mex challenged. However, E-Mex not only challenged the *oficio* at issue but also "[a]ll the effects and consequences arising from these challenged actions,"[308] i.e., the effects and consequences of the 2009-BIS Oficio.

272. The amparo action would not make any sense if only the challenged government measure was annulled and not its effects and consequences.[309] In fact, it is highly common in an amparo action for the judgment to grant amparo protection not only against the challenged government measure but also against any subsequent action resulting from it.[310]

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302 *Id.*, ¶¶ 325-327.

303 *Id.*, ¶¶ 319-322.

304 *Id.*, ¶ 324.

305 *Id.*, ¶¶ 308-310.

306 *Id.*, ¶¶ 330-331.

307 *Id.*, ¶¶ 317-318.

308 Exhibit C-269.

309 Exhibit RER-1, Expert Report from Dr. Mijangos, ¶¶ 135-136.

310 *Id.*, ¶ 137.

273. On this point Dr. Mijangos argues that "the granting of amparo, by its nature, logic and constitutional design, clearly reaches the act of being challenged, but also its direct consequences or effects."[311] This is based on the "fruit of tainted acts" doctrine, which states that "if the original act is flawed and should not legally subsist, it is clear that those acts that derive therefrom should not either, or not because they contain some flaw in themselves, but because they are the consecquence of an act that legally should not have existed."[312]

274. Voiding the effects or consequences of a government measure that has been ruled unconstitutional does not violate the *relativity* principle (i.e., the judgment only affects the person who filed the complaint). The Seventh Collegiate Court has ruled that the Permitholder and Permitholder-BIS Oficios were intimately related to the matter in dispute. In addition, E-Mex expressly moved to have the effects and consequences of the 2009-BIS Oficio revoked, which had no effect on unrelated legal positions, and thus, said principle was not violated.[313] E-Games had knowledge of any procedural sequel and was summoned to Amparo 1668/2011 as an aggrieved third party (i.e., the party to an amparo action summoned to trial to defend its position when the amparo judgment could potentially affect its status).

275. Moreover, the fact that it was the Seventh Collegiate Court and not the Sixteenth Court who ruled to revoke the Permitholder BIS Oficio because it was a "fruit of tainted acts" is not an irregularity. Under the Mexican legal system, if the ruling issued by the first judge is subject to review by a second judge, the first decision will be subject to the result of the second ruling and this second ruling will prevail. The fact that the first and second ruling are not in agreement does not imply an error in either decision.[314]

(2) The Seventh Collegiate Court ruled that the concept of an "independent operator" is not established in the RLFJS and therefore E-Games had no "vested rights"

276. The Claimants argue that the Seventh Collegiate Court set off under a false premise when, in the ruling Non-Compliance Complaint, it determined that the concept of "acquired rights" was declared unconstitutional in Amparo 1668/2011.[315] This conclusion is erroneous and is based on an incomplete analysis. The Respondent has transcribed the relevant parts of the analysis conducted by the Seventh Collegiate Court regarding the relationship between the 2009-BIS Oficio and the Permitholder and Permitholder-BIS Oficios in paragraphs 265-267, *supra*.

277. It is clear from these paragraphs that the Seventh Collegiate Court did not declare the concept of "acquired rights" unconstitutional. What was deemed unconstitutional was the notion that that the 2009-BIS Oficio had established some type of vested right in favor of E-Games

311 *Id.*, ¶ 141.

312 *Id.*, ¶ 142.

313 *Id.*, ¶ 149.

314 *Id.*, ¶ 146.

315 Memorial, ¶¶ 325-327.

because it was based on the concept of an "independent operator," which is not found in the Regulations. Accordingly, those *oficios* based on this nonexistent concept must also be revoked.[316]

(3) The revocation of the Permitholder-BIS Oficio did not violate E-Games' right to a defense

278. The Claimants argue that revoking the Permitholder-BIS Oficio during the compliance stage of Amparo 1668/2011 deprived them of their right to a defense.[317] The Claimants believe that the way the Mexican courts decided on the revocation of its permit was inadequate, however, they have failed to prove that their right to a defense was restricted throughout the Amparo 1668/2011 proceeding.

279. As described in preceding sections, E-Games was an active participant in Amparo 1668/2011. It had the opportunity to present a defense in each stage of the trial and to challenge the decisions rendered by the Sixteenth Court and Seventh Collegiate Court. In fact, when E-Games appealed the Amparo 1668/2011judgment through Review 107/2013, E-Games did not attack the Sixteenth Court's decision regarding the illegality of the 2009-BIS Oficio but merely presented arguments attacking the admissibility of E-Mex's third amendment to the complaint.[318]

280. The Claimants always had the opportunity to present arguments deemed appropriate before the Mexican courts. The Sixteenth Court and the Seventh Collegiate Court took into consideration the arguments made by all parties, including the Claimants'.

(4) The Permitholder Oficio was a consequence of the 2009-BIS Oficio

281. The Claimants state that the Seven Collegiate Court erred when ruling that the Permitholder Oficio and Permitholder-BIS Oficio did not originate from the 2009-BIS Oficio.[319] However, the Respondent maintains that both the Permitholder Oficio and Permitholder-BIS Oficio were a consequence of the 2009-BIS Oficio, as explained in Section II.I.2. In fact, that section explains that the Claimants themselves agreed that the Permitholder Oficio was a consequence of the 2009-BIS Oficio (see paragraphs 175 and 176, *supra*).

282. In any case, the Seventh Collegiate Court analyzed these *oficios* and arrived at the same conclusion:

- [T]he resolution with folio DGAJS/SCEV/0827/2012, of August 15 of two thousand twelve, in which the administrative authority resolved the new situation of the operator Exciting Games, a variable capital corporation, was based on the DGAJS/SCEV/0260/2009-BIS resolution of May twenty-seven two thousand nine, declared unconstitutional in the judgment being completed, so the Director of Games

316 Exhibit RER-1, Expert Report from Dr. Mijangos, ¶¶ 159-160.

317 Memorial, ¶¶ 319-322.

318 See ¶ 255, *supra*.

319 Memorial, ¶ 324.

and Raffles of the Secretary of the Interior was required to deem unsubstantiated such a determination, as well as the various DGAJS/SCEV/1426/2012 of November sixteen of two thousand twelve, which was based on the aforementioned resolution in the first place and its consequences[.][320]

- [T]he collegiate court considers that the DGAJS/SCEV/0827/2012 resolution was based on the declared unconstitutional (DGAJS/SCEV/0260/2009-BIS, of May 27 two thousand nine), and on the basis of it, the various DGAJS/SCEV/1426/2012, of November sixteen two thousand twelve, was issued and permit DGAJS/SCVEF/P-06/2005-BIS was granted to operate seven remote betting centers and seven raffles rooms, derives from a procedural sequel, that is, from acts concatenated together involving the application of the resolution DGAJS/SCEV/0260/2009-BIS, of May twenty-seven of two thousand nine, declared unconstitutional in the judgment to be completed.[321]

  [Emphasis added]

283. Dr. Mijangos analyzed the Seventh Collegiate Court's ruling and concluded that the decision was correct:

- Now, restating why I consider that the Collegiate Tribunal was right, as the latter so indicates, **the official communication of November 16, 2012 makes express mention of the official communication of May 27, 2009 within its body of recitals**, and the reason is clear: the request made by Exciting Games to be recognized as a permit holder, **was formulated from a certain status or specific legal position**, consisting of being an "autonomous operator" of a permit with a different holder, which derived precisely from the official communication of 2009.[322]

- That is, **I advise that the situation generated by the official communication of May 27, 2009, is legally relevant as the basis or foundation of the situation produced by the official communication of November 16, 2012**, which is sufficient to consider that the latter is flawed as a consequence of the fact that it is based on and assumes the existence of the first of the official communications, which was unconstitutional because it recognized a quality -"autonomous operator"- not provided for in the Regulations of the Federal Law of Games and Raffles.[323]

  [Emphasis in the original]

(5) SEGOB revoked the 2009-BIS Oficio and its consequences in compliance with the Amparo

320 Exhibit C-290, p. 93.

321 *Id.*, p. 95.

322 Exhibit RER-1, Expert Report from Dr. Mijangos, ¶ 175.

323 *Id.*, ¶ 177.

1668/2011judgment; E-Mex had no influence over SEGOB's actions

284. The Claimants allege that, in less than 24 hours from receiving notice of the Court order of August 26, 2013, SEGOB issued 12-page ruling rescinding seven resolutions, which they claim is unlikely and therefore suggest it was an act of corruption.[324] This is false.

285. Mr. Landgrave explains the context in which SEGOB complied with the order from the Sixteenth Court. In his witness statement he notes that the new Amparo Law establishes a stricter mechanism to avoid noncompliance with rulings by the authorities and establishes monetary penalties for those officials in contempt. Therefore, there was a very significant incentive for complying in due time and proper form with the Amparo judgment.[325] Once SEGOB notified the Sixteenth Court that it had complied with the Amparo 1668/2011judgment on July 24, 2013, Mr. Landgrave recommended that the DGJS prepare for the potential scenario in which E-Mex would complain alleging noncompliance with the judgment, given the short amount of time they would have to comply with the court order.[326]

286. Finally, regarding the Claimants' claim that E-Mex allegedly influenced SEGOB,[327] Mr. Landgrave states the following: "I denied that there had been such influence in my acts as SEGOB's lawyer in the 1668/2011 amparo."[328] Mrs. Gonzalez Salas also denies any influence by E-Mex on SEGOB: "Again, I clarify that I never received a personal benefit for permit-related arrangements, during my administration I met with Mr. Rojas Cardona once and I can say that he had no influence on me, or in the DGJS. The insubsistence of E-Games' permission in no way was due to the influence of E-Mex or any other person, derived from the fulfillment of an order by a judicial authority."[329] [Emphasis added]

(6) The decision by the Sixteenth Court to initiate a noncompliance incident was legally correct

287. The Claimants argue that the Sixteenth Court had other procedural options that would have been more efficient for the administration of justice than the Non-Compliance incident, e.g.,

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324 Memorial, ¶ 308.

325 Exhibit RWS-2, Witness Statement of Mr. Jose Raul Landgrave, ¶¶ 14-16. On April 2, 2013, a new Amparo Law was enacted a few months before the 2009-BIS Oficio was revoked pursuant to the judgment from Amparo 1668/2011. Among the innovations established by the new law was "a new mechanism for the execution of sentences which intended to make more efficient amparo judgements." For example, it established fines and criminal penalties for officials who fail to comply with court orders.

326 *Id.*, ¶ 22. ("To mitigate that risk, my recommendation to the Directorate-General of Games and Raffles was to prepare in case that the Judge order to annul [*dejar insubsistente*] the consequences of the May 27, 2009 communication, in that sense we revised the file carefully. If the Judge confirmed that SEGOB had complied with the sentence adequately, there would not be any downside for SEGOB, except for the time spent to prepare for an additional request from the Judge.")

327 Memorial, ¶ 305.

328 Exhibit RWS-2, Witness Statement of Mr. Jose Raul Landgrave, ¶ 25.

329 Exhibit RWS-1, Witness Statement of Mrs. Gonzalez Salas, ¶ 26.

demand compliance by SEGOB or filing a motion for an ex-officio clarification ["*incidente de aclaración oficiosa*"].[330]

288. Issuing a renewed order of compliance to SEGOB was an alternative that implied that the terms of the judgment were not clear and accurate, and consequently, the new order would have to clarify the way in which compliance would be attained.[331] The motion for an ex-officio clarification, in turn, implied that there were errors or inaccuracies regarding the manner in which the judgment would have to be complied with, and therefore clarification was required.[332] However, when commencing the Non-Compliance Complaint, the Sixteenth Court did not conclude that the terms of its ruling were inaccurate. In this regard, Dr. Mijangos notes:

> [T]he District Judge initially established a clear rule of compliance: all acts deriving from the official communication declared unconstitutional were to be voided. Such rule, since it did not contain a list of acts -since that is not the nature of the resolution, since it was a legal solution containing a mandate to the authority- was to be used by the Directorate-General of Games and Raffles, and the District Judge would later have to evaluate whether the concrete and specific acts chosen by the authority to be annulled, actually responded to the previously imposed rule. This last act of control and verification does not imply that the sentence is vague or imprecise, but only that the Judge must analyze whether the authority has fully complied with the mandate imposed thereupon.[333] [Emphasis added]

289. Although there were other options in addition to the Non-Compliance Incident, this does not mean that the Sixteenth Court's analysis and decision to commence this action was improper from a legal standpoint.

3. The motion for reconsideration was correctly decided by the Supreme Court and the Seventh Collegiate Court

290. On March 31, 2014, E-Games filed a motion for reconsideration against two decisions: i) the judgment rendered by the Seven Collegiate Court on the Non-Compliance Incident, and ii) the ruling issued on March 10, 2014 by the Sixteenth Court whereby it ruled that the judgment from Amparo 1668/2011 had been complied with (Motion for Reconsideration).[334] On May 6, 2014, the Supreme Court admitted the Motion for Reconsideration and assigned it case number 406/2014.[335] On September 13, 2014, the Supreme Court decided the Motion for Reconsideration.[336]

291. Regarding the first challenged decision (i.e., the judgment rendered by the Seventh Collegiate Court on the Non-Compliance Incident), the Supreme Court ruled that the motion for

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330 Memorial, ¶¶ 330-331.

331 Exhibit RER-1, Expert Report from Dr. Mijangos, ¶¶ 184-185.

332 *Id.*, ¶¶ 186-187.

333 *Id.*, ¶ 188.

334 Exhibit C-296.

335 Exhibit C-25.

336 Exhibit C-26.

reconsideration was inadmissible.[337] Regarding the second challenged decision (i.e., the ruling issued on March 10, 2014, by the Sixteenth Court whereby it ruled that the judgment from Amparo 1668/2011 had been complied with), the Supreme Court agreed to admit the challenge. However, after evaluating the Claimants' arguments, it concluded that the Supreme Court's intervention was unwarranted because the case was not exceptional.[338] According to the internal regulations of the Supreme Court dated September 9, 2013, the authority to decide on a motion for reconsideration was delegated to the Collegiate Courts due to, among other reasons, the high number of motions for reconsideration the Supreme Court had received. The Supreme Court would only reassert its jurisdiction in exceptional cases. [339]

292. In the Supreme Court's opinion, the purpose of E-Games' motion was to determine whether the Sixteenth Court's decision on compliance with the Amparo judgment by SEGOB was correct. The Supreme Court determined that this could be resolved by the Seventh Collegiate Court without the intervention of the Supreme Court:

> Such arguments are not applicable for the intended ends, in principle because they provide no evidence that are unique or relevant to the subject, nor merit the National Supreme Court to resume original competence, given at issue are statement directed to challenge the reasons for which the District Judge considered as fulfilled the amparo order, which will be subject of study that should need the need arise will be carried out by the Collegial Circuit Entity to rule on the appeal motion in question.[340]

293. As a result, on January 29, 2015, the Seventh Collegiate Court ruled that the Motion for Reconsideration was unfounded because SEGOB had fully satisfied the judgment without exceeding its authority.[341]

294. The Claimants question the Supreme Court's decision to return the Motion for Reconsideration to the Seven Collegiate Court to rule on its own ruling in the Non-Compliance Incident. Furthermore, they argue that the lack of an alternative recourse to appeal this judgment is a denial of justice under the principles of Public International Law, including the American Convention on Human Rights.[342]

295. The Respondent considers that the ruling issued by the Supreme Court does not imply a denial of justice. The Supreme Court has held that the Amparo proceeding is consistent with

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337 Exhibit RER-1, Expert Report from Dr. Mijangos, ¶¶ 231-233. Dr. Mijangos explains that the reason why the motion for reconsideration is inadmissible against a judgment from a non-compliance complaint is because this ruling constitutes a review of the decision rendered by the District Court on compliance, so there's no need for an additional review.

338 Exhibit C-26, pp. 49-50.

339 *Id.*, pp.42-43.

340 *Id.*, pp.45-46.

341 Exhibit C-297.

342 Memorial, ¶ 355.

Article 25 of the Inter-American Convention on Human Rights.[343] Regarding the motion for reconsideration, Dr. Mijangos opines the following:

> [I]n accordance with the jurisprudence of the Inter-American Court of Human Rights, and in response to the rulings of the Supreme Court of Justice on the matter, I believe that the remedy of non-conformity provided for in the Amparo Law satisfies the standard of effectiveness for considering the right to effective judicial protection to be fulfilled. It is ideal for reviewing and controlling the actions for which it was expressly created by the legislator -mostly aspects of compliance with amparo rulings-, and, in accordance with the particularities of this case, the appeal fulfilled its objective: a court reviewed the action whereby a District Judge considered that his amparo ruling had been duly complied with, once a whole procedural sequence had been followed that allowed the parties to intervene and fully state their positions.[344]

296. On the other hand, the Claimants also allege that the Legal Counsel to the Federal Executive also unlawfully influenced the ruling by the Supreme Court.[345] However, Mr. Landgrave opines that this assertion is implausible because he never received instructions nor was he ever contacted by the Legal Advisor or his office in search of information about the case. Given Mr. Landgrave's involvement in Amparo 1668/2011 and being a member of the same administration, it is implausible that the Legal Advisor would have intervened without Mr. Landgrave's knowledge.[346]

297. The explanation is actually much simpler: the Claimants did not offer sufficient legal arguments to justify the "exceptional" nature of their motion for reconsideration so that the Supreme Court could attract the case. The Supreme Court considered the arguments made by the Claimants, but they were insufficient to warrant the Supreme Court's intervention. Like any other standard for exception, the threshold is high, and the Claimants failed to reach it. They also failed to offer evidence of the alleged intervention by the President's Legal Advisor, but that has not stopped them from making baseless allegations regarding the alleged political campaign led by the Mexican presidency against the Claimants. The Legal Advisor of the Federal Executive is responsible for issues of the highest legal relevance on actions arising directly from the President. This involves the legal review of executive orders or actions taken by the President or the legal defense of the office of the presidency on actions of unconstitutionality.[347] Agencies comprising the federal government are charged with overseeing matters under their jurisdiction and defending any action arising from these agencies before the court system, including the SJCN *[Supreme Court]*. It is unnecessary to explain to this Tribunal that the particular situation of the Claimants' 5 casinos is not exactly a priority matter or even relevant in the day-to-day life of the President or his Legal Advisor.

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343 Exhibit RER-1, Expert Report from Dr. Mijangos, ¶ 228.

344 *Id.*, ¶ 229.

345 Memorial, ¶¶ 352-354.

346 Exhibit RWS-2, Witness Statement of Mr. Jose Raul Landgrave, ¶ 32

347 *See* https://www.gob.mx/cjef/que-hacemos

298. Finally, the fact that the Seventh Collegiate Court ruled against E-Games' interests and that the ruling came from the competent entity and not the Supreme Court, as E-Games would have preferred, does not suggest any irregularity or legal error in the proceeding.[348] Much less a denial of justice.

4. The rulings in Amparo 1151/2012 were not binding on the Amparo 1668/2011

299. The Claimants hold that the "the November 16, 2012 ruling in Amparo 1668/2011 was illegal because it was contrary to E-Mex's procedural conduct and the determination made by the Second District Court in Amparo 1151/2012."[349]

300. On December 18, 2012, E-Mex filed an amparo against the failure to notify the permits issued to E-Games (Permitholder-BIS Oficio) and Producciones Moviles (oficio DGAJS/SCEVF/P-06/2005-TER).[350] The case was assigned to the Second District Administrative Court in Nuevo Leon (Second Court) under case file number 1151/2012 (Amparo 1151/2012). Approximately three months later, on March 19, 2013, E-Mex filed an amendment challenging, the Permitholder-BIS Oficio, among other government measures.[351] The Second Court admitted the amendment on March 20, 2013,[352] which was successfully challenged by E-Games via a complaint decide on October 17, 2013. [353]

301. The Claimants allege the following:

- Because the amendment was rejected, E-Mex lost its opportunity to challenge the *oficio* dated November 16, 2012 in another proceeding.
- The Sixteenth Court and the Seven Collegiate Court were both obliged to consider the implied consent determined in Amparo 1151/2012 and therefore, the Permitholder-BIS Oficio could not be revoked in the Non-Compliance Incident of the Amparo 1668/2011 ruling. They also maintain that SEGOB should have informed the Sixteenth Court that it could not revoke the Permitholder-BIS Oficio because of the Amparo 1151/2012 ruling.[354]
- According to the "estoppel theory" (when a party invokes facts that contradict its own statements), Permitholder-BIS Oficio 2012 could not be revoked in Amparo 1668/2011 because by challenging it in the amended complaint in Amparo 1151/2012, E-Mex

348 Exhibit RER-1, Expert Report from Dr. Mijangos, ¶ 240.

349 Memorial, ¶¶ 339-340.

350 Exhibit C-273.

351 Exhibit C-292.

352 Exhibit C-293.

353 Exhibit C-295.

354 Memorial, ¶¶ 339-344.

> revealed that it was aware that this *oficio* could not be revoked via Amparo 1668/2011.[355]

302. Regarding the first issue, the decision of the First Collegiate Court in Complaint 30/2013, only means that in that particular case, and based on the evidence offered and arguments made by the parties, the Permitholder-BIS Oficio was untimely challenged and was therefore inadmissible. However, this determination is limited to a specific case and to the evidence and arguments made by the parties. Therefore, it cannot automatically be applied in another proceeding even if they share some similarities.[356]

303. In addition, one ruling by a Collegiate Circuit Court cannot be binding on another Collegiate Circuit Court because there is no hierarchy between them. In fact, one Collegiate Circuit Court is not bound by its own decisions because each case may present its own subtleties which may require a different decision.[357]

304. In Amparo 1668/2011, the Sixteenth Court was not required to follow the conclusions arrived at by the First Collegiate Court in the complaint filed in another case (i.e., complaint 30/2013). It was only required to adhere to the orders issued by the Seventh Collegiate Court in the Non-Compliance Incident in Amparo 1668/2011. Due to the hierarchical system of the Federal Judicial Branch, the Sixteenth Court cannot question or deviate from the orders issued by the Seventh Collegiate Court in the Non-Compliance Incident.[358]

305. Regardless of whether SEGOB was aware of the decision in Complaint 30/2013, SEGOB could not deviate from the orders issued by the Sixteenth Court and Seventh Collegiate Court, because had it done so, the public servant responsible for complying with the judgment, i.e., the General Director of the DGJS, could have been penalized or subject to removal from office. The SEGOB was precluded from conducting an analysis on the impact of Amparo 1151/2012 on Amparo 1668/2012, because that would involve assuming the role of a judge who decides cases and appeals in an Amparo proceeding; its role, however, is limited to complying with the orders issued by these courts.[359]

306. In relation to the second issue alleged by the Claimants, it must be clarified that the "estoppel" doctrine is not applicable to a determination of whether a ruling can be appealed by an Amparo proceeding, since the admissibility of an Amparo is limited to the restrictions established in the Amparo Law and the Constitution.[360]

307. A Court cannot reach a conclusion as to the intentions of a person filing an amparo action and penalize whoever has filed an amparo action when he or she is attempting to file another action related to the former action. In this case, the Sixteenth Court and Seven Collegiate Court cannot

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355 *Id.*, ¶¶ 345-348.

356 Exhibit RER-1, Expert Report from Dr. Mijangos, ¶¶ 259-260.

357 *Id.,* ¶¶ 262-264.

358 *Id.*, ¶¶ 266-268.

359 *Id.*, ¶¶ 269-270.

360 *Id.*, ¶ 281.

presume that E-Mex had a specific intention and rule that the Operator-BIS Oficio could not be appealed via Amparo 1668/2011 because E-Mex had already appealed it in Amparo 1151/2011. This would be tantamount to the judge evaluating E-Mex's strategy and ascribing it a consequence based on an unproven (alleged) intention, merely by attempting to defend its interests through available legal mechanisms.[361]

M. The inspections and suspension of operations of the Casinos were consistent with the LFJS

308. The Claimants claim a series of alleged irregularities in the inspections and closure of the Casinos. They are also alleging that the Claimants' procedural rights were violated during the administrative proceedings following the closures.[362] However, as will be shown below, SEGOB exercised its authority in accordance with the law and the Claimants always had access to legal remedies to challenge the Respondent's actions and defend its interests.

1. The SEGOB has the authority to conduct inspections in order to monitor the Casinos' operations

309. As noted in Section II.A, games of chance and games involving betting are prohibited in Mexico,[363] and are only permitted when an authorization is obtained from SEGOB.[364] In addition, the LFJS establishes that SEGOB is the authority in charge of overseeing and controlling the enforcement of the Games and Sweepstakes Regulations in Mexico.[365]

310. Since gambling is prohibited in Mexico, the LFJS orders SEGOB to close any establishment where such activities take place without a valid authorization:

> Article 8.- Any open or closed facility where prohibited games or gambling or sweepstakes take place without legal authorization shall be closed by the Secretariat of the Interior, without prejudice to any applicable penalties that may be levied [Emphasis added].

311. SEGOB's oversight authority is carried out through DGJS inspectors.[366] In this regard, as Supervisor of the Adjunct Directorate of Regulation and Verification of SEGOB, Mr. Garcia states:

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361 *Id.*, ¶ 280.

362 Memorial, ¶¶ 380-412.

363 Exhibit 30, Article 1 of the LFJS ("Betting and gambling are prohibited throughout the country in accordance with the Law").

364 *Id.,* Article 4 of the LFJS ("No house, or open or closed place, may be established where gambling or sweepstakes of any kind are taking place without permission from the Department of the Interior").

365 *Id.,* Article 3 of the LFJS ("The Federal Executive, through the Department of the Interior, is responsible for the regulation, authorization, control, and oversight of all gaming when they involve betting of any kind, as well as all sweepstakes, except for the National Lottery, which shall be governed by its own law"). [Emphasis added]

366 *Id.,* Article 3 of the LFJS ("The Department of the Interior will oversee and control all Gaming and Sweepstakes, as well as the enforcement of this Law through its appointed inspectors").

> To carry out a verification of inspection, the area under my charge received the instruction from the DGJS, who through a Verification Order and an Official Letter of Commission, appointed the inspectors so that within the faculties conferred by the Organic Law of the Federal Public Administration (LOAPF), Federal Law of Administrative Procedure (LFPA), LFJS and its Regulation and the Internal Regulation of the SEGOB, inspections of games and raffles could be carried out. [367]

312. In order for SEGOB to perform its supervisory and control activities, the LFJS orders federal and state authorities, including the police, to provide support to SEGOB when enforcing the LFJS.[368] Mr. Garcia states that while planning an inspection, "[t]he State or Municipality in which the establishment was located, were also evaluated and analyzed. All this, if necessary, to request the accompaniment of the public force (as indicated in article 10 of the LFJS), with the sole purpose of safeguarding the integrity of the commissioned inspectors. [369]

313. The LFJS also provides for the levying of criminal penalties on owners, managers, or administrators of establishments where legally regulated gambling activities take place without authorization from SEGOB. In this regard, Mrs. Gonzalez Salas states that "when a casino is closed down for operating without a valid permit, SEGOB files charges for illegal gambling pursuant to Article 12(II) of the Federal Games and Sweepstakes Law. These charges are filed against all casinos that are closed down under these conditions, without exception."[370]

314. How the inspections were conducted in the Claimants' casinos is explained below. Despite the allegations made by the Claimants, their due process rights were always respected.

2. The Inspections of the E-Games Casinos were ordered and executed in accordance with the LFJS and its Regulations

315. On April 23, 2014, the DGJS issued orders to inspect six E-Games establishments, which were to be executed the following day.[371] The orders do not reference the name of the company to which the establishments belong, they only indicate the address where the commission inspectors were to conduct inspections were to conduct the inspection. It is also relevant to note that the purpose of these orders was to confirm whether these places had been carrying out activities regulated by the LFJS. This was relevant because on August 28, 2013, the Permitholder-BIS Oficio was revoked in compliance with the Amparo 1668/2011 judgment and on March 10, 2014, the Sixteenth Court confirmed that SEGOB had properly complied with the judgment. For example, the inspection order for the Naucalpan Casino states:

> Pursuant to Articles 3 and 7 of the [LFJS], Article 2 paragraph 3, Article 7, and Article 139 of its Regulations, the [DGJS] surveils and supervises gambling and sweepstakes

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367 Exhibit RWS-3, Witness Statement of Mr. Marcos Garcia Hernandez, ¶ 7.

368 *Id.,* Article 10 of the LFJS ("All federal and local authorities and the police shall collaborate with the Department of the Interior to enforce the orders it issues pursuant to this Law.").

369 Exhibit RWS-3, Witness Statement of Mr. Marcos Garcia Hernandez, ¶ 8.

370 Exhibit RWS-1 Witness Statement of Mrs. Marcela Gonzalez Salas, ¶ 22.

371 Exhibits C-300-C-304. Exhibit R-58, Huixquilucan Casino Inspection Order. The Claimants reference five casinos (Memorial, ¶ 5). However, they had one more casino in Huixquilucan, State of Mexico.

> and their compliance, through designated inspectors…therefore, this order is issued to confirm whether the establishment located in Avenida Jardines de San Mateo numero 8, Santa Cruz Acatlan, Naucalpan, Estado de Mexico is engaging in activities related to the [LFJS and RLFJS], and if so, to close the establishment down; given that by ruling dated the twenty-eighth of August of the year two thousand thirteen, the [Permitholder-BIS Oficio], which contains its permit, was revoked, among other things.[372]

316. From the location of the establishments and the reference to the Permitholder-BIS Oficio, there is no doubt that the Inspection Orders were directed towards the E-Games casinos and not the E-Mex casinos as alleged by the Claimants.[373] The orders also had the purpose of confirming whether the E-Games casinos were still operating despite the fact that the Permitholder-BIS Oficio had been revoked on August 28, 2013, in compliance with the Amparo 1668/2011 judgment.

317. On April 24, 2014, SEGOB executed the inspection orders at the five casinos plus the casino located in Huixquilucan (Inspections). SEGOB prepared a factual report for each Inspection.[374] The Claimants exaggerate the facts in their Memorial, and describe them inaccurately in other documents, so it is important to clarify some of these facts.

318. The Claimants state that the inspections of the Naucalpan, Villahermosa, and Puebla casinos were carried out with excessive Federal Police force.[375]

319. Mr. Garcia explains in his witness statement that performance of his duties entails coordinating the logistics of the inspections. Contrary to the statements made by the Claimants, the Inspections were conducted in accordance with applicable statutes and in the same way as in any other establishment, even pointing out that it was common practice to "request for the presence of the police because of the need to ensure the safety of the inspectors."[376] This evidence is consistent with the facts provided in the Inspection Reports, which confirm that extraordinary police support was necessary.

320. In fact, in the inspection conducted on the Naucalpan Casino, the inspectors noted in their report how important it was for SEGOB to conduct their Inspections with police assistance to protect not only the safety of the inspectors but also for the people who were there:

> "Once we had entered the establishment, duly identified before the security personnel, a dark-skinned person, height 1.80, almond-shaped eyes who is presumed to be called [Bryan] without knowing his last name, disrupted the public order in front of the people who were present who were operating various gaming machines, since he gave the order over radio to close the doors to the staff of the establishment obstructing the entrance to the undersigned, therefore the support of personnel accompanying us was requested

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372 Exhibit R-057, Naucalpan Casino Inspection Order.

373 Memorial, ¶ 389.

374 Exhibits C-300, C-301, C-302, C-303, and C-304, and Exhibit R-59, Huixquilucan Casino Inspection Report.

375 Memorial, ¶ 383.

376 Exhibit RWS-3, Witness Statement of Mr. Marcos Garcia Hernandez, ¶¶ 11-13.

> to prevent one of the inspectors being alone within the facilities as well as all the players present…"[377]

321. The Claimants also point out that all "certificates of inspection"[378] or "closure orders," which –more accurately Inspection Orders– were addressed to E-Mex and not E-Games, which 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."[379]

322. It should be noted that on April 24, 2014, SEGOB also conducted inspections on six E-Mex casinos which were also closed because they did not have a valid permit.[380] However, as explained above, the Claimants' suggestions that SEGOB mistakenly chose the wrong permitholder is baseless because the inspection orders do not reference a particular company but rather an establishment. Besides that, it is easy to conclude from the contents of the orders that they refer to E-Games' Casinos because they indicate the address where the establishments are located. And, although the inspection record for the San Jeronimo Casino[381] contains the names of E-Mex and E-Games, this does not mean that SEGOB intended to inspect E-Mex, as erroneously alleged by the Claimants.

323. The Claimants also allege that during the inspection conducted in the Puebla casino, the Manager was ordered to shut off all security cameras "They were completely out of the ordinary."[382] Mr. Marcos Garcia states that inspections do not necessarily end with a closure, but if a closure is warranted, by the end of the inspection and before putting up the closure seals, the person in charge of assisting with the preceding is asked to shut off power and close the establishment as normal, and then they would put up the seals.[383] This is most likely the context in which the facts on which the Claimants rely to suggest irregularities in the provisional closure of the establishment located in Puebla took place, which in no way are uncommon or in violation of the LFJS or its Regulations.

324. Finally, the inspectors left a copy of the inspection reports with E-Games' representatives.[384] For example, the reports on the San Jeronimo, Naucalpan, Puebla,

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377 Exhibit C-303, p. 8.

378 The Claimants use the terms "certificates of inspection" and "closure orders" indistinctly in their Memorial. For example, *See* ¶¶ 389-390.

379 Memorial, ¶ 389. Even Mr. Patricio Gerardo Chavez Nuno, witness for the Claimants and who was present during the visit to the Naucalpan casino, stated the following: "...the official showed me a closure order. I clearly remember that the closure order was not addressed to Exciting Games ("E-Games"). However, and I don't remember this with absolutely certainty because it was a long time ago, but I think I remember that the closure order displayed the name of Entretenimiento de Mexico, S.A. de C.V." (Exhibit CWS-54, Deposition of Mr. Patricio Gerardo Chavez Nuno, ¶ 17)

380 Exhibit R-56. Establishments Closed in 2013 at 2014. Exhibit RWS-1. Deposition of Mrs. Marcela Gonzalez Salas, Exhibit 4, casinos identified by numbers 42- 47.

381 Exhibit C-300, p. 1.

382 Memorial, ¶ 387.

383 Exhibit RWS-3, Witness Statement of Mr. Marcos Garcia Hernandez, ¶ 16.

384 *See* C-300, C-301, C-302, C-303, and C-304, and Exhibit R-59, Huixquilucan Casino Inspection Report.

Villahermosa, and Huixquilucan Casinos contain the names and signatures of E-Games' representative at the top of the first page.

3. The SEGOB was not precluded from exercising its verification powers

325. The Claimants argue that SEGOB could not close the E-Games Casinos mainly because: *i)* on March 31, 2014, E-Games filed a Motion for Reconsideration against the judgment issued on the Non-Compliance Complaint, which was *sub judice*, and *ii)* E-Games was granted a temporary precautionary measure on September 2, 2013, against the first attempt at compliance:

> [T]hese 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 1668/2011 proceeding, which was pending at the time before the Supreme Court. 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; 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."[385] [Footnotes omitted]

326. As will be shown below, the Claimants' statements are inaccurate. The Motion for Reconsideration did not suspend the effects of the revocation of E-Games' permit and the temporary precautionary measure was revoked on September 22, 2014, specifically because it was determined that the revocation of the E-Games permit became effective on March 10, 2014. This temporary precautionary measure will be discussed in more detail in subsection b *infra* of this section. In short, SEGOB was not barred from exercising its inspection powers or from closing the Casinos in the event they had no active permit.

327. It is also important to note that E-Games' behavior contradicts the Claimants' argument. On April 4, 2014, four days after E-Games filed the Motion for Reconsideration, it applied for new permits with SEGOB to operate the same Casinos plus the casino in Huixquilucan, all of which were closed.[386] If the Claimants really thought that the revocation of the Permitholder-BIS Oficio would not be effective while the Motion for Reconsideration was under review, there would be no reason to apply for new permits to operate the same casinos. The only consistent explanation for the Claimants' actions is that they were aware that the revocation of the Permitholder-BIS Oficio, which occurred on August 28, 2013, was confirmed at least since March 10, 2014, when the Sixteenth Court complied with the judgment from Amparo 1668/2011. Therefore, at least since March 10, 2014, the operation of the Claimants' casinos.

a. The Motion for Reconsideration did not suspend the effects of the revocation of the E-Games permit.

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385 Memorial, ¶ 381.

386 *See* Section II.P, *infra*.

328. As stated above, E-Games filed the Motion for Reconsideration on March 13, 2014.[387] However, the Supreme Court did not admit it until May 6, 2014.[388] Therefore, the Motion for Reconsideration had not yet been admitted when the inspections were conducted, and the Casinos were provisionally closed. Accordingly, the Claimants cannot allege that "they were protected" by this appeal. They have once again distorted the facts to suggest that there was an irregularity where there was none.

329. It should be clarified that the Motion for Reconsideration also did not prevent SEGOB from exercising its inspection powers over the Claimants' Casinos and, where appropriate, to close them down. Dr. Mijangos explains this in his expert report:

> [T]he appeal of non-conformity -in accordance with its legal regulation and the criteria that the Federal Judicial Branch has issued on it-, when presented for resolution, **does not generate the suspension of the acts that the authority may carry out** on the occasion of the amparo ruling in question, which would imply, in this case, that the filing of the appeal of non-conformity did not prevent the Directorate-General of Games and Raffles from exercising its powers in the matter since the permit granted to Exciting Games had disappeared -in legal terms due to the aforementioned judgments.[389] [Emphasis added]

330. The reason why the temporary precautionary measure was also unsuccessful is explained below.

b. The temporary precautionary measure dated September 2, 2013 did not bar SEGOB from exercising its oversight and surveillance powers

331. The Claimants' also reference a temporary precautionary measure issued on September 2, 2013,[390] allegedly "barring the Government from impeding or otherwise hindering the Casinos' operations pending the final resolution of the Amparo 1668/2011 proceeding."[391] The Claimants' argument here is unclear and fails to explain the context in which this temporary precautionary measure was issued. In any case, as explained below, there was no such prohibition. The temporary precautionary measure originated in the JCA complaint filed by E-Games with the TFJFA on August 23, 2013,[392] against the First attempt at compliance.[393]

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387 Exhibit C-296.

388 Exhibit C-25.

389 Exhibit RER-1, Expert Report from Dr. Mijangos, ¶ 241.

390 Exhibit C-299.

391 Memorial, ¶ 381.

392 Exhibit R-060, E-Games Action for Annulment dated August 23, 2013.

393 As stated in paragraph 258 *supra*, SEGOB issue the First attempt at compliance and adherence to the order in the judgment from Amparo 1668/2011. This judgment ordered SEGOB to revoke the 2009-BIS Oficio because it was not grounded in the RLFJS. Exhibit C-272.

332. In its complaint, E-Games requested the temporary precautionary measure because it believed that the revocation of the 2009-BIS Oficio would probably affect the validity of the Permitholder-BIS Oficio.

> I believe that the petitioned temporary precautionary measure should be granted, because first, I am requesting that the status quo be maintained and that the oficio challenged does not become effective. If the temporary precautionary measure is not granted, it would cause irreparable harm to my principal. If the ruling to comply with the order given by the [Sixteenth Court] in amparo 1668/2011 described in oficio DGJS/DGA/DPA/0820/2013 [First attempt at compliance] under appeal is allowed to continue, this may impede the financial and regulated activities my principal had acknowledged in oficio DGJS/SCEV/1426/2012 [Permitholder BIS-Oficio]. In other words, the respondent authority, or others with legal authority, may eventually determine that my principal is illegally operating its facilities, despite the fact that it is lawfully and presently engaging in its regulated commercial activities under the abovementioned oficio DGJS/1426/2012.[394] [Emphasis added]

333. The petition for a temporary precautionary measure filed by E-Games in this JCA contradicts the Claimants' position in this arbitration. In their Memorial, the Claimants' categorically deny any nexus between the 2009-BIS Oficio and the Permitholder-BIS Oficio. [395] However, as can be seen from the previous reference, E-Games petitioned for the temporary precautionary measure because it thought that the revoked 2009-BIS Oficio could affect the validity of its permit. E-Games' position at that time was that both oficios were related.[396] On September 2, 2013, the Hidalgo-Mexico Second Regional Chamber (Second Regional Chamber) of the TFJFA admitted the E-Games complaint and granted the temporary precautionary measure, which consisted in "keeping things in the state they are in, until the corresponding interlocutory judgment is issued."[397]

334. However, the Second Regional Chamber revoked the temporary precautionary measure on October 4, 2013, and replaced it with another pursuant to the following terms:

> The temporary precautionary measure to prevent the ruling on compliance with the order rendered by the [Sixteenth Court] in amparo 1668/2011 set forth in oficio DGJS/DGA/DPA/0820/2013 to take legal effect [is denied] … in addition, the temporary precautionary measure is granted exclusively to prevent the authorities from taking any action aiming to impede or prevent the commercial operation of the gaming facilities referred to in [Permitholder-BIS Oficio] [is granted].[398]

335. Subsequently, on May 9, 2014, E-Games filed a complaint with the Second Regional Chamber because it is believed, among other things, that SEGOB had violated the temporary

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394 Exhibit R-060, E-Games' Action for Annulment dated August 23, 2013, p. 13-14.

395 Memorial, ¶ 324.

396 Other proceedings in which E-Games relied on the relationship between the 2009-BIS Oficio and its permit are identified in Section II.I.3 *supra*.

397 Exhibit C-299.

398 Exhibit R-061. Revocation of Injunction dated September 22, 2014, p. 2-3.

precautionary measure on October 4, 2013 when SEGOB closed the Casinos.[399] Shortly thereafter, on May 14, 2014, SEGOB requested the Second Regional Chamber to amend the October 4, 2013 temporary precautionary measure.[400] SEGOB reported that it had revoked the 2009-BIS Oficio and its consequences, such as the Permitholder-BIS Oficio, in compliance with the Amparo 1668/2011judgment, and therefore, the temporary precautionary measure should be revoked.

336. In addition, on June 10, 2014, SEGOB informed the Second Regional Chamber that its powers to inspect the operation of the E-Games casinos was not limited and, therefore, its actions were carried out in compliance with the verification, oversight, and surveillance powers established in the LFJS and its Regulations.[401]

337. On September 22, 2014, the Second Regional Chamber ruled in favor of SEGOB's petition to revoke the temporary precautionary measure and ruled that the E-Games complaint was moot.[402] It is important to highlight that E-Games had the opportunity to present counterarguments, but it did not. The Second Regional Chamber noted that E-Games "had failed to make any arguments within the term granted in the ruling dated June 2, 2014".[403]

338. The Second Regional Chamber also ruled that SEGOB "conclusively proved that oficio DGJS/SCEV/1426/2012 issued on November 16, 2012 was revoked" and "determined that the petition to amend the temporary precautionary measure was justified."[404] Therefore, the Second Chamber revoked the temporary precautionary measure dated October 4, 2013.

339. This decision is relevant for two reasons. First, it shows that the temporary precautionary measure obtained by E-Games did not have unlimited reach and depended on the Permitholder-BIS Oficio remaining in effect. Once the E-Games permit was revoked in response to the Amparo 1668/2011 judgment, the temporary precautionary measure was vacated. Secondly, the Second Chamber noted that the Court that granted the temporary precautionary measure on October 4, 2013, stated that its purpose was not "to prevent the execution of r the order issued by the

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399 Exhibit R-062. SEGOB Report to the Second Regional Chamber dated June 10, 2014. This document references arguments made by E-Games. Regarding the casinos close on April 24, 2014, E-Games stated that: "closing the establishments of my principal violated the injunction it was issued…since the government defendant in this proceeding is prevented from enforcing the judgment issued Amparo 1668/2011…until the motion for reconsideration filed by my principal against the judgment dated February 19, 2014, rendered in the non-compliance complaint 82/2013, and against the ruling dated March 10, 2014," pp. 2-3.

400 Exhibit R-063.Oficio UGAJ/DGC/433/2014 from SEGOB, dated May 14, 2014.

401 Exhibit R-062. Report from SEGOB to the Second Regional Chamber dated June 10, 2014, p. 3 ("the verification performed by the [DGJS] does not originate from any court ruling but from the verification, oversight, supervisory, and sanctioning authority set forth by the [LFJS – Articles 3 and 4] and its Regulations").

402 Exhibit R-061, Revocation of the Injunction dated September 22, 2014.

403 *Id.,* p. 5.

404 *Id.,* p. 7.

[Sixteenth Court] in the Amparo proceedings 1668/2011 and much less to annul the ruling rendered by the foregoing federal court."[405]

340. As to the complaint filed by E-Games on May 9, 2014, because it believed that the closure of the casinos had violated the temporary precautionary measure, the second Regional Chamber ruled that the complaint was now moot because the temporary precautionary measure had been revoked.[406]

341. Therefore, the Casino Inspections and closures did not violate the temporary precautionary measure as argued by the Claimants. If the Claimants are certain that the temporary precautionary measure prevented SEGOB from closing its casinos, they should have challenged SEGOB's petition on May 14, 2014 to revoke the temporary precautionary measure. However, E-Games failed to appear at court to defend its interests. Consequently, it is inappropriate for the Claimants to attempt to litigate before this Arbitration Court interests that they failed to defend at the appropriate time.

N. E-Games had access to a legal defense to defend itself and be heard on the closure of its Casinos

342. The Claimants refer to the motion for reconsideration (Administrative Reconsideration) they filed with the Undersecretary of the Interior of SEGOB on May 16, 2014, against the inspection orders and provisional closures dated April 24, 2014. The Claimants' specifically alleged that Mexico violated its *in personam* rights throughout the prosecution of the Administrative Reconsideration procedure. Likewise, they argue that the requirements for service of process and statute of limitations were violated, and E-Games was prohibited from presenting evidence to substantiate that the provisional closures were improper.[407]

343. The Claimants' allegations are inaccurate. As stated below, the Claimants filed the Administrative Reconsideration that SEGOB deemed inadmissible. The Claimants could have appealed the decision on inadmissibility, but they decided not to do so. Additionally, during the administrative disciplinary proceedings, the Claimants defended themselves and offered evidence, which was considered by SEGOB. This is explained below.

1. The administrative Reconsideration filed by E-Games against the provisional closure was dismissed and E-Games did not appeal this decision

344. The Motion for Administrative Reconsideration filed by E-Games was decided by SEGOB on June 5, 2014.[408] It its resolution, SEGOB ruled that the motion was inadmissible because the LFPA states that the Administrative Reconsideration is only permissible against "government actions or resolutions that put an end to an administrative proceeding, instance, or adjudicate a

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405 *Id.,* p. 6.

406 Exhibit R-065. Ruling dismissing the E-Games grievance dated September 22, 2014.

407 Memorial, ¶¶ 403-404.

408 Exhibit C-360. p. 7.

case."[409] In E-Games' case, the inspection and closure orders could not be appealed by this remedy because "they are procedural acts … that only serve to illustrate and provide all the necessary data for a final decision to be made, then these do not put an end to the administrative procedure"[410] However, notwithstanding the inadmissibility of the Administrative Reconsideration, SEGOB noted that E-Games had the chance to defend itself and offer the evidence it deemed necessary during the Disciplinary Proceeding.[411] The Claimants may disagree with the decision, but SEGOB stated the legal and factual grounds as well as the reasons why it ruled to dismiss it: inspection orders are not an action that put an end to an administrative proceeding. Legal remedies were available to E-Games to challenge the inadmissibility but it decided not to invoke them.

2. In the Administrative Disciplinary Proceedings, E-Games had the opportunity to defend itself and its procedural rights were not violated

345. On July 7, 2014, SEGOB commenced a Disciplinary Proceeding against E-Games "for probably not having [sic] permit for betting or gambling and also for operating slot machines"[412] at the establishments inspected and closed on April 24, 2014. SEGOB commenced six disciplinary proceedings: one for each Casino.

346. On July 17, 2014, SEGOB informed E-Games of the commencement of these disciplinary proceedings. From the start of these proceedings, SEGOB ordered that the case files be made available to E-Games so they could review them. E-Games was also given 15 business days from the date in which notice of the commencement of such proceedings was delivered to prepare a defense and offer any evidence it deemed appropriate.[413]

347. On July 8, 2014, prior to receiving notice of the commencement of the disciplinary proceedings, E-Games requested SEGOB to declare the expiration of what it erroneously considered an "administrative verification inspection proceeding" because, in its opinion, SEGOB had not issued the respective resolution in said "proceeding."[414] The Claimants described this petition in their Memorial in the following terms:

> [...] Mexican law states that after 30 days have elapsed from the date on which the relevant authority—in this case, SEGOB—should have issued a resolution regarding

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409 Article 83 of the LFPA: "Article 83.- Interested parties affected by actions or resolutions by administrative authorities that terminate an administrative proceeding, an instance, or adjudicate a file, may file a motion for review, or if admissible, the applicable judicial remedy."

410 Exhibit C-360. p. 7.

411 *Id.,* p. 13. ("...[A] closure may be provisional and temporary, because its purpose is not only to prevent the prohibited activities from continuing or continue without the appropriate authorization, but also because it will be remain in force until the disciplinary proceeding have commenced, where the violator may provide the evidence it deems appropriate and assert all rights available under the law, and where a final judgment will be issued on whether or not to uphold the respective violation").

412 Exhibit R-066, Ruling to Commence the Disciplinary Proceeding AJP/0068/14-VII, regarding the Naucalpan casino on July 7, 2014.

413 *Id*.

414 Exhibit R-067, E-Games Petition, dated Tuesday, July 8, 2014.

> the first phase of the administrative proceedings at issue; here, the Casinos' provisional closures, the administrative proceeding expires. 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 [LFPA].[415]

348. E-Games incorrectly based its request on Article 60, paragraph three, of the LFPA, which states that those proceedings commenced ex officio are deemed to have expired, at the request of the interested party or by operation of law, after 30 days once the term for issuing a resolution has expired. However, as will be seen below, SEGOB analyzed its petition and concluded that Article 60 of the LFPA was not applicable.

349. On August 7, 2014, within the procedural timeframe established in the Disciplinary Proceeding, E-Games filed its defense and offered the evidence it considered relevant,[416] which included the following:

- The Disciplinary Proceeding had expired;
- The E-Games Motion for Reconsideration was still pending before the Supreme Court and, therefore, the manner in which compliance with the Amparo 1668/2011 ruling was to be achieved was yet to be determined; and
- E-Games did not operate slot machines in any of its casinos.[417]

350. On October 9, 2014, after SEGOB had asked E-Games for additional information and E-Games had provided it, SEGOB issued a ruling in which it weighed the evidence offered in the Disciplinary Proceeding.[418] It also ruled on the expiration argument made by E-Games, because it believed it was important to weigh E-Games' argument due to the impact it could have on the proceeding if it were applicable.

351. The SEGOB agreed with E-Games that, in administrative proceedings commenced by operation of law, Article 60, paragraph three, of the LFPA mandates expiration "… after 30 days upon expiration of the term for issuing a resolution."[419] However, E-Games erroneously believed that SEGOB had commenced the Disciplinary Proceeding with the Inspections. The SEGOB noted that the Disciplinary Proceeding did not begin with the Inspections; they simply constituted

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415 Memorial, ¶ 406.

416 Exhibit R-068, E-Games Motion filed in the Disciplinary Proceeding related to the Naucalpan casino, dated August 5, 2014

417 The SEGOB ruled that slot machines were used in five Casinos except for the casino in Huixquilucan. *See* Exhibits C-300-C-304 C-303, and Exhibit R-59, Huixquilucan Casino Inspection Report.

418 Exhibit R-069, SEGOB Ruling dated October 9, 2014.

419 Exhibit R-064, Article 60, paragraph 3 of the LFPA: "A proceeding commenced ex officio shall expire in 30 days as of the expiration of the term for issuing a resolution and the case file shall be archived, by party petition or ex officio."

"government actions through which the [DGJS], through its inspectors, oversee and surveil establishments required to adhere to the provisions of the [LFJS]"[420] [Emphasis added].

352. The SEGOB explained that if any conduct that could constitute a violation to the LFJS or the RLFJS was identified through the exercise of its inspection and surveillance powers, it was required to commence the Disciplinary Proceeding in order to safeguard the essential formalities of said proceeding. The SEGOB concluded that the expiration [rule] did not apply:

> [...] after commencing the administrative proceeding with service of process of the ruling dated the seventh of July of the year two thousand fourteen, conducted on the following seventeenth, it is undeniable that this agency is monitoring the procedural stages comprising this particular administrative proceeding, as it has been safeguarding the principles established in Articles 14 and 16 of the Federal Constitution, since this Authority is still gathering the necessary items to properly put together this case file for purposes of learning the legal truth and decide on the facts raised; therefore it may be affirmed that it is acting within the term set forth by Article 60 of the [LFPA] to substantiate and rule on […][421]

353. In their Memorial, the Claimants described the manner in which SEGOB commenced the Disciplinary Proceeding on July 7, 2014 as "irregular," arguing that E-Games did not have the opportunity to defend itself.[422] However, as stated in preceding paragraphs, E-Games always had the opportunity to intervene, consult the record, offer evidence, and be heard before and throughout the Disciplinary Proceeding.

354. The Claimants argue that SEGOB unlawfully included the operation of slot machines at the E-Games casinos in the resolution to commence the Administrative Proceeding as a potential violation when these machines were not included in the inspection reports.[423] The Claimants baselessly allege that the reason why SEGOB included a reference to slot machines was to have an additional reason to clause the casinos in the event the Supreme Court did not confirm the revocation of the E-Games permit. However, this is inaccurate because E-Games appealed the revocation of the Permitholder-BIS Oficio and the DGJS/SCEV/PT-06/2012 Oficio dated November 23, 2012, i.e., authorization for slot machines, in the Motion for Reconsideration.[424] So, the fact that SEGOB determined that E-Games was not authorized to have slot machines was an additional matter for which E-Games did not a permit. E-Games was well aware of this relationship and therefore disputed the cancellation of the Permitholder and Permitholder-BIS Oficios and the abovementioned Oficio dated November 23, 2012, among others.

355. It is also incorrect to point out, as done by the Claimants, that SEGOB "simply" excluded the evidence offered by E-Games regarding the slot machines. E-Games offered an expert report

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420 Exhibit R-069, SEGOB Ruling dated October 9, 2014, 6.

421 *Id.*, p. 7.

422 Memorial, ¶ 409.

423 *Id.,* ¶ 409.

424 Exhibit C-296. p. 2.

for the purposes of determining whether "slot machines were in operation."[425] The SEGOB stated that the evidence offered by E-Games was unnecessary because if it had been accepted, "it would have been limited to determining whether or not the machines or electronic terminals were operational and not whether they were operating at the time of the inspection."[426] On October 24, 2014, Jose Luis Segura Cardenas, petitioned SEGOB on behalf of E-Games to revoke the authorizations of E-Games representatives registered up to that date.[427]

356. On February 26, 2015, SEGOB issued final resolutions regarding the Casinos in Naucalpan, San Jeronimo, Cuernavaca, Puebla, and Villahermosa. Then, on March 3, 2015, SEGOB issued a final revolution regarding the Huixquilucan casino.[428] The contents of the six resolutions are similar, so the Naucalpan Casino Resolution will be used below to explain the contents of the six resolutions.[429]

357. In the administrative resolutions, SEGOB weighed the evidence and each of the defenses made by E-Games (Final Resolution). It even ruled again on the defense that the proceeding had expired, despite the fact that SEGOB had already considered and ruled on this defense in the ruling dated October 9, 2014.

358. The context and the reasons why SEGOB conducted the Inspections including in the closing of the E-Games Casinos on April 24, 2014 are contained in the Final Resolution:

> [O]n the date the inspection was conducted by the Directorate of Games and Sweepstakes on the establishment subject to this determination of the company 'Exciting Games S. de R.L. de C.V.', this company was already aware that the [E-Games permit] had expired and no judicial or administrative ruling had been issued as of that date that would limit or prevent this Administrative Agency from exercising its duties and powers that have been legally conferred upon this [DGJS]. In other words, the [DGJS] is responsible for addressing, processing and dispatching matters related to the supervision and surveillance of compliance with the [LFJS] and its Regulations, and therefore if, while exercising these powers, it discovers any conduct or omission that may constitute an alleged violation of the LFJS or its Regulations, it is required to commence the respective administrative proceeding and, where appropriate, penalize them.[430] [Emphasis added]

359. Another important point from the Final Resolution is the alleged nonexistence of slot machines in the Casinos. The SEGOB noted that there were in fact machines found in the Casinos that would qualify as slot machines according to the Regulations:

> [...] Article 12 of the [RLFJS] states that 'slot machines in any of its forms are prohibited. Accordingly, and in compliance with the inspection of oversight powers

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425 Exhibit R-068, E-Games Motion filed in the Disciplinary Proceeding related to the Naucalpan Casino, dated August 5, 2014, p. 15.

426 Exhibit R-069, SEGOB Ruling dated October 9, 2014, 13.

427 Exhibit R-070, E-Games Petition, dated Friday, October 24, 2014.

428 Exhibit C-361.

429 *Id.*, p. 269-322.

430 *Id.*, p. 33.

> conferred upon this [DGJS], it conducted an inspection on [April 24, 2014], which confirmed that 184 machines were found on the premises, which, upon inspection, were devices in which a user wages a bet by inserting money, a token, electronic device or any other method of payment for purposes of obtaining a prize not previously determinable.[431] [Emphasis added]

360. The SEGOB concluded in the Final Resolutions that the E-Games casinos did not have a "valid permit to carry out any betting or gambling and had been operating devices referred to as slot machines by the [LFJS]." Accordingly, SEGOB ruled that the closure of the E-Games Casinos was final.

361. On March 26, 2015, E-Games filed a motion for administrative review against the Final Resolutions that ordered the closure of the Casinos. Once again, E-Games resorted to available legal remedies to challenge the decision. This type of remedy is not decided by the DGJS but the Undersecretary of the Interior. E-Games repeated the same arguments of expiration and that the Motion for Reconsideration before the Supreme Court was still pending.[432] On June 10, 2015, SEGOB notified E-Games that it could make submissions. On July 1, 2015, E-Games submitted its arguments.[433]

362. On August 17, 2015, the Undersecretary of the Interior decided the Administrative Remedy. The Undersecretary of the Interior reviewed the DGJS's actions during the Inspections and during the disciplinary proceedings based on the arguments made by E-Games, but ultimately did not find any irregularities. The resolution states towards the end that E-Games had the chance to appeal the resolution via a JCA.[434]

363. E-Games did appeal the resolution via a JCA, which was heard by the First Northeast Chamber of the State of Mexico of the Federal Administrative Court (previously the TFJFA).[435] However, the Claimants decided to withdraw from that proceeding in order to commence this arbitration.

364. It is improper for the Claimants to repeat the same arguments of alleged irregularities and violations to Mexican law in this arbitration when they were already reviewed, weighed, and decided through administrative proceedings established by law. And it was the Claimants themselves who decided to withdraw from the JCA.

3. The case files of the closure proceedings were made available to E-Games

365. The Claimants state that they had "petitioned SEGOB for copies of these administrative files (the case files of the Review of Closure Administrative Proceeding) on numerous occasions

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431 *Id*.

432 Exhibit R-071, E-Games Motion for Review against the Closure Resolutions, dated March 26, 2015.

433 Exhibit R-072. Resolution dated August 17, 2015, p. 3.

434 *Id*.

435 Exhibit CWS-52, Fourth Deposition of Mr. Julio Gutierrez, ¶ 91.

during the last two years. The Claimants have petitioned the copies in writing and also directly from SEGOB."[436]

366. The Claimants did in fact petition for copies of the case files on the Casino closure proceedings. However, according to SEGOB, these copies were made available to the Claimants but were never collected.

> [E-Games] filed writ of amparo 1526/2017 before the First District Administrative Court in Mexico City, claiming the Assistant Director of Litigation of the Legal Division failed to rule on the delivery of the requested records of administrative proceedings AJP/0063/14-VII, AJP/0064/14-VII, AJP/0065/14-VII, AJP/0066/14-VII, AJP/0067/14-VII, and AJP/0067/14-VII.
>
> Therefore, and since it paid the government fees in full, the abovementioned agency made the requested records available to Julio Gutierrez Morales, legal representative of E-Games, via oficio DGJS/DGAAD/DJ/875/2017, dated November 30, 2017.
>
> However, [E-Games] never went to the [DGJS] facilities, despite the fact that this administrative unit made efforts to deliver the records it requested.
>
> Therefore, the [SEGOB] made these records related to the certified copies available to the First District Administrative Court in Mexico City via a reasoned report dated December 1, 2017.[437]
>
> [Emphasis added]

367. Notwithstanding the above, it is important to note that the Claimants did have access to the case file during the disciplinary proceedings (see paragraph 346, *supra*).

O. Seal removal and delivery of legal possession of the properties where E-Games operated its casinos

368. The Claimants state that "Mexico illegally lifted the closure seals in all of the Claimants Casino locations and incorrectly returned legal possession of the premises to individuals or companies other than E-Games." As described in this section, SEGOB lifted the seals to return possession of the property to its owners in compliance with court orders. These orders stem from proceedings in which the Claimants' companies, the Juegos Companies and E-Games in some of these proceedings, were the defendants. Therefore, the Claimants knew or should have known of the legal actions filed to recover the properties, since at least 2016. The SEGOB did not act unlawfully.

369. The Claimants also argue that they "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."[438] As explained below, the Claimants' argument reveals that they were passive and negligent in defending their interests. In some cases, such as that of the Villahermosa Casino, the Claimants even evaded *i)* attempts made by property owners

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436 Memorial, ¶ 425.

437 Exhibit R-080. Oficio DGJS/DGAAD/129/2017, dated December 21, 2017, p. 4.

438 Memorial, ¶ 413.

to contact them concerning their having defaulted on their lease agreement, and *ii)* attempts by the courts to serve notice on the Claimants of the contract termination proceeding. Now, the Claimants are attempting to illegally transfer the consequences of their own negligence onto the Respondent, arguing that SEGOB had failed to notify them that the closure seals had been lifted: *nemo auditur propriam turpitudinem allegans*.

1. Naucalpan Casino

370. Jovita Guadalupe Rodriguez Deciga, Maria de los Angeles Rodriguez Deciga, Silvia Araceli Rodriguez Huerta, and Jose Juan Rodriguez Huerta, owners of the property where the Naucalpan Casino was located, filed an eviction action against JVE Mexico.[439] The action was heard by the Fifth Civil Trial Court of the Judicial District of Tlalnepantla, Naucalpan, State of Mexico (in case file 457/2015).[440]

371. On December 5, 2016, the Fifth Court returned possession of the property directly to its owners. The relevant part of the ruling states:

> Consequently, forward the orders to the Law Enforcement Official assigned to this Court who shall travel to the subject property in this proceeding and give physical and legal possession to the plaintiff, so that the plaintiff's property rights on the abovementioned property are no longer violated.
>
> Notify the Directorate of Games and Sweepstakes of the Secretariat of the Interior and the General Directorate of Civil and Fire Protection of Naucalpan, Mexico so that they or their representatives are present on the date and time scheduled to remove the closure seals on the foregoing properties. Failure to appear will authorize the law enforcement official of this court to remove the foregoing seals.[441]

372. As can be noted, SEGOB, did not lift the closure seals on its own volition but was ordered to lift them by the Fifth Court. The SEGOB confirmed this via resolution dated May 22, 2017, in which it responded to a petition by the owners to recover possession of the property. The SEGOB determined that, since the Fifth Court had ordered the closure seals to be lifted and possession of the property to be returned, "it falls on said court to effect the removal of the seals it ordered."[442] It also stated that it would act "based on determinations made in eviction action 457/2015."[443]

373. Finally, the Claimants reference the unlawful lifting of the closure seals and unauthorized removal of machines and equipment by unauthorized individuals:

> Mr. Gutierrez was contacted by the premises' owners, who informed Mr. Gutierrez that the seals had been lifted and that unidentified individuals had removed assets from within the Casino, including Claimants' gaming machines. SEGOB had also never informed Claimants that their property had been removed from the Casino. The gaming

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439 On May 10, 2011, the property owners entered into a lease agreement with JVE Mexico and JVE Sureste. Then, JVE Mexico entered into a sublease agreement with E-Games.

440 Exhibit R-073. Oficio DGJS/DGAAD/106/2017, dated September 5, 2017, p. 3.

441 *Id.*, p. 3.

442 Exhibit R-074. Oficio DGJS/DGAAD/058/2017, dated Monday, May 22, 2017, p. 4.

443 *Id.,* p. 5.

> machines, most of which Claimants owned, are valuable assets that belonged to Claimants.[444] [Footnotes omitted]

374. However, it appears that at least Mr. and Mrs. Burr were aware who had illegally lifted the seals and removed the Claimants' equipment. In the Mr. Randall Tayolor's affidavit, submitted as an exhibit to this Counter-Memorial,[445]there is a transcription of a telephone call between Mr. Taylor and Mr. and Mrs. Burr, where they refer to the theft of machines, among other topics:

> [**Mr. Burr**:] And we've also heard – and we're trying to figure this out – we've heard that they removed machines, they've removed equipment from our casinos.
> **Randal Taylor**: Who are they?
> …
> **Gordon Burr**: We heard Alfredo. But it's hard to prove this stuff. We have a witness.
> …
> **Gordon Burr**: Listen, one of our ex-employees, Alfredo hired him. He says -this guy wouldn't lie – he said Alfredo hired him to dismantle the servers and remove them from the buildings. They were servers to run the machines. We also have been told by an employee that Alfredo brought trucks in in the middle of the night, went into the building – you remember that tunnel on the side – you're facing the Naucalpan on the right-hand side, you can bring trucks in?
> **Randal Taylor**: Sure.
> **Gordon Burr**: That they broke those seals. They brought trucks in in the middle of the night and loaded machines in and left.
> **Randall Taylor:** No security cameras?
> **Gordon Burr:** No, because John and Alfredo took over the security in September, put their own security people in. And they fired the guys I had in there.[446]
>
> [Emphasis in the original]

375. According to the above, people associated with the Claimants were the ones who broke the closure seals and removed equipment from the Naucalpan casino, which is prohibited and also constitutes a crime.[447]

2. San Jeronimo Casino

376. The Claimants state that the "SEGOB improperly lifted the closure seals and returned legal possession of the premises to the premises' owners - instead of to E-Games -".[448] The SEGOB did not act improperly. The owners of this property also commenced a civil action to obtain a court order for SEGOB to lift the closure seals and deliver possession of the property to its owners.[449] In

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444 Memorial, ¶ 416.

445 Exhibit R-075, Deposition of Mr. Randall Taylor, dated August 17, 2015.

446 *Id.*, ¶¶ 22-23.

447 Article 187 of the Federal Criminal Code ("The breaking of any seals put in place by the public authorities is punishable by thirty to one hundred eighty hours of community service").

448 Memorial, ¶ 417.

449 Exhibit R-076, SEGOB Ruling dated July 3, 2017 related to the San Jeronimo Casino.

fact, it was not just the property owners who resorted to legal action to recover the property--ScotiaBank also obtained a court order to recover ATM machines located inside the Claimants' casinos.[450]

377. After SEGOB had issued the final closure resolution on February 26, 2015, the company Del Bosque Corporacion, S.A. de C.V. (Del Bosque) sued JVE DF to terminate the lease agreement of the property where the San Jeronimo Casino was located.[451]

378. On May 19, 2015, Del Bosque filed its complaint with the Forty-First Civil Court in Mexico City (Forty-First Court). On March 4, 2016, the court served notice to JVE DF so that it would have the opportunity to respond to the complaint. However, JVE DF did not file an response and was ruled in default.[452] Finally, on April 27, 2017, the Forty-First Court ruled that the lease agreement was terminated and ordered the immediate return of the property to Del Bosque.

379. Based on the judgment rendered by the Forty-First Court, Del Bosque petitioned SEGOB to lift the seals to recover possession of the property. Consequently, on July 3, 2017, SEGOB ordered that the seals be lifted in compliance with the court order.[453]

380. On July 6, 2017, SEGOB inspectors lifted the seals in front of representatives of Del Bosque, E-Games (Mr. Sebastian Humbero Zavala Gonzalez) and ScotiaBank and prepared a factual report in compliance with the judgment from the Forty-First Court.[454] The SEGOB inspectors and representatives from Del Bosque and ScotiaBank all signed the factual report. Mr. Zavala Gonzalez, the E-Games representative, did not sign it. As confirmed in the report, Mr. Zavala left despite the inspectors' request to wait until the report was finished.

3. Cuernavaca Casino

381. The Claimants state that "[i]n 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".[455] However, the Claimants fail to mention that they knew or should have known, since at least 2016, that the company that owned the property, Inmobiliaria Esmeralda de Morelos S.A. de C.V. (Inmobiliaria Esmeralda) had commenced a civil action to recover possession.

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450 Exhibit R-073. Oficio DGJS/DGAAAD/106/2017, dated Tuesday, September 5, 2017, p. 1. ScotiaBank obtained and Amparo judgment which ordered SEGOB to lift the closure seals in order to remove the ATMs from the Casinos located in Mexico City, Naucalpan, Puebla, and Villahermosa. (Amparo Proceedings 2357/214 - Seventh District Administrative Court in Mexico City).

451 On March 20, 2011, Del Bosque entered into a lease agreement with JVE DF for the Naucalpan casino property. JVE subsequently sub leased this property to E-Games.

452 Exhibit R-077, Judgment from the Forty-First Civil Court in Mexico City, dated April 27, 2017cua.

453 Exhibit R-076, SEGOB Ruling dated Monday, July 3, 2017, p. 7.

454 Exhibit R-078, Detailed Report dated July 6, 2017.

455 Memorial, ¶ 419.

382. As can be noted from SEGOB oficio dated December 11, 2017 ordering that the seals be lifted,[456] on February 11, 2016, E-Games was served notice of the action filed by Inmobiliaria Esmeralda due to the sublease agreement it had executed with JyV Mexico.[457] However, E-Games did not appear at trial.[458]

383. On February 17, 2017, the Civil Court ordered the lease agreement terminated and "ordered the physical, actual, material and legal return of the property referred to as 'Kash Cuernavaca.'"[459] In compliance with the court order, SEGOB lifted the closure seals and delivered possession of the property to Inmobiliaria Esmeralda on December 21, 2017.[460]

4. Villahermosa Casino

384. As for the Villahermosa Casino, on June 14, 2016, the company Promotora de Tabasco S.A. de C.V. (Promotora) filed a motion with SEGOB informing it that it had filed an action against JVE Sureste and JVE Mexico with the Third Civil Court of the Central Judicial District, Tabasco (case file 370/2015).[461] The purpose of this action was the default in rent payment from JVE Sureste and JVE Mexico to Promotora for the use of the property where the Villahermosa casino was located.[462]

385. Promotora describes in its motion the difficulties it faced when attempting to contact JVE Sureste and JVE Mexico for purposes of service of process:

> 8.- It should be noted that the foregoing action is at the service of process stage, <u>because the lessees have constantly evaded service of this action</u>.
>
> 9.- It is important to note that since my principal withdrew the complaint filed against the company yet to be served, and <u>the company that has already been served is in default</u>, a judgment will be issued by the court within the next few days ordering the eviction.[463] [Emphasis added]

386. The Claimants complained that "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."[464]

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456 Exhibit R-079, SEGOB Ruling dated December 11, 2017.

457 *Id.*, p. 3. Inmobiliaria Esmeralda entered into a lease agreement with JyV Mexico on August 1, 2011. Then, JyV Mexico entered into a sublease agreement with E-Games. In addition, Inmobiliaria Esmeralda brought an action to terminate the lease agreement executed with JyV Mexico before the Third Civil and Commercial Court of the First Judicial District of Morelos.

458 *Id.*, p. 3.

459 *Id.*, p. 4.

460 Exhibit R-080, Detailed Report dated December 21, 2017.

461 Exhibit R-081, Writ from Promotora to SEGOB dated June 14, 2016, p. 3.

462 On December 1, 2010, Promotora entered into a lease agreement with JVE Sureste and JVE Mexico for the property where the Villahermosa Casino is located. JVE Sureste, in turn, entered into a sublease agreement with E-Games on the property.

463 Exhibit R-081, Writ from Promotora to SEGOB dated June 14, 2016, p. 3.

464 Memorial, ¶ 422.

However, as can be seen from the two foregoing excerpts, the reason why the Claimants did not have any more information on the status of the property was because they decided to not participate in the proceeding.

387. Finally, the Claimants state that "[i]n late 2017... confirmed that the establishment where Villahermosa Casino used to be located was open and operating as the "Vegas Casino.'"[465] This claim is incorrect. Towards the end of 2017, specifically on November 24, 2017, Promotora contacted SEGOB and requested that the closure seals be lifted so it could take possession of the property:

> [A]s you are aware and can be concluded from case file AJP/0063/14-VII, [SEGOB] ordered and enforced first the suspension and then the closure, which has been in place since the twenty-fourth of April of the year two thousand fourteen.[466]

5. Puebla Casino

388. The owner of the property, Operadora Prissa, S.A. de C.V. (Operadora) filed an action against JVE Centro to terminate the lease agreement, vacate the premises, return the property, and pay rent. The action was filed before the Fourth Specialized Civil Court in the City of Puebla (creating case file 760/2015/4C).[467]

389. On August 16, 2016, the court terminated the lease agreement, ordered that the property be vacated and returned to Operadora, and ordered JVE Centro to pay all outstanding rent.[468] In compliance with the judgment, SEGOB lifted the closure seals and returned possession of the property to its owner on July 13, 2017.

390. Another relevant point in the ruling is that the court stated that neither JVE Centro nor Antonio Moreno Quijano, i.e., the JVE Centro representative who signed the lease agreement as guarantor cosigner and joint and several obligor, appeared at trial to defend themselves. The ruling states:

> SECOND. The plaintiff, Fernando Salazar Martinez, as general attorney-in-fact for litigations and collections of the company Operadora Prissa S.A. de C.V., proved his action for terminating the lease agreement and payment of outstanding rent, which was filed against Juegos de Video y Entretenimiento del Centro, limited liability company of variable capital, as lessee, through its legal representative, who failed to appear at trial and make any defense whatsoever, and also against Antonio Moreno Quijano as guarantor cosigner and joint and several obligor against who withdrew from the action.[469] [Emphasis added]

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465 *Id.*, ¶ 422.

466 Exhibit R-082, Writ from Promotora to SEGOB dated Friday, November 24, 2017, p. 2.

467 Exhibit R-073. Oficio number DGJS/DGAAAD/106/2017, dated September 5, 2017, p. 2.

468 Exhibit R-083, Judgment from the Fourth Specialized Civil Court of the Judicial District of Puebla, on August 16, 2016.

469 *Id.*, p. 13.

391. Finally, the Claimant states that "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."[470] The Respondent argues that SEGOB was not required to do this. As noted by Mr. Lazcano, because *i)* although the closures limit the property rights to the properties, these rights do not attach to the property itself, and because E-Games is merely the lessee of the properties, it does not have a right to have possession of the properties restored to it, *ii)* the final closure remains against E-Games as a violator of the LFJS and its Regulations, but not against the owners of the properties, who through civil actions had their property rights restored. Therefore, SEGOB was not required to notify any event or action regarding the lifting of the seals to anyone who did not have any property rights.[471]

P. The permits that E-Games applied for in 2014 were denied because of several deficiencies and not because SEGOB required the establishments to be open and operational

392. On April 4, 2014, E-Games applied for seven new permits from SEGOB and alleged it had satisfied "all requirements set forth in the [RLFJS], despite having already obtained an independent permit."[472] The applications were for the six casinos E-Games had operated in Cuernavaca, Huixquilucan, Naucalpan, Puebla, San Jeronimo, and Villahermosa, plus an additional establishment located in Veracruz.[473]

393. On August 15, 2014, SEGOB responded to each one of the six permit applications filed by E-Games.[474] On the one hand, the Claimants minimize the denial of their applications by claiming that SEGOB based its decision on "technical grounds" but, on the other hand, misrepresent SEGOB's decision by noting that "open and operational casinos" were a necessary condition to obtain the permits.[475] Both statements are false as explained below.

1. Deficiencies in the applications for new permits

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470 Memorial, ¶ 414.

471 Exhibit RER-2, Expert Report from Mr. Lazcano, ¶¶ 187-190.

472 Memorial, ¶ 437.

473 It is reasonable to conclude that the reason why the Claimants applied for new permits after the ruling issued by the Sixteenth Court in Amparo 1668/2011, dated March 10, 2014, was because the Claimants were aware that the revocation of their permit was valid and it was illegal to continue operating its casinos under those conditions. Therefore, the Claimants were subject to being closed for violating the LFJS because they did not have a valid permit. The Claimants' reaction when their permit was revoked should be compared to Megasport's reaction, another permitholder that lost its permit and had been operating 40 establishments (See Section P.2, *infra*).

474 Exhibits C-27 to C-33.

475 Memorial, ¶ 438.

394. First, since the establishments have been closed down,[476] SEGOB concluded that "these establishment[s] [could not] perform or carry out any type of cross bet or draw…"[477] In other words, it ruled that they could not operate casinos because they were closed down for operating without a valid permit. Therefore, there was a legal impediment to operate on these properties. The SEGOB did not require the establishments to be open and operational as incorrectly alleged by the Claimants.

395. Second, SEGOB had determined that the permit applications did not explain the origin of the investment funding, and therefore did not satisfy the requirements set forth in the RLFJS, in relation to submitting documentation and information on the "[i]nvestment plan to be carried out determining the origin of the applied resources". The SEGOB stated the following:

> In this regard, and after analyzing the above-mentioned documentation and having in view the document being discussed, it is necessary to refer that, even though it is stated that the investment was from a third party, it does not concretely specifythe [sic] origin of the applied resources, thus not complying with Section 22 of the [RLFJS].[478] [Emphasis added]

396. Third, SEGOB determined that the applications did not satisfy the requirement of submitting documentation "certifying that the applicant has a favorable opinion from the federal entity, city council or delegatory authority for the installation of the premises whose permit is requested"[479] [Emphasis added]. E-Games submitted municipal authorizations from the cities where the establishments would be located, however these were granted in substitution of a favorable opinion previously granted in favor of the E-Mex Permit. For example, in the case of the San Jeronimo Casino, it states:

> [...] having in view the certified order without number, dated January 20, 2009, replacing order DAO/DGJG/1254/2008, dated July 7, 2008, by which the Legal and Government Director of the Álvaro Obregón district, Bachelor Jesús Lucatero Rivera, represents his favorable opinion to install and operate a game arcade, in terms of what is established in [E-Mex Permit], and grants replacement of the favorable opinion in favor of [E-Games].[480]

397. Based on the foregoing, SEGOB stated that "therefore, the above-mentioned document, although true, grants the replacement of the favorable opinion inf favor of Exciting Games, S. de

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476 Exhibit C-33. The establishment named by E-Games in the permit application for the Veracruz casino was not one of the casinos closed down on April 24, 2014. Therefore, SEGOB resolution which denied this particular application was not based on the situation the establishment was in at that time.

477 See Exhibits C-27 to C-32, section 1 "About the legal ownership."

478 See Exhibit C-27 to C-32, section 3 "Investment plan to be carried out determining the origin of the applied resources" and Exhibit C-33. Section 2 "Investment plan to be carried out determining the origin of the applied resources."

479 *See Id.*, section 2 "On Favorable Opinions". Article 22(IX) of the Regulations require that a favorable opinion from the state or municipal Council be substantiated to set up a Casino.

480 Exhibit C-28, p. 8.

R.L. de C.V, but it comes from a derived act and granted to a legal entity different from the applicant of the new permit."[481]

398. The SEGOB also noted that the favorable opinions that were submitted were issued up to five years prior (in the case of the Puebla and San Jeronimo casinos, for example). Therefore, it determined that given the amount of time that had elapsed since the opinions were issued "it cannot be assumed that the authority that issued the favorable opinion still has the same opinion".[482]

399. Finally, in the case of the applications for the Cuernavaca and San Jeronimo Casinos, SEGOB identified the need to confirm the authenticity of the favorable opinions that were submitted, because SEGOB was not sure whether the signatures of the subscribing officials were legitimate, and they also did not contain the stamps from the issuing authority.[483]

400. It is worth noting that the Claimants allege that, despite proving how they had "legal possession of the properties, SEGOB denied their application because they were "closed." And therefore, they allege that SEGOB applied different standards to them than on other permit applicants.[484] These allegations are also incorrect. Whether a property is open or closed is irrelevant for the purposes of compliance with the Regulations. There is a legal and factual impediment for "legal possession." E-Games as an applicant cannot actually have the use of the site, i.e., possession.

401. Finally, Mr. Lazcano analyzes SEGOB's responsive oficios and concludes that they fully comply with all aspects and validity requirements for government acts, among whiche are reasoned and legal provisions that respond to the subject matter of the application. Therefore, although the response was a denial, it met all the necessary requirements to justify the end result.[485]

402. At any rate, regardless of SEGOB's determinations on the new permit applications, E-Games had legal remedies at its disposal and the opportunity to appeal SEGOB's decision and to test the argument the Claimants are now making in their Memorial. SEGOB's *oficios* expressly state that they may be appealed via a review proceeding pursuant to the LFPA.[486] E-Games did not appeal SEGOB's decision and now expects this arbitration to decide whether it is consistent with the RLFJ.

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481 *Id.*, p. 9.

482 *Id.*, p. 9.

483 *Id.*, p. 9. ("...be advised that the oficio submitted does not contain a stamp of authentication, i.e., it does not satisfy the legal formalities set forth in Article 129 of the Federal Code of Civil Procedure; additionally, it is not sufficient that a certified copy of this document is submitted, since this Government Authority does not have in its possession the signatures of the issuing agency; consequently, and for purposes of monitoring the legality of the documentation submitted to this Department, which, when enforcing the relevant law, inspires it actions, its authenticity must be confirmed, which is supported by the following case law…").

484 Memorial, ¶¶ 440-441.

485 Exhibit RER-2, Expert Report from Mr. Lazcano, ¶¶ 163-164.

486 Exhibit C-28, p. 11. ("...this resolution is final and may be appealed via a Motion for Review within fifteen days as of the day following that upon which notice of this resolution becomes effective, pursuant to Articles 39, 83, and 85 of the Federal Law of Administrative Procedure…").

2. The Megasport case contrasts significantly to the E-Games case

403. The Claimants make reference to companies to which SEGOB did issue permits, "even though such companies did not have open casinos operating at the time the requests were made."[487] However, as explained previously, SEGOB did not require E-Games to have six open and operational casinos when applying for the new permits. The primary reason why they were not issued permits was the deficiencies in the documentation submitted by E-Games and the fact that it expected to obtain permits for the same establishments that had been closed for operating without a permit. Therefore, references made by the Claimants to other cases are no related to the situation faced by E-Games.

404. However, it is important to discuss the case of permitholder Cia. Operadora Megasport, S.A. de C.V. (Megasport) referenced by the Claimants,[488] in order to contrast it with the E-Games case.

405. On May 6, 2014 (days after the E-Games casinos were closed),[489] SEGOB closed the "Casino 777 Fortuna", one of Megasport's establishments, because it determined that the favorable opinion from the municipality where the casino was located was forged.[490] Therefore, SEGOB commenced Disciplinary Proceeding AJP/0036/14-V and on October 24, 2014, it decided not only to fine the permitholder and close down the casino but to also revoke its permit. After its permit was revoked, Megasport notified SEGOB, between November 12-14, 2014, that it had closed its 40 establishments located throughout the country,[491] which prevented SEGOB from closing them down for operating without a permit.

406. After closing the establishments, Megasport challenged before domestic courts the resolution issued in the Disciplinary Proceeding through which SEGOB canceled its permit. The fact that the establishments operated by Megasport were not closed by SEGOB allowed the establishments to reopen through a different permit.

407. By contrast, the Claimants decided to continue operating the six casinos illegally without a valid permit, despite the Sixteenth Court having confirmed the revocation of the Permitholder-BIS Oficio on March 10, 2014. This reckless decision was, in the end, what caused the Casinos to be closed on April 24, 2014.

408. Finally, in an attempt to prove discriminatory treatment, the Claimants point out that SEGOB issued permits to the company Pur Umazal Tov S.A. de C.V. to operate casinos in establishments where Megasport had operated its casinos. However, and as already explained, the

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487 Memorial, ¶ 442.

488 *Id.*, ¶ 444.

489 Exhibit R-056. Establishments Closed in 2013 at 2014, casino identified with the number 50.

490 Exhibit R-084, Screenshot of the revocation of the Megasport permit. The information related to Cia. Operadora Megasport, S.A. de C.V. an be viewed on SEGOB website on the following link: http://www.juegosysorteos.gob.mx/es/Juegos_y_Sorteos/Salas_de_Sorteos_de_Numeros

491 Exhibit R-085, Screenshot of the Report on the closing of 40 Megasport establishments. The information on the closing of the Megasport casinos appears on SEGOB website: http://www.juegosysorteos.gob.mx/es/Juegos_y_Sorteos/Salas_de_Sorteos_de_Numeros

situation of Megasport was different from the Claimants' situation, not because of the treatment it received from SEGOB but because of the strategy they employed. Megasport avoided the closure of its casinos by shutting them down before their operating permit was revoked, while the Claimants decided to continue operating illegally without a permit.

Q. Attempts to sell the Casinos failed due to causes attributable to the Claimants

409. The Claimants allege that after the casinos were closed on April 24, 2014, they attempted to sell the casinos and their assets. In this respect, they describe that they "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."[492] However, the Claimants again claim that SEGOB was responsible for the Claimants' unsuccessful attempts to sell their casinos. The Respondent cannot be responsible for the Claimants' failed negotiations to sell its Casinos or transfer their businesses. This would lead the absurdity that the State is responsible for every failed transaction between private parties. The Claimants reference alleged negotiations with Televisa, Mr. Juan Cortina, Messrs. Chow and Pelchat, and Codere.

410. Regarding the discussions with Televisa, the Claimants state that they had meetings with Mr. Jose Antonio Garcia and other company representatives, who, according to Mr. Burr, "conveyed the clear impression that SEGOB, for reasons unknown at the time to Claimants, would block every attempt by Claimants to reopen the Casinos and/or recuperate their investments in any meaningful way."[493] Mrs. Gonzalez Salas said she remembers meeting with Mr. Garcia, who expressed interest in acquiring the casinos. However, the context of the conversations with Mr. Garcia is different from what Mr. Burr had stated:

> As head of the DGJS, I would constantly meet with permitholders, so I had several meetings with representatives of Televisa, which is the holding company of the company with the trade name PlayCity. I specifically recall meeting with Jose Antonio Garcia, Vice President of Televisa Corporate Management, who related interest in acquiring the E-Games establishment in Cuernavaca. However, this space along with the five other casinos belonging to this company could not open because they were subject to administrative proceedings that were still pending a decision and criminal complaints still in process. It is important to clarify that when a casino is closed for operating without a valid permit, SEGOB files criminal charges for illegal gambling, pursuant to Article 12(II) of the Federal Games and Sweepstakes Law. This happens to all casinos closed under these conditions without exception. As such, the establishments could not be reopened until the proceedings had concluded.
>
> Jose Antonio Garcia (PlayCity) said they were considering acquiring them to operate them under the permit the company already had. However, I suggested that he find out what the status was of the casinos he considered acquiring. For example, if they had the necessary municipal permits, and if the properties where casinos were operated were

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492 Memorial, ¶ 428.

493 *Id.*, ¶ 431.

> leased or owned. I offered to continue with our conversation, but he never came back to discuss this this matter further.[494]
>
> [Emphasis added]

411. The Claimants also assert that they contacted Mr. Juan Cortina, who in turn contacted Mrs. Gonzalez Salas, who allegedly refused to approve the transaction. The Claimants also state that "Mr. Cortina sold his casinos, informing Mr. Burr that he sold his casinos because he realized that the Mexican government was not going to accept any foreign investment in the gambling industry."[495] Mrs. Gonzalez Salas also remembers meeting with Mr. Cortina, but describes the conversation in a different context:

> There was a similar situation with Juan Cortina Gallardo, who approached the DGJS with the same intentions. I personally met with him and I told him the same thing that I had told Mr. Jose Antonio Garcia: the casinos were not in legal condition to be reopened. This legal condition was independent of the origin of the investment (foreign or domestic) and it was outside the DGJS's authority.[496] [Emphasis added]

412. Mrs. Gonzalez Salas witness statement regarding the conversations with both Mr. Garcia and Mr. Cortina show that there was no intention to block or interfere in the sale of the casinos. Mrs. Gonzalez Salas was merely describing the legal status of the casinos: the casinos had been closed for operating without a valid permit. This is a violation of the LFJS and, therefore, there were administrative and criminal proceedings underway, which themselves would prevent the casinos from operating normally.

413. The Respondent argues that the Claimants's alleged attempts to sell their assets did not fail for reasons attributable to the Respondent, as explained below based on Mr. Randal Taylor's affidavit (one of the Claimants).[497]

414. With respect to the negotiations with Televisa, Mr. Taylor's affidavit includes an email from Mr. Burr to "Tery" from the company Caddis Capital (also one of the Claimants), stating, among other things, that: "*John [Conley (another Claimant)] sent an email in which he said that the Televisa deal was never real and he had been duped into providing information to Televisa and going along with the purported deal. In hindsight, crazy? Yes! As a result of these failed efforts to sell our assets, our debt in Mexico is now so high that even if there is a buyer it will be a miracle if we ever recover a penny or peso*."[498] [Emphasis added]

415. In addition, the Claimants reference negotiations with Mr. Benjamin Chow and Mr. Luc Pelchat. According to the Memorial, Mr. Burr describes the proposal in the following terms, pointing out that Mrs. Gonzalez Salas and Mr. Felipe Cangas (who succeeded Mrs. Gonzalez Salas in the DGJS) were those who had prevented negotiations from continuing:

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494 Exhibit RWS-1, Witness Statement of Mrs. Marcela Gonzalez Salas, ¶¶ 22-23.

495 Memorial, ¶ 433.

496 Exhibit RWS-1, Witness Statement of Mrs. Marcela Gonzalez Salas, ¶ 24.

497 Exhibit R-075, Sworn affidavit of Mr. Taylor p. 32, item 5. The contents and scope of this statement are described in more detail in Section III.G *infra.*

498 *Id.,* p. 32, item 5 p. 32, item 5.

> Mr. Chow represented that he had contacts at SEGOB and that he could help us reopen the Casinos. Messrs. Chow's 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"), which would in turn sell all of Grand Odyssey's stock to a Canadian public company. The Canadian public company would then issue securities to the owners of the Juegos Companies, including all of the U.S. investors. The idea behind this transaction was for the U.S. shareholders to remain invested in the Juegos Companies, but only indirectly through their ownership in the Canadian public company. 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, Felipe Cangas ("Mr. Cangas"), explicitly said that they would not allow the Casinos to reopen as long as the U.S. shareholders were involved.[499] [Emphasis added]

416. However, Mr. Randall's affidavit reveals that the negotiations with Mr. Chow were fraudulent and it did not appear that the "B-Mex Members" were aware of it:

> In 2014 B-MEX solicited loans from the Members to keep operations going. The below details that Gordon and Erin Burr allowed B-Mex Member/Lender Doug Moreland to be taken advantage of by Dan Rudden and aided and allowed Dan Rudeen to usurp a B-MEX orporate opportunity. Basically, instead of loaning money to B-MEX, Rudden out Doug Moreland´s money into a subscription agreement with Benjamin Chow's company, Grand Odyssey. Rudden then kept 10% of the proceeds for himself. This happened in 2014 and neither of the Burrs ever revealed this to the Members.[500]

417. In the email from Mr. Burr to "Terry" from the company Caddis Capital, referred to above, Mr. Burr reveals that other causes, not the Respondent, prevented the negotiations with Televisa from materializing, among others:

> 3) Erin and I did not interfere in the efforts to sell the assets in Mexico, and fully cooperated when the BOD needed assistance, even though we disagreed with the approach in finding a buyer. On both sides, there was much animosity and fighting that occurred during more than two years of failed efforts with Televisa and others. Misinformation and complete breakdown in transparency during transactions with Benjamin, Alfredo and then Televisa led to great mistrust on our side. All this has fostered an almost completely dysfunctional situation. As a result of failed efforts (not blaming anyone) we are spending hundreds of thousands of dollars and hundreds of hours trying to rectify the illegal stock transfer, refute Mexico's claim we have waived our NAFTA rights, salvage any assets we have, and attempting to protect our investors. No matter how you look at what happened in Mexico the last two years, the boards failed in efforts to sell the assets while at the same time some of members [sic] were allowing, intentionally or unintentionally, conflicted Mexican nationals to jeopardize our investment while continuing to maintain a close working relationship with these same nationals… We have had no help from the BOD with the NAFTA case, actions against Chow and others and all related transactions. The entire focus of the other board members has been on attempting to sell the Mexican assets, and none of those efforts had come to fruition.[501] [Emphasis added]

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499 Exhibit CWS-50, Third Witness Statement of Mr. Burr, ¶ 114.

500 Exhibit R-075, Sworn affidavit of Mr. Taylor, p. 32, p. 22.

501 *Id.,* p. 32, item 5

418. This demonstrates that the Respondent did not interfere in any way with the Claimants' unsuccessful negotiations to sell the casinos and assets. On the contrary, it seems that the causes were the disagreements between the Claimants themselves, misunderstandings, and the "irregular" operations.

R. Producciones Moviles and Petolof were in different circumstances than E-Games

419. The Claimants argue that "Mexico has allowed other Mexican casino companies and nationals that operate casinos in identical circumstances as Claimants to remain open."[502] In support of their argument, they reference two permitholders: Producciones Moviles y Petolof. The Respondent argues that the circumstances of these companies were different than E-Games' circumstances.

420. The Claimants argue that "SEGOB and the Mexican judiciary have left essentially undisturbed the casino operations of Producciones Moviles, a company that sought and obtained its own, independent casino permit under almost identical legal arguments and factual circumstances as E-Games."[503] Indeed there are some similarities between E-Games and Producciones Moviles. Both companies were E-Mex operators and, in view of the risk of E-Mex losing its permit when it was declared commercially insolvent, they both requested SEGOB to change their status from operator to permitholder. However, there is one major difference that cannot be ignored.

421. Unlike E-Games, the Producciones Moviles permit was not a consequence of the 2009-BIS Oficio. As explained in Section II.L.2, *supra*, the revocation of the E-Games permit was not an action that SEGOB decided on its own. The Permitholder-BIS Oficio was revoked in compliance with the Amparo 1668/2011 judgment, which ordered that all oficios stemming from the 2009-BIS Oficio be revoked. Therefore, whether E-Games' and Producciones Moviles' permits were similar is irrelevant because there was no ruling ordering the annulment of the Producciones Moviles permit.

422. The Claimants requested SEGOB the 2009-BIS Oficio in order to be recognized to "operate [their] establishments because they [had] benefited from the legal theory relating to vested rights, and they were therefore operating at the same time but separately from the permitholder itself."[504] Producciones Moviles, in turn, requested SEGOB on March 5, 2019, to simply be recognized as an E-Mex operator. The SEGOB stated the following via Oficio DGAJS/SCEV/0120/2009-BIS:

> This administrative authority attests for all legal and administrative purposes that it is appropriate to recognize the company "Producciones Móviles S.A. de C.V." its capacity as operator with irrevocable effects to collect bets via internet and telephone, as well as to operate 40 forty authorized establishments of permit DGAJS/SCEVF/P-06/2005, dated May 25, 005, and its subsequent modifications, being able to act in such capacity, directly before this dependency, for all relevant purposes and Procedures, as well as to

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502 Memorial, ¶ 449.

503 *Id.*, ¶ 450

504 Exhibit C-11.

> comply with each and every obligation of the [LFJS], its regulation, and the general conditions of the entire permit N° DGAJS/SCEVF/P-06/2005, and its amendments.[505] [Emphasis added]

423. The SEGOB did not act discretionally or discriminatorily to harm E-Games or to allow Producciones Moviles to "remain in the business."[506] The SEGOB complied with the judgment from Amparo 1668/2011. If SEGOB had revoked the Producciones Moviles permit, they would have unlawfully infringed upon Producciones Moviles' rights in violation of its right to due process.

424. The SEGOB, like any other Mexican government authority, may only act within the scope of its powers and its actions are valid unless they are declared invalid by an administrative authority or Court.[507] The Permitholder-BIS Oficio was revoked after E-Mex filed Amparo 1668/2011, *i.e.,* the government action was declared invalid by a Court. And this Court ruled that the government action was void because a private party (E-Mex) filed a claim alleging that its constitutional rights had been violated. Again, the DGJS did not revoke the E-Games permit *motu proprio*.

425. The Claimants also state that "[u]nder Mexican law, the principle of legal certainty in administrative law demands that the authorities conduct themselves in accordance with consistent and homogeneous legal criteria, so as to limit arbitrary and unconscionable actions." However, in Mr. Lazcano's opinion:

> SEGOB did not apply a different criterion for both companies, since the situations in which they found themselves were different... SEGOB did not transfer the principle of legal certainty in administrative matters to the detriment of E-Games, as the "consistent and homogeneous legal criteria" of the authorities, in strict logic, are possible in identical, similar or analogous situations; situation that did not occur in this case.[508]

426. The Claimants were also not in similar circumstances as Petolof, which is explained in detail in Section S.3 *infra*. This is because SEGOB issued the permit to Petolof in compliance with a court order, so it was not discretional. Therefore, their argument that SEGOB applied the RLFJS arbitrarily and discriminatorily is incorrect.

427. In sum, beyond any similarities between the cases of Producciones Moviles and Petolof wich E-Games that the Claimants are attempting to create, the truth is that there are significant differences that result in different situations. The E-Games Permit was revoked because of the amparo filed by E-Mex, which ended in compliance with the Amparo 1668/2011 judgment. The Producciones Moviles permit could not be legally revoked on the basis of this judgment because E-Mex did not challenge it nor was it a consequence of the 2009-BIS Oficio. In contrast, the Petolof permit was issued in compliance with a ruling in another action (before the TFJFA) and under completely different circumstances from E-Games.

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505 Exhibit C-354.

506 Memorial, ¶ 454.

507 Exhibit CER-2, Expert Report from Mr. Omar Guerrero, ¶¶ 174-175.

508 Exhibit RER-2 Expert Report from Mr. Lazcano, ¶ 151.

S. Tax and criminal actions taken against E-Games

1. The tax authorities used their power to determine that E-Games had not satisfied its tax obligations

428. The Claimants state that they were subject to a tax audit in September 2012 regarding E-Games' operations from 2009.[509] On February 28, 2014, the SAT determined that E-Games had breached its tax obligations and was ordered to pay $170,475,625.02. As described by the Claimants, E-Games had access to all legal instances to defend itself which, once again, went all the way to the Supreme Court. However, it did not prevail.

429. The Claimants again allege that the actions by the authorities (in this case, fiscal [authorities]) were part of the Respondent's alleged plan to harm them and have submitted as evidence what Mr. Gutierrez heard from other people.[510]

430. Again, the explanation is simple. The resolution issued by the SAT on February 28, 2014, originated from its verification powers in tax matters and not from actions or reprisals against E-Games.[511] The SAT issued a fine and tax credit for the amount of $170,475,625.02 with regard to several taxes as well as profit sharing with its employees for $5,601,964.87.[512] E-Games resorted to all available legal defense mechanisms and obtained a partial victory because it was able to get the profit-sharing amount revoked.[513] There is no evidence whatsoever to substantiate the Claimants' accusations. The truth is that E-Games has still not paid its tax obligation.[514]

2. Criminal investigations commenced against E-Games for illegal gambling

431. The Claimants argue that SEGOB used the Federal Attorney General's Office *[Procuraduria General de la Republica]* (PGR, today the *Fiscalia General de la Republica*) to illegally and arbitrarily file complaints for unjustified crimes against E-Games.[515]

432. The Respondent categorically denies that the criminal complaints filed by SEGOB against E-Games are unjustified or are reprisals for commencing this arbitration proceeding. Pursuant to Article 12(II) of the LFJS, it is a federal crime to operate casinos without authorization from

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509 Memorial, ¶ 461

510 *Id.*, ¶ 463

511 Article 42, first paragraph and subsection III of the Federal Tax Code: "The tax authorities, in order to substantiate that taxpayers, joint and several liable parties, and related third parties have complied with tax provisions and, where applicable, determine unpaid taxes or tax obligations, and to also prove the commission of tax crimes and provide information to tax authorities, shall be authorized to: [---] III.- Conduct visits of taxpayers, joint and several liable parties, or related third parties, and review their accountings, properties, and merchandise."

512 Exhibit R-087, SAT Oficio dated February 28, 2014.

513 Exhibit CWS-52, Fourth Witness Statement of Mr. Julio Gutierrez ¶ 107 and Exhibit R-101, Judgment from the Superior Chamber of the Federal Tax and Administrative Court on March 8, 2016, p.936.

514 Exhibit R-088, SAT Oficio dated Tuesday, October 13, 2020.

515 Memorial, ¶ 464.

SEGOB.[516] It is worth recalling that on March 10, 2014, the Sixteenth Court issued a ruling confirming that SEGOB had complied with the judgment from Amparo 1668/2011 and as part of this compliance, SEGOB revoked E-Games' permit. Therefore, the Claimants had been operating their casinos without a valid permit since March 10, 2014.

433. Mrs. Gonzalez Salas states that the criminal complaints for unauthorized casino operations were filed after a casino was closed for the crime of illegal gambling:

> It is important to clarify that when a casino is closed for operating without a valid permit, SEGOB files criminal charges for illegal gambling, pursuant to Article 12(II) of the Federal Games and Sweepstakes Law. This happens to all casinos closed under these conditions without exception. As such, the establishments could not be reopened until the proceedings had concluded.[517] [Emphasis added]

434. However, the Claimants were not affected at all by the criminal complaints.

435. The Claimants also note that they requested access to the investigation file ("preliminary investigation") to the PGR but their request was denied.[518] The PGR responded that it was not possible to grant the Claimants' request as it was not the appropriate stage of the proceeding, that they would be summoned at the appropriate time, and that this was not a violation of their right to a hearing.[519] This response merely reflects that the PGR was conducting its investigation, and therefore it was not the appropriate time to grant them access to the file.[520] At any rate, the Claimants have had legal remedies at their disposal to challenge the consequences that could arise from the criminal investigations.

T. The Petolof case did not apply to E-Games, both companies were in different circumstances

436. The Claimants have presented two arguments relating to the case of Petolof S.A. de C.V. (Petolof), which currently has a casino operating permit. The first argument is that "E-Games relied on a resolution issued by SEGOB to ("Petolof"), on October 28, 2008."[521] In its second argument, the Claimants argue that, the alleged similarity between E-Games and Petolof and the fact that the latter is currently operating as a permitholder, proves that the Respondent has applied

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516 Article 12(II) of the LFJS. "A penalty of 3 months to three years of prison and a fine from 500 to 10 thousand pesos shall be imposed, and dismissal from employment, where applicable: […] II.- On owners, organizers, managers, or administrators of a house or facility, whether open or closed, in which unlawful gaming or betting takes place without authorization from the Department of the Interior, and on those who have any interest in the company in any way…"

517 Exhibit RWS-1 Deposition of Mrs. Marcela Gonzalez Salas, ¶ 22.

518 Memorial, ¶ 465.

519 Exhibit C-363.

520 Article 2(II) of the Federal Code of Criminal Procedure: "The Federal Prosecutor is responsible for conducting preliminary investigations and, where applicable, filing criminal charges with the courts: […] II.- To perform and order the performance of all actions relevant to substantiating the body of the crime and potential liability of the criminal defendant…"

521 Memorial, ¶ 118.

different standards under similar circumstances.[522] Both arguments are incorrect. Before responding to each argument, a brief description of the Petolof case is in order.

1. The Petolof Case

437. On July 14, 1978, well before the Regulations were issued, the SEGOB issued a permit to Espectaculos y Deportes del Norte, S.A. de C.V. (EDN) to *i)* build a racetrack and greyhound racetrack in the City of Nuevo Laredo, Tamaulipas,[523] and *ii)* develop horse and greyhound race betting and gambling establishments.[524] The permit was originally valid for 25 years, i.e., until 2003. The permit was amended several times (1979, 1992, 1998, and 1999). In the 1998 amendment, SEGOB extended the validity of the permit for 25 years from that year, i.e., until 2023.[525]

438. On November 23, 1999, EDN entered into an agreement with Petolof that not only allowed Petolof to use the permit but also granted a series of additional rights and obligations as a partner. This can be deduced from merely reading the title of the agreement:

> Services and Joint Venture Agreement for the use of federal permit dated July 14, 1978, granted by the Secretariat of the Interior, and its future amendments, given in payment for up to a total of 49% forty-nine percent of the shares and all property and rights acquired by the company Espectaculos y Deportes del Norte S.A. de C.V., and commodatum of personal property.[526]

439. Among the rights and obligations that EDN and Petolof acquired are the following:

- The use and exploitation of the EDN permit, in partnership with Petolof (Clause Three, subsection A).
- EDN reserves the exclusive use and exploitation of the racetrack and greyhound racetrack. In turn, Petolof agrees to remodel and open the racetrack and greyhound racetrack in accordance with SEGOB's specifications. In consideration, Petolof acquires

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522 *Id.*, Section XXX.L.1.a.

523 Exhibit R-089, Agreement between EDN and Petolof dated November 23, 1999. Regarding this aspect of the permit, EDN had the following obligations: *i)* build the racetrack and greyhound race track along with the gambling establishments, according to the project approved by SEGOB (Condition No. 2); *ii)* maintain the facilities in good condition (condition No. 8), *iii)* execute all legal actions necessary to perform its obligations (condition No. 21), and *iv) upon the expiration of the permit, transfer marketable title of the racetrack and greyhound racetrack to the federal government, free of charge and clean from all encumbrances.*t (condition No. 9). *See*, Services and Joint Venture Agreement to operate a federal permit dated July 14, 1978, issued by SEGOB, and subsequent amendments, as an accord and satisfaction for up to a total of 49% of the shares and all property and rights acquired by the company EDN and gratuitous loan of personal property.

524 *Id.*, p. 5.

525 *Id.*, p. 7. In the 1998 amendment, SEGOB took the financial problems faced by EDN in operating the racetrack and greyhound racetrack into account ("Its principal needed to suspend operations of the racetrack and greyhound racetrack due to the severe financial problems caused by monetary devaluations and economic crises in the country, the repercussions of which were greater along border areas").

526 *Id.,* p. 1.

49% of the EDN's shares and the rights owned or held in title by EDN (Clause 3, subsection B).

- The establishment and operation of 15 yet to be opened gaming facilities. Each party's investment was agreed to as follows: 60% by EDN and 40% by Petolof (Clause 3, subsections C and E).[527]
- Petolof provided EDN with property in commodatum to satisfy the requirements of the permit (Clause Six).

440. On May 28, 2006, before the Regulations entered into force, SEGOB revoked EDN's permit for failing to meet the conditions of the permit. As a consequence of the permit revocation, seven gambling establishments operated by Petolof were closed. Petolof filed an *amparo* (Amparo 176/2005-3) against SEGOB for failure to provide service of process of the Disciplinary Proceeding resulting from the revocation of EDN's permit. On April 5, 2005, the District Court rendered its judgment, ruling that Petolof's due process rights had been violated by not having been summoned to the Disciplinary Proceeding, and ordered SEGOB to hold a new hearing for Petolof.[528]

441. SEGOB commenced the new proceeding and issued its resolution on October 28, 2008 (Petolof Resolution).[529] Petolof argued that it should be considered a permitholder based on the agreement it executed with EDN.[530] The SEGOB ruled that this argument was inconsistent with the LFJS, since the permit was granted to a person "who had satisfied the requirements established and required at the time," i.e., EDN.[531] However, SEGOB acknowledged that, based on the executed agreement, Petolof had vested rights and obligations to manage the EDN permit, specifically with regard to the operation of seven gambling establishments based on the agreement. The SEGOB ruled in the following terms:

> [Petolof] is acknowledged as having vested rights to the permit…granted to [EDN], and its future amendments, pursuant to the agreement…regarding use and operation rights and obligations and exclusively as may be referred to on 07 seven foreign books.[532] [Emphasis added]

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527 Managing the gambling establishments would be carried out "jointly at each establishment, but separately, which must be understood in the sense that [Petolof] would be responsible for the operation and administration of the Foreign Book in reference to taking bets… In accordance with the conditions of the permit…; with 'the parties' agreeing that [EDN] will withhold and pay management and operation expenses, taxes, and federal contributions" (Clause 4).

528 EDN is not a party in the new hearing because the revocation of the permit that occurred in 2004 was already a final judgment.

529 Exhibit C-253.

530 *Id.,* ("This government authority has not ignored the pleadings…since [Petolof] refers to the fact that the same mut be considered permitholder based on the execution of the agreement"), p. 10.

531 *Id.,* ("[Pursuant to] Articles 3 and 5 of the [LFJS], it cannot be validly considered a permitholder, because these provisions must be interpreted in the sense that to authorize or grant permits, an administrative application process designed for that effect must be used"), p. 11.

532 *Id.*, p. 18.

442. The EDN permit, the agreement between EDN and Petolof, and the proceeding that culminated in the revocation of the EDN permit, occurred before the RLFJS entered into force, and therefore, SEGOB had to rule solely in accordance with the LFJS. In this context and based on Petolof's vested rights from the partnership agreement, SEGOB authorized Petolof to continue using the EDN permit [to operate] seven gambling establishments that were in operation before EDN's permit was revoked. The difference between Petolof and E-Games is obvious: Petolof operated as a partner of EDN and was a direct beneficiary of the permit and the distinction between the concepts of permitholder and operator did not apply to Petolof –obviously, the concept of "independent operator" also did not apply.

2. The Claimants assumed a great risk by requesting Oficio 2009-BIS based on the Petolof case, given the significant differences between both cases

443. The Claimants argue that:

> 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.[533]

444. In support of their position, the Claimants and their expert simplified the alleged similarities and improperly minimize the relevance of certain factors in an attempt to avoid obvious differences between the Petolof and E-Games cases.[534] However, both companies were in a different situation because they were subject to two different legal systems and the contractual relationship that they had with the permitholders.

a. Petolof and E-Games were subject to two different legal systems

445. The District Court, in Amparo 176/2005-3 ordered SEGOB to commence a new proceeding in compliance with Petolof's right to a hearing. As a result of the proceeding, SEGOB issued the Petolof Resolution, which allowed it to continue operating seven gambling establishments. But this resolution was only based on the LFJS and not the Regulations. From a legal standpoint, the Petolof situation is fundamentally different from that of E-Games because E-Games was subject to both the LFJS and the Regulations.

446. It is true that the Petolof Resolution was issued in 2008 after the Regulations went into effect, but SEGOB was unable to apply the Regulations to Petolof because it would have had to apply them retroactively. Had SEGOB applied the Regulations to Petolof, this surely would have caused injury to the company, because it had not been authorized by SEGOB as an operator based on the RLFJS and much less as permitholder pursuant to the LFJS or its Regulations.

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533 Memorial, ¶ 117.

534 *Id.*, ¶¶ 119-124.

447. In this context, SEGOB applied the theory of vested rights in order to avoid affecting those rights that had become a part of Petolof's assets before the Regulations,[535]and avoid retroactive application to its detriment,[536] which would have resulted in a constitutional violation.[537] In the relevant section of the Petolof Resolution, SEGOB concluded the following:

> "…what can occur is that the concept of created or vested rights in favour of the applicant over the permit dated July 14 fourteenth, 1978 nineteenth seventy-eight, and its future amendments, with regard to the contract… which contains, in addition to the rights acquired when the contract was executed, and acquired obligations jointly with the holder of the permit, and also with the Secretariat of the Interior, and therefore [sic] the operation of [gaming establishments]. This begins with the doctrine used by the federal courts and how they interpret this specific matter, and how [sic] they define the concept of created or vested rights, which is as follows: A vested right can be defined as the act performed that introduces a good, a power, or benefit from the estate of a person, which cannot be infringed, either by the will of those who intervened in the act or by a conflicting legal provision."[538] [Emphasis added]

448. Another relevant difference is E-Games' status as "operator" pursuant to the Regulations. E-Games obtained this status precisely by satisfying the requirements established in the Regulations. Petolof, as stated previously, was not an operator pursuant to the RLFJS. However, the Claimants minimize this circumstance by stating that "the 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."[539] If the argument made by the Claimants were correct, operators authorized under the RLFJS could easily avoid the obvious dependence that the operator has on the permitholder established by the Regulations. They would simply have to demonstrate [the existence of] a contractual relationship between the permitholder and the operator, whereby the permitholder authorizes the operator to operate specific establishments under the permit, and then argue that it has "acquired rights" and apply to operate "independently" from the permitholder. This would be a clear violation of Mexican law.

b. The Petolof Agreement had a different scope than E-Games's agreement

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535 Exhibit RER-2, Expert Report from Mr. Lazcano, ¶ 78. In his expert report, Mr. Lazcano states in this regard that "the theory of acquired rights derives from the principle of non-retroactivity of the law to the detriment of any person, being the retroactivity the defining element of such idea."

536 *Id.*, ¶ 81. Mr. Lazcano also notes that "the criteria used by SEGOB in relation to the company Petolof, S.A. de C.V. ("Petolof"), was based on the theory of acquired rights because, in my opinion, Petolof did face a real hypothesis in which they put themselves at risk and, in fact, violated a series of rights (for example, shares, property, possessions, among others) that were part of their patrimony." Exhibit RER-2, Expert Report from Mr. Lazcano, ¶ 81.

537 Article 14, paragraph one, of the Federal Constitution, states that [n]o law shall be applied retroactively to the detriment of any person whatsoever."

538 Exhibit C-253, p. 14.

539 Memorial, ¶ 125.

449. The scope of the operating agreement between E-Mex and E-Games was substantially different from the agreement between Petolof and EDN. The Claimants negotiated an agreement with E-Mex that had a limited scope.

> 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.[540]

450. The intention of designing an agreement with limited scope with E-Mex was to maintain a distance between E-Mex and Mr. Rojas. Mr. Burr states in this regard: "[i]mportantly, other than the permittee-operator relationship between E-Mex and E-Games, the two companies were independent of each other, had no investments or ownership in common, and we had nothing whatsoever to do with Rojas, E-Mex, or its operations, investments or corporate decisions".[541]

451. By contrast, the agreement between EDN and Petolof was the exact opposite because it established a series of complex rights and obligations (see paragraph 437-441 *supra*). Aside from the joint operation of the EDN permit, Petolof made investment commitments to maintain the racetrack and greyhound racetrack in exchange for up to 49% of EDN's shares and the rights it held. Furthermore, EDN and Petolof made co-investment commitments to establish up to 15 gambling facilities; joint operation of these gambling facilities; Petolof property given to EDN in commodatum; and services to be rendered by Petolof to EDN. All of this was agreed upon in order to satisfy the conditions of the EDN permit.[542]

452. In any case, in the current context of the Regulations, it is unlikely that SEGOB would approve this type of contract, as noted by Mr. Lazcano:

> Another important difference between the EDN & Petolof Contract and the Operating Contract is that the former was signed in 1999 when the Gaming Regulations did not exist, and the second was held until 2008, with said legal order in force. It is important to note that, at least hypothetically, the purpose of the EDN & Petolof Contract could never have been authorized in the light of the Gaming Regulations, because... Articles 30 and 31 strictly prohibit assuming the corporate or administrative control of the Permittee, as well as the transfer, assignment, sale or commercialization of the Permit.[543] [Emphasis added]

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[540] *Id.*, ¶ 87.

[541] Exhibit CWS-50, Third witness statement of Mr. Burr, ¶ 44.

[542] Exhibit RER-2, Export Report from Mr. Lazcano, ¶ 84. Mr. Lazcano refers to differences between both contracts ("[T]he purpose of the EDN & Petolof Contract… in no way can be equated with the purpose of the Operating Contract, since, while the former granted in favor of Petolof the status of "*Associate*" of EDN, acquiring rights of use and exploitation of different movable and immovable property (including the EDN Permit), share rights, joint and separate administration rights, various property reserves and possession deliveries, among others; the second was only restricted to the simple joint exploitation of the E-Mex Permit between E-Mex, as Permittee, and E-Games, as Operator.").

[543] *Id.*, ¶ 85.

453. Petolof acquired rights to the EDN permit through the agreement with EDN; [rights] that E-Games did not have over E-Mex's Permit. In fact, Petolof argued during the new hearing in 2008, that due to the scope of the agreement with EDN, it should be recognized as a permitholder.[544] SEGOB rejected this argument because it believed that Petolof could not be considered a permitholder because it was never issued a permit under the LFJS. However, due to the particular scope of the agreement between EDN and Petolof, along with the situation regarding the RLFJS, SEGOB authorized Petolof to continue operating its gambling establishments.

3. SEGOB did not discriminate against E-Games with respect to the permit issued to Petolof in 2016

454. The Claimants argue that SEGOB discriminated against E-Games based on the permit issued to Petolof on March 27, 2016.[545] They argue:

> SEGOB's actions in revoking EGames' 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.[546]

455. The SEGOB did not discriminate against E-Games because Petolof was in a different situation as explained in the preceding section. Besides, by simply reading the Petolof permit, it is clear that SEGOB issue the permit in compliance with the judgment rendered by the TFJFA:

> That in compliance with the resolution dated the twentieth of August of the year two thousand fifteen rendered in the Contentious Administrative Proceeding 786/15-17-12-3, by the Tenth Regional Metropolitan Chamber of the Federal Tax and Administrative Court, this administrative authority issues this permit in substitution of permit 000003 dated July 14, 1978 and its subsequent amendments to 'Petolof, S.A. de C.V.[547]

456. In fact, according to the available information on SEGOB's website, on August 29, 2014, SEGOB denied Petolof's petition to substitute permit 000003 for a new permit.[548] Petolof challenged SEGOB's resolution before the TFJFA and obtained a favorable judgment on August 20, 2015. As a result, SEGOB, in compliance with the court order, issued a new resolution and the permit to Petolof.

U. Black Cube

457. The Claimants rely on the Black Cube recordings[549] to argue that the revocation of the Permitholder-BIS Oficio and the closure of its establishments were politically motivated and intended to benefit other players in the industry. The Respondent's position is that these witness

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544 *Ver* ¶ 441, *supra*.

545 Exhibit C-328.

546 Memorial, ¶ 457.

547 Exhibit C-328.

548 Exhibit R-090, Information on the Petolof permit. Information from SEGOB Source: http://www.juegosysorteos.gob.mx/es/Juegos_y_Sorteos/Salas_de_Sorteos_de_Numeros

549 Exhibit CWS-57. Deposition from Dr. Avi Yanus.

statements are unlawful and illegal according to applicable Mexican law. None of this evidence has any probative value whatsoever, is inadmissible, and does not prove, even remotely, that the revocation of the permit or the closure of the establishments was politically motivated. These recordings were obtained illegally and the Claimants' modus operandi in engaging these services to compel so-called testimony is unethical. The recordings also contain information that, if revealed, would violate Mexican law. Therefore, the Respondent requests that these recordings not be admitted in this arbitration. In fact, several investment courts have ruled that this type of evidence is inadmissible, as indicated in the following sections.

458. Notwithstanding the importance of the foregoing, the Respondent's position is that the witness statement of Dr. Yanus lacks any probative value because of *i)* the manner in which the recordings were compiled, *ii)* the financial and professional interest that the interviewees had in sharing their viewpoints, *iii)* how Black Cube agents interfered in the statements made by the interviewees, and *iv)* the cherry picking of those statements that they deemed would further the Claimants' interests.

1. Black Cube in context

459. The company 5B.C. Strategy UK Ltd. is a firm that operates under the name of Black Cube, which has become famous for the methods used to obtain information on negative aspects of the private life of its clients' "objectives" or "targets." The tactics used by Black Cube include enticing a target under false pretenses so that they meet with Black Cube agents who record the meeting with hidden cameras and/or microphones.[550]

460. Black Cube has been involved in *i)* efforts to discredit officials of the Obama administration; *ii)* influence elections in Hungary; *iii)* obtainin embarrassing statements from a Canadian judge at the request of a company that obtained an unfavorable judgment by the investigative judge; *iv)* acquire "dirty laundry" on a critic of the Vladimir Putin administration; and *v)* obtaining information in an attempt to discredit whistleblowers against producer Harvey Weinstein.[551]

2. The Black Cube recordings that were submitted in this arbitration

461. The Claimants have submitted a witness statement by Dr. Avi Yanus along with recordings from meetings between Black Cube agents and Obdulio Avila Mayo and Kevin Rosenberg. The Respondent is unable to confirm whether these recordings are in fact of Obdulio Avila Mayo or Kevin Rosenberg; whether the statements in the conversations are true; or whether the recordings are a truthful reflect what was discussed in these conversations. The discussion in this section is based on the recordings that the Claimants submitted with their Memorial and should not be taken as an admission by the Respondent regarding their truthfulness.

462. Dr. Yanus's witness statement expressly states that his partial objective, in our view, was to obtain statements to demonstrate that the casinos were closed for reasons other than legal

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[550] Exhibit R-092, Read (Quartz, Read *Israeli spy firm Black Cube's secret pitch to clients*).

[551] Id. Exhibit R-093, Ronan Farrow Reveals How Black Cube Spies Tracked His Harvey Weinstein Investigation

considerations "to investigate the underlying motives behind Mexico's revocation of E-Games' permit. The investigation included possible motives of individuals, public institutions, and competitors."[552]

463. According to Dr. Avi Yanus's testimony, several Black Cube agents met with Obdulio Avila Mayo and Kevin Rosenberg on several occasions. In these meetings, the Black Cube agents, with the pretext of gaining a better understanding of the Mexican casino market and through leading questions, sought to obtain statements favourable to the Claimants. What is very serious is that Messrs. Avila and Rosenberg were not aware that they were being recorded and that the recordings were obtained without their consent and through deception.

464. The Respondent believes that Dr. Avi Yanus's testimony lacks any probative value because of the following problems:

- *One*, Dr. Avi Yanus cannot provide factual testimony regarding conversations with the interviewees because he was not present during those interviews.
- *Two*, the goal of the interviews conducted by Black Cube was not to objectively explain what happened but to get the interviewees to express opinions supporting the Claimants' position.
- *Three, the questions asked by the Black Cube agents induced the answers given by Messrs. Avila and Mr. Rosenberg.*
- *Four, the interviewees did not have access to the revocation documents, so they did not have enough information to render an objective opinion in that regard.*
- *Five, the recordings are very poor; some parts are inaudible or edited.*
- *Six, the interviews were long, and the interviewers and interviewees were drinking during the interviews.*

465. In addition, the Black Cube agents created economic and professional expectations for Messrs. Avila and Rosenberg because they told them that they were seeking out advisors for casino projects in Mexico (in both cases the Black Cube agents described significant casino projects).[553] The opinions of Messrs. Avila and Rosenberg lack impartiality because they were attempting to make this consulting relationship become a reality; not to give an objective account of what happened. It is likely that they offered opinions on issues they were not sure about, or that they lied or exaggerated issues to make a good impression or to become advisors on these projects.

466. There was an additional situation that affected the objectivity of Mr. Obdulio Avila. The two meetings held with the Black Cube agents in New York (whose travel expenses were paid by Black Cube) contributed decisively to his subsequent opinions, probably because he began to trust more in the truthfulness of the project and his interest in participating in it. The opinions he shared in the first meeting compared to future meetings is obvious.

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552 Exhibit CWS-57, Deposition from Avi Yanus, ¶ 26.

553 *Id.*. Minute 5:50 of file OAM 07.25.2018 (2).mp3 (first meeting) for Mr. Obdulio Avila; minute 22:40 of file KR 07.30.2018 (2) (first meeting) for Mr. Kevin Rosenberg.

467. The Claimants [also] omitted parts that are contrary to their interests. The Respondent's position is that the testimony by Dr. Yanus is inadmissible and lacks probative value. However, if the Tribunal does give it some probative value, it should also consider the following statements made by Mr. Obdulio Avila Mayo:

- No permit was issued to E-Games or Producciones Moviles, rather it was an acknowledgment of the operator's rights to have permitholder-access that allowed it to access the permit, and this acknowledgment came from an action they had commenced years prior and not something they had recently conceived.[554]
- When Mr. Avila was asked if there was any intention to favor Mexican companies over foreign companies, he expressly stated that there was no intention to favor foreign investment.[555]
- The proceeding from which the Permitholder-BIS Oficio stems predates 2011.[556]
- Regarding the difficulties to obtain a permit, he stated that obtaining a permit was difficult, historically they are not issued, and only 37 permits had been issued since the LFJS was created in 1947.[557]
- Among the reasons influencing the revocation of the E-Games permit was the internal fighting within members of the company and a flawed legal defense: "they didn't have a suitable defense and there was a problem among members that didn't allow those who really defended and made the decisions, the owners, to act. There was a—one of the owners vanished—didn't contribute to the defense. The defense was deficient and that also caused them to be revoked."[558]

468. The Respondent reiterates its position regarding the testimony by Dr. Yanus, however, should the Arbitration Tribunal decide to give it some probative value, it should also consider the following opinions from Mr. Kevin Rosenberg:[559]

- E-Games partnered up with the wrong person, Mr. Pepe Rojas, and when they began in Monterrey, their casinos were illegal (did not have permits).[560]
- There were several difficulties that derailed the negotiations to acquire E-Games' casinos. Mr. Rosenberg states that E-Games rejected Play City's 20 million dollar offer

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554 *Id.*, Minute 16:50 of file OAM 07.25.2018 (2).mp3 (first meeting).

555 *Id.*, Minute 52:00 of file OAM 08.15.2018.mp3 (second meeting).

556 *Id.*, Minute 25: 30 of file OAM 07.25.2018 (3).mp3 (first meeting).

557 *Id.*, Minute 1:34:13 AM of file OAM 08.15.2018.mp3 (second meeting).

558 *Id.*, Minute 8:27 AM of file OAM 07.25.2018 (4).mp3 (first meeting).

559 Mr. Kevin Rosenberg Vitorica has been Director of "Business Development" for Playcity Casino since 2012. The Claimant notes that Mr. Rosenberg has not been a SEGOB official and could not have had access to the necessary documents for providing an objective opinion, and therefore his statements must be considered within the context of these limitations.

560 Exhibit CWS-57. Deposition from Dr. Avi Yanus. Minute 25:31 of file KR 07.30.2018 (3).mp3 (first meeting).

for its five casinos because they were unwilling to accept less than 50 million dollars, but he believes the price they were asking was not adquate.[561]

- Buying a casino involved a long legal process in which it would have to be demonstrated that the casinos were not illegal.[562]
- Another problem was that partners were fighting amongst themselves, and the fact that the meetings were held in Mexico City made it difficult for one partner to travel, so these issues also influenced Play City's decision to halt the negotiations to buy their casinos.[563]
- The Permitholder-BIS Oficio was linked to the E-Mex Permit, which is evident from the *oficio* numbers "and that small relation, was their, that was the problem because when they removed this permit, they also lost their permit".[564, 565]
- The oficio numbers linked Mr. Pepe Rojas's (E-Mex) permit to that of E-Games, so E-Games made the mistake of operating under this permit and only thought it would not associate its permit with the E-Mex permit.[566]
- This was a legal issue in which the E-Games Permit would follow the fortunes of the E-Mex Permit.[567]

3. The Black Cube evidence must be rejected and eliminated from this arbitration

469. The declarations of Messrs. Avila and Rosenberg obtained by the Black Cube agents through deception and without their consent is forbidden under Mexican law and violates several

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561 *Id.*, Minute 7:30 AM of file KR 07.30.2018 (4).mp3 (first meeting). ("I think 50 million were, wasn't the right price, but our Televisa, let's say finance, the finance gap the CFO set they have no hope, so 20 it's a good number for them and we never made a deal. I think if we had offered 35 or maybe 45, 40").

562 *Id.*, Minute 12:25 AM of file KR 07.30.2018 (4).mp3 (first meeting). ("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, that there were no drugs, it's a long process to defend everything, to just get able to go inside.").

563 *Id.*, Minute 9:00 AM of file KR 07.30.2018 (4).mp3 (first meeting).

564 *Id.*, Minute 4:27 AM of file KR 07.30.2018 (5).mp3 (first meeting).

565 *Id.*, Minute 4:00 AM of file KR 07.30.2018 (5).mp3 (first meeting). ("They convinced SEGOB to create somehow a new entity called Exciting Games, but still have a little string connected to E-Mex and it was the number.").

566 *Id.*, Minute 4:15 of file KR 12.14.2018 (1).mp3 (first meeting). ("Watch it the number, the permit number and you will see that. We always thought that they made a huge mistake and they didn't think that this was going to happened, that somehow, they were going to be related, well and the Supreme Court was going to.").

567 *Id.*, Minute 5:07 AM of file KR 12.14.2018 (1).mp3 (first meeting). ("This is a legal issue because if the parent company never existed there's no way the subsidiary can exist, so if the subsidiary come and try to get their own permit consequently couldn't subsist.").

of Messrs. Avila´s and Rosenberg's fundamental rights. In fact, several investment arbitration tribunals have deemed this type of evidence inadmissible.[568]

470. Under the Mexican legal system, the Black Cube recordings (including how the information was collected and disclosed) constitute a violation of privacy and data protection rights under Article 16 of the Mexican Constitution and should therefore be rejected as documentary evidence.

471. The right to confidential communications protects the liberty and the confidentiality of private communications from third parties (whether private individuals or authorities). However, the Supreme Court has stated that this right is only enforceable against third parties who do not take part in the communication and is not violated if one of the parties who participated in the communication consents to its disclosure.[569]

472. In this case, Messrs. Avila and Rosenberg were unaware that they were being recorded, so they could not have consented to the disclosure of these communications. The only ones who could have given their consent were the Black Cube agents who participated in the interviews and they did not. In fact, their identity is unknown, because they used aliases and their voices are distorted.[570]

473. Even if one of the parties in the communication gives consent, this does not mean that the communication can be disclosed, because other rights could be violated depending on the content of the communication, such as the right to personal data protection.

474. Mexican courts[571] have noted that data protection rights imply the power of an individual to "decide what aspects of their life may or may not be known or reserved for the rest of society and the possibility of demanding compliance from the authorities and private citizens who know, use, or convey this information."

475. The Federal Law for the Protection of Personal Data in the Possession of Private Individuals *[Ley Federal de Proteccion de Datos Personales en Posesion de los Particulares]* (LFPDPPP) seeks to protect personal information, including sensitive personal information in the possession of individuals and legal entities who process this data.[572]

476. The LFDPPP defines personal data as information related to an identified or identifiable individual and sensitive personal data as the personal data that involves the most intimate aspects of their owner, or the unlawful use of which may give rise to discrimination or lead to a serious

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568 *See* Exhibit R-094. Inadmissibility of the information submitted by Black Cube in investment tribunals.

569 Exhibit R-095. Binding Case Law from the First Chamber of the Supreme Court: The Right to Privacy of Private Communications. Enforced only against Outside Third Parties.

570 Exhibit CWS-57, Deposition from Avi Yanus, ¶ 11.

571 Exhibit R-096. Ruling from the 10th Collegiate Administrative Court of the First Circuit: Personal Data Protection. Constitutes a Right Associated with the Protection of other Fundamental Rights Inherent to Human Beings.

572 Processing includes: "Obtaining, using, disclosing, or storing personal data by any means. Use includes any action involving the access, manipulation, use, transfer, or disposal of personal data." Exhibit R-097, Article 3(XVIII) of the LFPDPPP.

peril for such person, including those that may expose views, such as religious, philosophical, or moral beliefs, union affiliation, or political opinions.[573]

477. The LFDPPP also states that private individuals who process personal data are required to follow several principles, including legality and consent.[574] The principle of legality means that the personal data must be collected and legally processed pursuant to the LFPDPPP, and the data must not have been obtained through devious or fraudulent means.[575] The principle of consent states that when processing personal data, the owner[576] of the data must give consent and, when processing sensitive personal data, express written consent from the owner is necessary.[577]

478. It is clear that Black Cube and the Claimants' are treating Messrs. Kevin Rosenberg's and Mr. Obdulio Avila's personal and sensitive personal data, because aside from recording and disclosing information that refers to them as identified individuals, it contains moral beliefs and political opinions that may affect their personal and professional relationships. These recordings suggest that the statements made by Messrs. Avila and Rosenberg were obtained fraudulently and without their consent, so they are a clear violation of the principles of legality and consent set forth in the LFPDPPP.

479. In addition, different International Treaties to which Mexico is a party recognize respect for private life, family, the home, personal correspondence, as well as honor and reputation.[578]

480. The Black Cube recordings reveal information that is private and personal to Messrs. Avila and Rosenberg and they also reveal detailed opinions on individuals, companies, government entities of one of the sectors in which they work. Accordingly, this puts their right to privacy, to a private life, to their honor, and to human dignity at risk.

III. Legal argument

A. Objection to jurisdiction regarding claims on prospective projects

481. This Tribunal does not have jurisdiction to decide on the claims made by the Claimants related to the casino projects in Cabo and Cancun and the online casino under Articles 1105 and/or 1110 of the NAFTA. These three casinos yet-to-be established, they were in the very early stages of planning, and the Claimants have not provided any evidence of any protected investment in relation with these projects.

482. Article 1139 of the NAFTA defines the term "investment" as follows:

> **investment** means:

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573 Exhibit R-097. LFPDPPP. Article 3(V) and (VI).

574 *Id*. Article 6.

575 *Id*. LFPDPPP. Article 7.

576 *Id.* Article 8.

577 *Id.* Article 9.

578 Exhibit RL-102. Article 17 of the International Packed of Civil and Political Rights and Exhibit RL-101, Article 11 of the American Convention on Human Rights.

(a) an enterprise;

(b) an equity security of an enterprise;

(c) a debt security of an enterprise

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the debt security is at least three years,

but does not include a debt security, regardless of original maturity, of a state enterprise;

(d) a loan to an enterprise

(i) where the enterprise is an affiliate of the investor, or

where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise;

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

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

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

(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or

(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

but investment does not mean,

(i) claims to money that arise solely from

(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or

(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or

(j) any other claims to money,

that do not involve the kinds of interests set out in subparagraphs (a) through (h);

483. This definition of "investment" is exhaustive and imposes specific requirements that, if not satisfied, will no longer protect the activity or asset under Chapter 11 of the NAFTA. The Claimants' Projects do not fall under the definition of protected interests set forth in Chapter 11 of the NAFTA.

484. Article 1139 of the NAFTA does not define "investment" as an abstract notion. It establishes a closed list of 10 specific categories that are considered a protected investment under the Treaty: eight categories of interest are considered investments and two categories that are expressly excluded from this definition. Under Chapter 11, "investment" refers to an asset or interest that falls within any of the eight categories outlined in each paragraph and are subject to specific requirements.[579] NAFTA does not extend Chapter 11 protection to just any "commitment of capital," but only to those that exhibit certain characteristics that gives them this protected interest status.[580]

485. In *Grand River v. United States,*[581] the tribunal confirmed that, given the relatively constricted definition of "investment" under Article 1139, the Claimants would have to show that their investment falls within one of the categories identified by this Article. The tribunal dismissed their claim after concluding that the Claimants had not substantiated the existence of an investment made in the United States as any kind of company, loan, property, or other protected interest pursuant to the definition under Article 1139.

486. Similarly, the tribunal in *Canadian Cattlemen v. United States*[582] concluded that merely cross-border trade interests are insufficient to trigger Chapter 11 protection:

> 144. In other words, these exclusions establish that mere cross-border trade interests are not sufficient to trigger Chapter Eleven – something more permanent – such as a commitment of capital or other resources in the territory of a Party to economic activity in such territory – is necessary for a contractual claim for money based on cross-border trade to rise to the level of an investment. Moreover, the exclusion's requirement that these simple trade interests be coupled with one of the other types of investment interests enumerated in subparagraphs (a) through (h) to fall within the definition of "investment" make it evident that wherever in Chapter Eleven it is not express, there is, nevertheless, an implied requirement that those investment interests be located in the host country as well.

487. Non-crystalized investments attempts are not protected investments under investment treaties. Investors are not entitled to file claims for damages for attempted investments or projects that have not materialized. For example, in *Generation Ukraine v. Ukrainek*, the tribunal stated that an office building that has yet to be built is not protected by the treaty:

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579 Exhibit RL-043 *Lion Mexico Consolidated L.P. c. Mexico*, CIADI Case No. ARB(AF)/15/2, Ruling on Jurisdiction, July 30, 2018, ¶ 248.

580 *Id.,* ¶245.

581 Exhibit CL-213, *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, "Award", January 12, 2011, ¶ 22.

582 Exhibit RL-044, *The Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Award", 28 2008.

> The Claimants' pleadings assume that the Claimant had a vested right to a commercial return on a completed office building, on or before the alleged final act of expropriation on 31 October 1997. This cannot possibly be so. As of 31 October 1997, not a single brick had been laid, nor had the foundations for the building been excavated, nor indeed had the Claimant definitively secured financing for the construction phase of the Parkview Project. The materialisation of the Claimants' legal interests - evidenced by the Order on Land Allocation, Lease Agreements, Foundation Agreement and Construction Permit - translate not to a right to a commercial return, but simply to proceed with the construction of the Parkview Office building on land over which Heneratsiya had a 49-year leasehold interest.[583]
>
> [Emphasis added]

488. The Claimants' pre-investment activities in relation to the casino projects in Cabo, Cancun, and the online casino, even if they had been properly substantiated (they are not), would not be included in the definition of "investments" under Article 1139. This is significant because the existence of an investment per the definition under Article 1139 is a condition for both filing a claim for an Article 1105 violation and a claim for an Article 1110 violation. Without this investment, the Tribunal does not have jurisdiction to decide whether the minimum standard of treatment was violated regarding the additional casino projects or whether these potential casinos were expropriated.

1. The Claimants have Been failed to prove the existence of an investment in a Casino in Cabo

489. According to the Memorial, the Claimants' efforts to open a casino in Cabo began at some point in 2007 when they entered into a nondisclosure and non-circumvention agreement with Discovery Land Company (Discovery).[584] Discovery and the Claimants allegedly "identified the property, created projections, lined up financing, researched various tax and legal issues, and created floor layouts."[585] However, the project did not move forward allegedly due to (unidentified) aggressive measures taken by Mexico against the Claimants, inaction in approving Claimants' own permit, and because the Claimants wanted to obtain their own independent permit.[586]

490. This narrative is not supported by the evidence in the record. Putting aside for the moment that there is no evidence of any plans, projections, or any additional exchanges with Discovery, and that the Claimants' contentions are based exclusively on the testimony of Mr. Burr and his daughter, it should be noted that in 2007, the Claimants' casinos were operating as video arcades under the Monterrey Resolution, and it was not until 2011 that the Claimants applied for their own permit (and they received it in mid-2012). Therefore, neither the alleged unidentified "aggressive measures" nor the supposed "inaction in approving the Claimants' permit" would explain why the Cabo project with Discovery did not materialize in the 5 years between 2007 and 2012.

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583 Exhibit CL-93, *Generation Ukraine, Inc. v. Ukraine*, CIADI Case No. ARB/00/9, "Award", September 16, 2003, ¶ 20-27.

584 Memorial, ¶ 68.

585 *Id.*, ¶ 68.

586 *Id.*, ¶ 69.

491. The Claimants also allege that in 2012, Mr. Burr met Messrs. Ferdosi and Erikson, who were working together to develop a luxury hotel in Cabo called Medano Beach Hotel, and shortly after the introduction, the Claimants executed an agreement whereby Mr. Burr agreed to provide $500,000 to purchase a Mexican company that owned the land where the hotel would be built. This is inconsistent with Mr. Burr's third witness statement, in which he states: "*B-Cabo, LLC invested US $600,000 through loans to [Medano Beach], who eventually used the majority of these funds to purchase property for the Cabo hotel and casino project*."[587]

492. Mr. Burr further testifies that "[w]e made considerable progress and investment in the development of the two projects in Cabo and Cancun" and, in relation to the Cabo project: "we were in the process of finalizing terms with our partners, including working diligently towards a finalized agreement with the Cabo partners, so we could begin accepting capital when Mexico began interfering with and ultimately unlawfully revoked our casino permit."[588] This is inconsistent with the previously quoted passage in which Mr. Burr suggests that the capital had already been raised and lent to Medano Beach through at least two loans (note that Mr. Burr used the plural term "loans" in his third witness statement).

493. The Claimants have not identified any investment, aside from the alleged loans, in relation to the Cabo Project. Also, as will be demonstrated further below, the loans were for the construction of the hotel that would eventually host the prospective casino if and when an agreement was reached with the hotel owners. It is thus unclear to the Respondent how the closing of existing casinos could have interfered with the alleged loans to Medano Beach for the construction of the hotel.

494. The Claimants rely mainly on five exhibits to support this part of their claim: "Medano Beach Project Booklet" dated September 10, 2012 (Exhibit C-248); Letter of Intent dated October 12, 2012 (BRG-033); the "Investment/Loan Agreement" dated April 5, 2013 (Exhibit C-65); a letter from Mr. Burr to Mr. Farzin Ferdosi dated May 16, 2013 (Exhibit C-66); and finally, a draft of the investment agreement dated October 2013 between B-Cabo LLC (as investor), Farzin Ferdosi, Christopher Erikson, and Medano Beach, S. de R.L. de C.V. (Medano Beach SRL) (BRG-032).

495. This evidence shows that Messrs. Ferdosi and Mr. Erikson were indeed planning to develop a luxury hotel, and not a casino, and that B-Cabo LLC, and not the Claimants collectively, agreed to loan money, yet to be determined, to a Mexican company called Medano Beach Hotel, S. de R.L. de C.V. to develop the hotel that could host a casino in the future. The evidence also demonstrates that the Cabo project was in its first stages and no material progress appears to have been made from late 2012 to April 2014, when the existing casinos were closed.

496. To date, no evidence whatsoever has been adduced to substantiate that these alleged loans were made or, if applicable, the amount of these loans.

a. The Medano Beach Project Booklet

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587 Exhibit CWS-50, Third Witness Statement of Mr. Burr, ¶ 69.

588 *Id.*, ¶¶ 68 y 80.

497. The "Medano Beach Project Booklet" (the Booklet) is a 40-page document dated 10 September 2012 prepared by the architectural firm *Rabago Arquitectos Asociados, S.C.* The Booklet contains a detailed description of the construction hotel project to be carried out in three different stages, as well as the floorplans that include the number and layout of the rooms, restaurants, parking space, office space, elevators, pools, beach club, and retail premises, among other amenities. The booklet does not mention a casino at all.

498. This is important because the Booklet is mentioned as evidence that "Chris Erickson ("Mr. Erikson"), who had already been working together to build a luxury hotel/casino in Cabo that was to be called the Medano Beach Hotel".[589] The absence of any reference to a casino in the Booklet clearly demonstrates that Messrs. Erikson and Ferdosi's original project did not include a casino and that Mr. Burr had misrepresented the evidence by suggesting their intention to build a "luxury hotel/casino" in Cabo.

b. Letter of Intent

499. Exhibit BRG-033 is a Letter of Intent signed on 12 October 2012 by Mr. Burr and Mr. Ferdosi, on their own behalf. The letter confirms their mutual understanding with regard to their intention to enter into negotiations to participate in a transaction to construct and operate a hotel: "*mutual understanding regarding our intent to enter into negotiations for participation in a transaction for the construction and operation of a 'Z Cabo Development' hotel on property owned by you and your affiliates in Cabo San Lucas, Mexico and the construction and operation of a casino in that hotel property*"[590].

500. Item one (investment and operation) explains that an entity or entities that will be established by the group will make a capital investment and possibly a loan to a Mexican entity to construct the hotel facility: *"[a]n entity or entities our group will form will make a capital investment in and possibly a loan to a Mexican entity (the "Z Cabo Company") formed by you and your affiliates as a SAPI for purpose of the construction and opening of the hotel facility*".[591]

501. Item two mentions the casino project and involves forming a Mexican corporation (the "Casino Company"), which would be capitalized by Mr. Burr and Mr. Ferdosi to build a casino within the hotel. It should be pointed out that it was mentioned that the only purpose of the letter of intent was to express the parties' intention and not a binding obligation to consummate the transactions that were being considered: "*the Letter of Intent is intended to serve only as an expression of the parties' intent and not as a binding obligation to consummate the contemplated transactions*."[592] There is no evidence in the record that the Casino Company was ever created or funded.

502. In any event, this document demonstrates that Mr. Burr's intention was to undertake two separate investments: the first was meant to finance the construction of the hotel, and the second

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589 *Id.*, ¶ 75.

590 Exhibit BRG-033, p. 1. Emphasis added.

591 *Id.*, p. 1. Emphasis added.

592 *Id.*, p. 4.

to build and operate a casino located on property leased to the hotel. It also proves that, as of the date of the Letter of Intent, the casino project was considered a future investment subsequent and independent that was contingent upon the successful completion of the hotel project.

c. Investment/Loan Agreement

503. On 5 April 2013, B-Cabo LLC (the Investor) and *Medano Beach Hotel, S. de R.L. de C.V.* (the Company) executed an Investment/Loan Agreement (Exhibit C-65). The "Explanatory Note" at the beginning of the document sets forth that the investor is being formed and capitalized to raise funds [...] in order to invest such funds in the Company and in another Mexican entity (the 'Casino Company'). This further demostrates that the intention was to make two separate investments: the first in Medano Beach Hotel and the second in a "Casino Company," not yet incorporated, to build and operate the casino.[593]

504. The first of these two separate investments consisted in a loan of up to $4 million dollars to the Company for the acquisition and merger of certain parcels of land for the hotel project, -through the acquisition of a Mexican company called *Inversiones Medano, S. de R.L. de C.V.*- as well as the construction of the hotel.[594] This loan was no dependent on the construction of the casino, as proved the following excerpt demonstrates:

> The parties contemplate and intend that the Casino Company will be formed and will construct and own a casino (the "Casino") in the Hotel, subject to a lease agreement (the "Lease") with the Company. [...] In the event that the Casino is not built for any reason, there will be no effect on the Investor's Loan or the repayment terms thereof.[595]

505. The loan would be made in two tranches and was subject to certain conditions. One of these conditions was: proof of the Company's ability to finance the building and opening of the Hotel and obtaining final architectural blueprints, among others.[596] The funds for the loan would proceed from an "offer" to "credited investors" the B-Cabo would make based on its "best efforts." The parties specifically acknowledged in the agreement that "the Investor may not be able to, and does not guarantee that it will, obtain the full amount of the Investment."[597]

506. It is important to point out that there is no evidence in the file showing that: a) the Company was able to meet the loan requirements; b) B-Cabo was able to raise the funds and, if so, in what amount; and c) B-Cabo actually released any funds to the Company pursuant to the agreement. In

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593 Exhibit C-65, p. 1. Respondent's Translation. The original text in English reads as follows: "the Investor is being formed and capitalized to raise funds [...] in order to invest such funds in the Company and in another Mexican entity (the 'Casino Company')."

594 *Id.*, p. 1.

595 *Id.*, p. 1.

596 *Id.*, pp. 11-12.

597 *Id.*, clause 2, p. 3. Respondent's Translation. The original text in English reads as follows: "The parties acknowledge that the Investor may not be able to, and does not guarantee that it will, obtain the full amount of the Investment."

other words, there is no evidence of the purported investment or of the amount invested in the hotel.

507. Furthermore, there is no proof that Casino Company was ever created and funded. This is important because this company would have been tasked with the construction and operation of the casino; the Claimants followed a similar arrangement in existing casinos and Juegos Companies.

508. Mexico intends to request documents related to the alleged loans and Casino Company during the document production round, which is to take place after this Counter-Memorial has been presented and reserves the right to amplify or modify its allegations in case any additional evidence is made available.

d. Communication from Mr. Burr to Mr. Farzin Ferdosi

509. On May 16, 2013, Mr. Burr sent a communication to Mr. Farzin Ferdosi following up the Investment/Loan Agreement. In this communication, Mr. Burr informed Mr. Ferdosi that he would contribute 500,000 dollars for the acquisition of Medano Beach S. de R.L. de C.V., the company that owned the land where the hotel was to be built. These funds would be delivered on the condition that Mr. Ferdosi would return them within the next thirty days if the parties did not reach a bonding agreement regarding a larger transaction that involved Mr. Burr's "best efforts" to raise at least $10 million dollars in exchange for a 10% participation in the Medano Beach company's equity.[598]

510. In this communication, the only reference to the casino was made in the context of Mr. Burr's commitment to execute an agreement on royalties payable to Mr. Ferdosi and Mr. Erickson on behalf of the future Casino Company and to guarantee payment of royalties with his participation in the Casino Company:

> 6. I will take actions necessary to assure that a written agreement is executed by which you and Mr. Erickson each receive, at the choice of each, either a 1% overriding royalty interest in gross profits, after gaming taxes, generated by the Casino Company, paid monthly, or $20,000 per month.
>
> […]
>
> Your personal guarantee under this letter agreement are guaranteed and collateralized by your ownership interests in the Company and lnversiones, and my obligations under paragraph 6 of this letter agreement are guaranteed and collateralized by my ownership interest in the Casino Company. […][599]

511. This document is quoted in the Memorial to support the proposition that "B-Cabo, LLC invested USD $600,000 through loans to Medano Beach, S. de R.L. De C.V."[600] However, there is no evidence that the fund transfer was ever made, and, in any event, those funds were meant to

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598 Exhibit C-66, pp. 1-2.

599 *Id.*, p. 2.

600 Memorial, ¶ 65.

acquire a participation in the Medano Beach company independently from the casino that was to be built within the hotel, as mentioned in the section above.

512. Even supposing that the investment was actually made, there is no proof that it was lost. To the best of our knowledge, Medano Beach could had paid the loans or returned the loan during the established term of 30 days because the parties were not able to reach a bonding agreement regarding the larger investment of $10 million dollars (see first paragraph of this subsection). In any case, it is important to consider that lack of payment of this loan (if it ever was granted) is not an issue that the claimant could be accountable for.

e. Draft Investment Agreement

513. The expert report on damages presented by the Claimants refers to another document related to the Cabo project, presented as Exhibit BRG-032. It is a draft of the "Investment Agreement" entered into by B-Cabo, LLC, Mr. Ferdosi, Mr. Erikson, and Medano Beach Hotel in October 2013.

514. The "explanatory note" points out that the parties intended to use the funds raised and contributed by the investor (B-Cabo) to build an eight-floor boutique hotel with 245 rooms (the "Hotel") in Cabo San Lucas, Mexico, on behalf of the Company. It must be noted that the document does not refer to a casino or to future plans to build a casino.

515. Thus, even supposing the loans were made, it is rather clear that the investment was to be made in a hotel, and that said investment would not have been affected by any of the measures claimed in this case. The declaration of void permit, the closure of the existing casinos, the alleged misconduct of the Judiciary, the alleged interference in the efforts to mitigate damages carried out by the Claimants, and the alleged harassment from PGR and tax authorities, have no relation whatsoever with the alleged loans to build a hotel made by B-Cabo to Medano Beach company.

2. The Claimants did not make an investment in a Casino in Cancun

516. According to the Claimants the development of the Cancun project started in 2011. Mr. Burr mentions that, in June 2011, the Board of E-Games ordered and authorized him to take all actions reasonable and necessary to establish the Cancun Company that will purchase a license under the Current or New Permit to capitalize, construct and operate a casino in Cancun.[601]

517. The Respondent considers it timely to digress and point out that the sale, transfer, or trade of a permit is forbidden under Article 31 of the Regulations,[602] and also that it would have constituted a violation of the terms of E-Mex's permit, which is penalized by the revocation of the

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[601] Exhibit CWS-50, Third Witness Statement of Mr. Burr, ¶ 84. Respondent's Translation. The English text reads as follows: "in June 2011, E-Games' Board directed and authorized [him] 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'."

[602] Exhibit R-033, Article 31 of the Regulations establishes that: "Permits cannot be transferred and may be not subject to any lien, cession, transfer or commercialization whatsoever."

permit. From this point of view, Mr. Burr's plans for a casino in Cancun would have been both mistaken and illegal.

518. The Claimants maintain that Mr. and Mrs. Burr worked with the developers to discuss several options and that, in April 2013, they had solidified a business plan for Cancun and were searching for a suitable partner.[603] The so-called "business plan" was actually carried out in April 2011.[604] It seems that no progress was made in the three years between that date and the date when the investment was allegedly expropriated. Mr. Burr also testifies:

> 84. [...] We were approached by the Marcos family, a very wealthy family and large landowner in Mexico. The Marcos family owns various 5-star resorts across Mexico and Latin America. Specifically, the Marcos family wanted us to build out a Casino in a new 5-star hotel that they planned to build in Cancun, which would have given the Cancun Casino an immediate customer flow once the hotel opened. For purposes of this project, the Marcos family would have raised all necessary funds. In the business plan, we estimated that net profits would be US$ 19 million annually after 5 years of operations. We 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. This hotel and Casino would have been spectacular.[605] [Footnotes omitted.]

519. The Claimants did not submit any evidence of an agreement or of communications with the Marcos family regarding the construction of a casino in the five-star hotel that they allegedly intended to build in Cancun. Neither have they offered any proof that "Cancun Company" was incorporated or funded, nor given evidence of any other form of protected investment related to this supposed project. Also, if the casino had been built, it is highly probable that the Marcos family would have had an important participation in Cancun Company, so it is not even certain that the future casino could have qualified as an investment protected by the NAFTA.

520. The only evidence submitted by the Claimants about this project is a "business plan" that is not really a business plan[606] (Exhibit C-245), a map of the supposed location of the Cancun project (Exhibit C-246), a presentation of the Cancun project (Exhibit C-335), and a render of the hotel and casino (Exhibit C-374). None of these documents comprise or prove the existence of an "investment" according to the definition of the term provided by Article 1139 of NAFTA.

3. The Claimants did not make an investment in an Online Casino

521. At Paragraph 72 of the Memorial, the Claimants allege that "when Mexico illegally closed the Casinos on April 24, 2014, the Claimants were about to launch an online gaming business" and that "[t]hese efforts were thwarted when the Mexican government closed the Claimants' Casinos." These claims stand exclusively on the witness statements of Mr. Burr, Mrs. Burr, and

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603 Memorial, ¶ 66.

604 The Claimants refer to Exhibit C-245 as "Casino business plan," dated April 2011.

605 Exhibit CWS-50, Third Witness Statement of Mr. Burr, ¶¶ 84-85.

606 The document presented as Exhibit C-245 is not a business plan. A business plan is a more comprehensive document that usually includes: a description of the proposed business, market analysis, development of products and services, marketing plan, financial projections, a proposal for the structure of the organization and administration, key staff, ownership, risk factors, etc.

specially, Mr. José Ramón Moreno, who cites documents attached to his testimony but not mentioned in the Memorial.

522. Mr. Burr testifies "[i]n 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 me about partnering with us to expand their business into online gaming in Mexico."[607] No evidence on the contacts with Bally was submitted.

523. Mr. Burr further explained that he held meetings with Carlos Engle, Bally's sales director, and Ramiro Salazar, Bally's Latin America director, and that after those meetings they decided to use Bally's services and platform to develop their online business.[608] No record or any other evidence of those meetings was produced.

524. Afterwards, Mr. Burr explained that, due to different tax and financial reasons, they decided to install Bally's servers in Queretaro and that they conducted several studies regarding the costs to install those servers and to maintain the data room. He also claims that they performed extensive due diligence to understand the online gaming landscape and that they only continued once they were confident that the operation would be successful.[609] The Claimants did not produce any evidence of the decision to install the servers in Queretaro or of the studies regarding the costs to install servers or the scope of online gaming.

525. Once again, without mentioning any evidence, Mr. Burr concludes saying that they "were ready to sign the contract to install the servers when the Casinos were shut down" and that he "expected that our online business would have been ready to kick off in July 2014."[610] Mr. Burr does not explain with whom he expected to enter into an agreement or in which basis could he expect that the business would start operations in July 2014.

526. Mrs. Burr's testimony goes along the same lines and lacks any reference to contemporary documents or to any other proof. For example, Mrs. Burr claims that they carried out due diligence to understand the overview of online gaming, the different platforms and kinds of games, and performed exhaustive research on technology suppliers.[611] However, she does never refer to a due diligence document or to other documents that prove the exhaustive research of said technology suppliers.

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607 Exhibit CWS-50, Third Witness Statement of Mr. Burr, ¶ 89.

608 *Id.*, p. 90. The original text in English reads as follows: "We had several meetings with Carlos Engle, Bally Sales Director, and Ramiro Salazar, Bally Director for Latin America, after which we decided that we would use Bally's services and platform to develop our online business."

609 *Id.*, ¶ 91. The original text in English reads as follows: "for various financial and tax reasons, we decided to install Bally's servers in Queretaro. We conducted various cost studies on how much it would cost to install the servers, as well as to maintain the data room. We also conducted extensive due diligence to understand the online gaming landscape and only proceeded once we were confident that our operation would be successful."

610 *Id.*, ¶ 91.

611 Exhibit CWS-51, Third Witness Statement of Mrs. Burr, ¶ 81.

527. Regarding Mr. Moreno, his witness statement claims that "when the Casinos were closed, Claimants were about to embark —just two months away —into the world of online gambling."[612] He also claims that:

- They had conducted studies on how much would it cost to install the servers, and on the expenses of leasing an office or a data room where the servers would be installed.[613]
- They had found out how much it would cost to install basic safety surveillance equipment.[614]
- They were on the verge of entering into an important agreement with Poker Stars (through Rational Group, a subsidiary of the company that owns and operates PokerStars) when Mexico closed the Casinos.[615]
- The lease contract for the space to install the servers was ready to be signed, as well as the agreement between Bally and E-Games, and an advance payment on the servers was ready to be made.[616]

528. There is no support for any of these claims. The only documents that Mr. Moreno was able to produce are Annexes C-337, C-337 and C-339. The respondent will discuss this evidence in the following subsections. However, a number of things that are mentioned but not proven in these proceedings must first be outlined.

529. The Claimants have not presented a lease contract for the installation of the servers (not even a draft); or studies concerning the cost of servers or security systems; or documents related to the due diligence allegedly performed to "understand the landscape of online gaming"; or a timetable for the project that proves that E-Games was planning to start operations of the virtual casino in July 2014; or communications between E-Games and other service suppliers that could prove that efforts were made to establish a virtual casino; or drafts of final agreements with Bally and PokerStars (Rational Group) that could prove that these agreements were duly negotiated and were ready to be signed, as the Claimants maintain.

530. Particularly, neither Mr. Burr nor any other Claimant has produced proof of purchase of Internet domains, development of a website, an app or any other means to make this casino available to the public, which is noteworthy considering that the casino was about to be opened, in just two months, according to Mr. Moreno.

531. It must also be pointed out that, as per Article 85 of the Regulations, all permitholders who want to provide online gaming must obtain written authorization from SEGOB and submit a request and documents describing their procedures and rules, in order to guarantee the honesty of

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612 Exhibit CWS-53, Second Witness Statement of Mr. Moreno, ¶ 25.

613 *Id.*, ¶ 30.

614 *Id.*, ¶ 30.

615 *Id.*, ¶ 33.

616 *Id.*, ¶ 32.

the game and prevent manipulation.[617] There is no proof that the Claimants requested authorization from SEGOB to run a virtual casino or that they developed any procedures to guarantee the honesty of the system that they intended to use.

532. That said, the Claimant will now discuss the scarce evidence mentioned in the testimony given by Mr. Moreno.

a. The Interactive Gaming Proposal

533. The first document mentioned by the Claimants is the "Interactive Gaming Proposal Exciting Games," dated March 31, 2013 (Exhibit C-337). The document includes a detailed explanation of Bally's services, a description of its Internet gaming platform, a business model, and a price list. However, it is obvious that this was just an exploratory non-binding proposal "for the purposes of creating work product and completing the final terms and conditions":

> This proposal and its contents, referred to throughout as the "proposal" are solely intended for purposes of creating work product to define and complete the final terms and conditions of both: (i) the contemporaneous projects being reviewed and considered between the parties, and (ii) a final, binding written agreement subject to good faith negotiations entered into between Bally and Exciting Games. Accordingly, this proposal and any of its contents, terms and conditions, shall not constitute a legally binding offer to enter into a contract on the part of either Bally or Exciting Games, as a result of several not-as-yet determined dependences, which include but are not limited to legal requirements, taxation assessment, regulatory approvals and licensing and other factors. Further discussions and negotiations between the parties may include requests by either party fer supplementary information from the other party to verify, clarify, or support the information provided in this proposal or to confirm any conclusions reached in the evaluation of its contents. There will be no legally binding relationship created with any party prior to the execution of a written agreement, and neither party shall be bound to accept any parts of the proposal pending a final written agreement. Al the sole discretion of either Exciting Games or Bally, either party unilaterally terminate any further discussions and negotiations related to or arising out of the proposal at any time with neither party having any further obligations to the other, with the exception of the ongoing obligations of confidentiality of each party to the other and the return of all confidential information of the parties being returned to the respective party owner.[618]

534. It must also be noted that the pricing section of the document specifically states that "pricing is valid with signed contract by 30 June 2013,"[619] which means that the offer had already expired by April 2014, when the Claimants affirm that they were ready to sign the agreement. The Claimants have not presented any other evidence of contacts with Bally or of any progress towards a final agreement regarding the terms of the contract with Bally.

535. The Respondent also points out that the Claimants do not refer to the document *per se*, but to the document as modified by Mr. Moreno. As can be seen, Mr. Moreno made a series of

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617 *See* Exhibit R-033, Article 85.

618 Exhibit C-337, p. 6.

619 *Id.*, p. 22.

handwritten annotations on Bally's price proposal, thus reducing Bally's net profit from 15% to 10%; reducing the minimal monthly fee payable to Bally from $15,000 dollars to $10,000 dollars; reducing the fee for game installation from $75,000 dollars to $30,000; and reducing the license fee from $7,500 dollars to $5,000 dollars.[620] There is of course no evidence that Bally accepted these changes.

b. Online casino investment project

536. To support his claim that "the Claimants had prepared an investment project for an online casino business," Mr. Moreno also refers to a 9-page document presented as Exhibit C-338.[621] There is no date on that document, and it does not identify any authors or sources of information. It also does not seem to be in the original file format, and no one attests to its origin and/or accuracy. Thus, it cannot have any probatory value.

537. The document is interesting because on page 6 it identifies an initial investment of $2.5 million dollars in licenses, infrastructure, and marketing, including an IT site, racks and other accessories, production of a marketing video and an "EG license."

Initial investment

Licenses	**1,535,000**
EG	1,500,000
Cash box	35,000
Infrastructure	**395,000**
Adjustments	45,000
IT Site	350,000
Racks and accessories	20,000
Marketing	**550,000**
Video production	50,000
Launch	500,000
Total	**2,480,000**

538. The files contain no evidence that any of these investments had actually been made, even though the Claimants state that the online casino was just two months away from starting operations. It is also noteworthy that E-Games seems to have been planning to sell a gaming license for $1.5 million dollars, presumably to an entity (similar to a Gaming Company) that had not yet been constituted. The Claimant reiterates that this practice would have been illegal according to the bylaws of the Federal Lottery Act (see Section II.B *supra*).

c. Memo on the structure of the transaction between Exciting Games and Rational Group

620 *Id.*, pp. 22-23.

621 Exhibit CWS-53, Second Witness Statement of Mr. Moreno, ¶ 30.

539. The last document mentioned by Mr. Moreno is a memo dated February 23, 2014, presented by the claimants as Exhibit C-339. Mr. Moreno cites this document to support his claim that "PokerStars would use the Claimants' online platform to install a service through which PokerStars would offer the *Texas hold'em* online game for the entire Mexican Republic" in exchange for a percentage of the "rake."[622] According to Mr. Moreno, the Claimants were one or two weeks away from entering into this important agreement with PokerStars.

540. The memo describes a transaction between E-Games and Rational Group. The Respondent is not sure of the relationship between the latter and PokerStars. In any case, the document is clearly identified as "a discussion paper" based on information provided by Kash (that is, the Claimants) that establishes a "preliminary understanding" that would need additional verification from local advisers:

> This discussion paper is for discussion purposes only. It is based on general information received from discussions with Kash and other sources and has not yet been verified by Mexican tax advisers retained by Rational Group. It does not constitute a legal opinion and should not be relied on for any purposes other than as an indication of our preliminary understanding, which should be further verified by local advisers.[623]

541. The memo then mentions possible structures for the transaction and the respective tax implications. Under the first proposed structure, Rational Group would provide services to Kash from outside of Mexico (i.e., from a company in Malta). Under the second proposed structure, Rational Group would establish a Mexican subsidiary to provide services to Kash. Under a third potential structure, Rational Group and Kash would jointly establish a Mexican subsidiary.[624] Nothing in the document suggests that the parties in the possible transaction had chosen a structure for the investment or were close to agreeing on the details of the transaction. On the contrary, the document shows that, less than five months before the supposed date on which the operations of the online casino were to begin, the parties had just begun to analyze how to structure the investment.

542. Another point worth noting is that, if the plans for the online casino were as advanced as the Claimants allege and it were legal to purchase a license (as they suggest), they could have purchased a license or sought to partner with another permitholder or operator to make the project happen. There is no evidence that they made any effort to try to save a project that was about to commence operations.

543. The truth is that the Claimants are unable to substantiate any sunk costs such as, investments (partial or otherwise) in servers, racks, IT sites or marketing materials, such as the production of the video identified in the table transcribed above. The Claimants have clearly filed a claim related to the online casino merely to boost their damages.

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622 *Id.*, ¶ 33.

623 Exhibit C-339, p. 1.

624 *Id.*, p. 1-2.

B. Fair and equitable treatment under Article 1105 (Minimum Standard of Treatment)

1. The Claimant's position

544. In the Memorial, the Claimants maintain that the Respondent violated its duty to give fair and equitable treatment ("FET") in accordance with Article 1105(1).[625] They affirm that the courts and the NAFTA Parties agree that both the Minimum Standard of Treatment ("MST") and the FET standard have evolved and keep evolving as time goes by.[626] Hence, the Claimants conclude that the customary rule for the MST standard is "indistinguishable" or at least "not materially different" from the FET standard applied by the courts.[627] Thus, awards granted by courts created under treaties other than the NAFTA, in their opinion, are relevant to evaluate the FET standard under Article 1105(1).[628] For the Claimants, the items of the FET standard include: (1) safeguarding legitimate expectations; (2) abstaining from taking unreasonable, arbitrary or discriminatory measures; (3) abstaining from harassment, coercion, or abusive treatment; (4) acting in good faith; and (5) offering transparency and due process.[629]

545. According to the above, the Claimants argue that the Respondent violated the FET standard when it: (1) frustrated the legitimate expectations of the Claimants regarding the E-Games permit; (2) arbitrarily hampered the Claimants' operations in a discriminatory manner and refused to grant the Claimants a new permit by giving excuses instead of reasons; (3) systematically interfered with the repeated efforts of the Claimants to mitigate damages by refusing to reopen or sell their Casinos; and (4) harassed and took reprisals through illegal and arbitrary tax audits and criminal investigations against E-Games and its representatives.[630]

2. The Respondent's Position

546. The Respondent submits that the Claimants misinterpret the relationship between the MST and the FET standards according to Article 1105(1). Under the NAFTA, the FET standard is a sub-element of the MST standard, in accordance with customary international law. It is not an autonomous standard. Thus, the FET standard set forth in Article 1105 is no different from the MST under customary international law and non-NAFTA awards are irrelevant in the context of NAFTA's Article 1105. A detailed analysis of the measures claimed by the Claimants shows they are judicial in nature. As such, the appropriate cause of action for the Claimants is the denial of justice element of the MST standard, not the FET element of the MST standard. Lastly, Claimants'

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625 Memorial, ¶ 532.

626 *Id.*, ¶ 533.

627 *Id.*, ¶ 535.

628 *Id.*, ¶ 535.

629 *Id.*, ¶¶ 539, 541-563.

630 *Id.*, ¶ 564. Frustrating the Claimants' expectations: ¶¶ 566-586; arbitrarily hampering the Claimants' operations and refusing to grant the Claimants a new permit: ¶¶ 587-589; systematically interfering with the repeated efforts of the Claimants to salvage their investment: ¶¶ 590-592; harassing and taking reprisals through tax audits and criminal investigations against E-Games and its representatives: ¶ 593-597.

other ancillary claims under the of the Claimants based on the FET standard must be dismissed by this Tribunal because they are either prohibited by the NAFTA or are without merit.

a. The Claimants misinterpret the relationship between the MST standard and the FET standard undero Article 1105(1)

(1) The practice of the NAFTA States in interpreting Article 1105(1)

547. Article 1105 of the NAFTA establishes the "Minimum Standard of Treatment" (MST). The first paragraph of this provision states:

> 1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.
>
> [Emphasis added]

548. On July 31, 2001, the NAFTA Free Trade Commission issued a Note of Interpretation on certain provisions of Chapter 11 ("Note of Interpretation"). Regarding the interpretation of the MST standard set forth in Article 1105(1), the Note of Interpretation states:

> **1. Minimum Standard of Treatment in Accordance with International Law**
>
> 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
>
> 2. 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 the customary international law minimum standard of treatment of aliens.
>
> 3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

549. According to Article 1105(1) and the Note of Interpretation of the Free Trade Commission that is binding on the interpretation of this provision, the FET standard is a sub-element of the MST standard. This follows from the title of Article 1105(1) –Minimum Standard of Treatment, which refers to international law, and the word *including* is used to refer to the FET standard.[631] Therefore, the examination of an investor's FET claim under NAFTA must be situated in this context, i.e., the FET standard is only one element of the umbrella MST standard.[632]

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631 See NAFTA's Article 1105(1)

632 Exhibit RL-045, Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (The Netherlands: Kluwer Law International, 2013), p. 45; Exhibit RL-096, United Nations Conference on Trade and Development "Fair and Equitable Treatment: A Sequel" in *UNCTAD Series on Issues in International Investment Agreements II* (New York and Geneva, UNCTAD, 2012), p. 44.

550. The three NAFTA parties' submissions in *ADF* demonstrate their long-standing collective position that the FET standard is subject to and an element of the overarching MST standard per Article 1105(1). In its Post-Hearing Submission in *ADF*, the United States wrote as follows:

> The "international minimum standard" embraced by Article 1105(1) is an umbrella concept incorporating a set of rules that over the centuries have crystallized into customary international law in specific contexts. The treaty term "fair and equitable treatment" refers to the customary international law minimum standard of treatment. The rules grouped under the heading of the international minimum standard include those for denial of justice, expropriation, and other acts subject to an absolute, minimum standard of treatment under customary international law. The treaty term "full protection and security" refers to the minimum level of police protection against criminal conduct that is required as a matter of customary international law.[633]

551. In 1128 Submission 1128 in *ADF*, Canada stated that:

> The FTC Interpretation is also consistent with the *Canadian Statement of Implementation, North American Free Trade Agreement*, a unilateral instrument made by Canada in connection with the conclusion of the NAFTA and therefore a relevant instrument for interpretating the Agreement under Article 31(2)(b). The *Statement of Implementation* set out Canada's view that Article 1105 "provides a minimum absolute standard of treatment, based on long-standing principles of customary international law."[634]

552. In support of the United States' position, Mexico submitted that the FET standard was subject to and an element of the MST standard:

> In its own Submission filed on the same day as the U.S. Submission [in Pope & Talbot], Mexico stated that it "concurs in" the U.S. Submission and "expressly adopts" [the following two paragraphs]:
>
> 3. "[F]air and equitable treatment" and "full protection and security" are provided as examples of the customary international law standards incorporated in Article 1105(1). The plain language and structure of Article 1105(1) requires those concepts to be applied as and to the extent that they are recognized in customary international law. They are not to be applied in a subjective and undefined sense without reference to international law standards.…
>
> 8. The international law minimum standard is an umbrella concept incorporating a set of rules that have crystallized over the centuries into customary international law in specific contexts. The relevant principles are part of the customary international law of state responsibility for injuries to aliens. Unlike national treatment, the international law minimum standard is an absolute, rather than relative, standard of international law that

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633 Exhibit RL-046, *ADF Group Inc. v. United States of America*, CIADI Case No. ARB (AF)/00/1, "Post-Hearing Submission of Respondent United States of America on Article 1105(1) and *Pope & Talbot*," June 27, 2002, 2-3. See also, Exhibit RL-047, *Glamis Gold, Ltd. v. The United States of America,* UNCITRAL, "US Counter-Memorial," August 19, 2006, ¶¶ 218-222.

634 Exhibit RL-048, *ADF Group Inc. v. United States of America*, Caso CIADI No. ARB (AF)/00/1, "Second Submission of Canada Pursuant to NAFTA Article 1128," July 19, 2002, ¶ 25.

> defines the treatment a State must accord aliens regardless of the treatment the State accords to its own nationals.[635]

553. The excerpts above demonstrate that the NAFTA Parties agree that the FET standard is subject to and is an element of the MST standard under the NAFTA. Contrary to what the Claimants argue,[636] the FET standard under the NAFTA cannot be interpreted as an independent MST standard or establish a lower threshold than the MST standard.

(2) NAFTA Case Law

554. In accordance with the practice of the NAFTA State Parties mentioned above, the NAFTA tribunals have consistently held that, as a rule of Customary International Law, the MST covers the FET standard. For example, in the case *S.D. Myers v. Canada*, the Tribunal ruled that:

> Article 1105(1) expresses an overall concept. The words of the article must be read as a whole. The phrases … fair and equitable treatment … and … full protection and security … cannot be read in isolation. They must be read in conjunction with the introductory phrase … treatment in accordance with international law.[637]

555. After noting that the FET standard is one aspect of the MST standard, the Tribunal in *Cargill v. Mexico* ruled that the threshold for establishing a violation of the MST is high:

> In summation, the Tribunal finds that the obligations in Article 1105(1) of the NAFTA are to be understood by reference to the customary international law minimum standard of treatment of aliens. The requirement of fair and equitable treatment is one aspect of this minimum standard. To determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety.[638]
>
> [Emphasis added]

556. In *UPS v. Canada*, the Tribunal determined that the word "including" ("*incluido*" in the Spanish version) used in Article 1105(1) shows that the FET standard is an element of and subject to the MST standard:

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635 Exhibit RL-049, *ADF Group Inc. v. United States of America*, CIADI Case No. ARB (AF)/00/1, "Second Article 1128 Submission of the United Mexican States in the Matter of ADF Group Inc. v. United States of America," July 22, 2002, ¶¶ 8-9.

636 Memorial, ¶¶ 534-535.

637 Exhibit CL-30, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, "Partial award," November 13, 2000, ¶ 262.

638 Exhibit RL-016, *Cargill, Incorporated v. Mexico*, Case CIADI No. ARB(AF)/05/2, Award, September 18, 2009, ¶ 296.

> [T]he obligation to accord fair and equitable treatment is not in addition to or beyond the minimum standard. Our reasons in brief are, first, that that reading accords with the ordinary meaning of article 1105. That obligation is "included" within the minimum standard.[639]
>
> [Emphasis added]

557. The Tribunal in *Glamis Gold v. United States* also concluded that the MST standard is a general standard that includes the FET standard:

> As the United States explained in its 1128 submission in Pope & Talbot, and as Mexico adopted in its 1128 submission to the ADF tribunal: "'fair and equitable treatment' and 'full protection and security' are provided as examples of the customary international law standards incorporated into Article 1105(1). … The international law minimum standard [of treatment] is an umbrella concept incorporating a set of rules that has crystallized over the centuries into customary international law in specific contexts.[640]
>
> [Emphasis added]

558. In addition to the three NAFTA parties' State practice, NAFTA jurisprudence shows that NAFTA tribunals have consistently subjected their interpretation of the FET standard to the MST standard. Those tribunals have repeatedly held that the former is an element of of the latter, and cannot provide investors with additional protection to that offered by the MST in accordance with customary international law.

(1) Non-NAFTA awards are largely irrelevant in this arbitration

559. The above-mentioned State party practice and NAFTA precedents show that, under the NAFTA, the FET standard is linked to the rule of Customary International Law of the MST standard. As noted by Patrick Dumberry: "Article 1105 must be analyzed under very specific parameters that do not exist under most of other [autonomous] FET clauses."[641]

560. Similarly, Rudolf Dolzer and Christoph Schreuer, two authors cited by the Claimants, are of the view that the practice developed under Article 1105 of the NAFTA "is of limited relevance for the interpretation of other treaties because the NAFTA has features not shared by other treaties: Article 1105 refers to the 'Minimum Standard of Treatment' in its title. It also refers to 'international law, including fair and equitable treatment'. In addition, it was the object of a binding interpretation by an authorized treaty body for the purposes of that treaty."[642]

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639 Exhibit RL-050, *United Parcel Service of America Inc. v. Government of Canada*, CIADI Case No. UNCT/02/1, "Award on Jurisdiction," November 22, 2002, ¶ 97.

640 Exhibit RL-051, *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, "Award," June 8, 2009, ¶ 618.

641 Exhibit RL-045, Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (The Netherlands: Kluwer Law International, 2013), p. 45 -46.

642 Exhibit RL-052, Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law,* 2nd edition, (Oxford: Oxford University Press, 2012), p. 137.

561. Following the reasoning of these two scholars, non-NAFTA awards in which tribunals ruled in favor of a standalone FET standard[643] or a FET standard not subject to an interpretation that ties the FET standard to the MST standard[644] are irrelevant in this arbitration under the NAFTA because they would be applying different standards applicable to different treaty regimes.

- **The Claimants misrepresent the NAFTA case law**

562. The Claimants invoke *Mondev*[645] and *Waste Management II* to argue that the MST standard under the NAFTA offers protection to foreign investors that is indistinguishable from an autonomous FET standard.[646] However, neither case supports the Claimants' position. To the contrary, they prove that the NAFTA tribunals have consistently considered that the FET standard is subject to the high threshold of the MST standard, especially when there is a denial of justice.

(a) *Mondev v. United States*

563. In their Memorial, the Claimants argue that the three NAFTA Parties have admitted that the MST "can evolve" and "has evolved." Therefore, the threshold for the MST standard has been lowered.[647] This misrepresents the *Mondev* tribunal's summary of the United States' position on the MST standard. In the hearing, the United States expressed the following:

> We concur that the standard adopted in Article 1105 was that as it existed in 1994, the international standard of treatment, as it had developed to that time. We also agreed, like all customary international law, the international minimum standard has evolved and can evolve. Finally[,] […] we agree that the sets of standards which make up the international law minimum standard, including principles of full protection and security, apply to investments.
>
> These points, however, only begin the inquiry. They don't answer the question of which particular standards are applicable. But here too there is an additional area of common ground. Mondev's claims raise the question of whether the system of justice provided to LPA by United States accorded with the standards of justice required by international law. The relevant rules of customary international law here therefore, are those that address the treatment of aliens by the courts of the host state. The rules that are generally grouped under the heading "denial of justice."[648]
>
> [Emphasis added]

564. Here, the United States pointed out (and was cited in part by the *Mondev* tribunal) that the MST rule pursuant to customary international law was incorporated into the NAFTA since 1994,

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643 Memorial, ¶¶ 535 and 537, particularly footnote 1372.

644 *Id*, ¶¶ 535 and 537, particularly footnote 1371.

645 *Id.*, ¶ 534.

646 *Id.*, ¶ 536.

647 Memorial, ¶ 534, citing *Mondev International Ltd. v. United States of America*, Caso CIADI No. ARB(AF)/99/2, "Award," October 11, 2002, ¶ 124.

648 Exhibit RL-053, *Mondev International Ltd. v. United States of America*, CIADI Case No. ARB(AF)/99/2, "Transcript of Hearing on Competence and Liability – Day 3 (uncorrected)," May 22, 2002, pp. 682-684.

when the NAFTA was signed. It did not indicate that the threshold of the MST standard had been lowered. As the United States correctly pointed out in the transcribed quotation above, that statement only opened the discussion. Since *Mondev's* claim was related to conduct attributable to the judicial branch of the United States, it was necessary to investigate whether a denial of justice had occurred. The United States' position was reaffirmed by the *Mondev* tribunal after determining that it referred "only with that aspect of the Article 1105(1) which concerns what is commonly called denial of justice, that is to say, with the standard of treatment of aliens applicable to decisions of the host State's courts or tribunals."[649] [Emphasis made by Respondent]

565. What Claimants cannot deny in this case is that their claim is also based on their disagreements with the Respondents' judicial system and the administrative actions arising from its decisions. Therefore, as in the *Mondev* case, the Claimants' only cause of action is the element of denial of justice in Article 1105(1) and not the FET sub-element. As will be discussed below in the section on denial of justice, the *Mondev* tribunal applied the high threshold of denial of justice and did not find that the United States had violated it.

(b) *Waste Management II*

566. In *Waste Management II*, the Tribunal determined that a general standard for Article 1105 was emerging:

> 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—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant…[650]
>
> [Emphasis added]

567. The above excerpt from *Waste Management II* shows that the threshold of the MST standard is high. The NAFTA Parties continue to refer to WM II in their submissions.

568. To determine whether a NAFTA Party has violated Article 1105(1), the conduct of the State's has to be "arbitrary, grossly unfair, unjust or idiosyncratic, … or involves a lack of due process leading to an outcome which offends judicial propriety."[651] Nothing in the *Waste Management II* tribunal's decision cited above demonstrates that the threshold to determine the existence of a violation of the MST standard under Article 1105(1) has been reduced.

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649 Exhibit CL-17, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, "Award," October 11, 2002, ¶ 96.

650 Exhibit CL-37, *Waste Management, Inc. v. Mexico [II],* CIADI Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶ 98, cited in the Memorial, ¶ 536.

651 *Id*.

569. Claimants fail to mention that the *Waste Management II* tribunal added that the substantive content of the rule of denials of justice in international customs applies when the investor's claims relate to the judicial conduct of the host State. Based on *Loewen*, the *Waste Management II* tribunal concluded that the threshold for determining whether there is a denial of justice according to the MST standard is strict. There must be a manifest injustice such as the lack of procedural guarantees leading to an outcome that offends a sense of judicial propriety:

> Neither 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. Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough, even if one applies the Interpretation according to its terms.[652]
>
> [Emphasis added]

570. The tribunal in *Waste Management II* agreed with the *Loewen* tribunal with regard to the determination of manifest injustice being judged in light of the entire judicial system of the host State, and not from the limited standpoint of an individual decision.

> [W]here the minimum standards of international law in question in a particular case are raised in respect of a claim of judicial action—that is, a denial of justice—what matters is the *system* of justice and not any individual decision in the course of proceedings. The system must be tried and have failed, and thus in this context the notion of exhaustion of local remedies is incorporated into the substantive standard and is not only a procedural prerequisite to an international claim.[653]
>
> [Emphasis added]

571. *Waste Management II* demonstrates that when a claim is based on conduct attributable to the respondent party's court system, it must be judged according to the denial of justice element of the MST standard in Article 1105(1). As will be discussed below in the section on denial of justice, the Claimants have not demonstrated a systemic failure of the Respondent's judicial system.

572. Having demonstrated that this case concerns an alleged violation of the element of denial of justice and not on the FET part of the MST standard, it is unnecessary and irrelevant for the Respondent to address the content of the FET standard raised by the Claimants.[654]

b. The nature of the Claimants' claims confirms that the appropriate cause of action pursuant to Article 1105(1) is denial of justice

573. The Claimants' FET/MST claim includes four components:

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652 *Id.*, ¶ 97, quoting *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, CIADI Case No. ARB(AF)/98/3, "Award," June 26, 2003 ¶ 132.

653 *Id.*, ¶ 97, quoting *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, CIADI Case No. ARB(AF)/98/3, "Award," June 26, 2003 ¶ 168.

654 Memorial, ¶¶ 538-563.

1) The Respondent frustrated their legitimate expectations by rendering its permit void via the judiciary;
2) The Respondent treated them in an arbitrary and discriminatory manner and refused to grant them new permits;
3) The Respondent interfered with their efforts to reopen its Casinos and sell their assets; and
4) The Respondent harassed the Claimants and took retaliatory measures through fiscal and criminal actions.[655]

574. As shall be explained below, the first part relates to judicial proceedings, that is, the amparo proceedings and the actions taken by SEGOB to comply with the orders of the Sixteenth Court.[656] Given that the claimed measures refer to the judicial conduct of the Respondent or to the administrative behavior derived from it, which in turn was confirmed by the judiciary, the only way for Claimants to establish a violation of the MST standard pursuant Article 1105(1) would be to demonstrate a denial of justice. The customary international law rule of denial of justice included in Article 1105(1) would lose its meaning if the Claimants could present their claims in any other way. As with the Claimants' "judicial expropriation" claim, the Claimants' alleged violation of the FET standard is no more than an attempt to hide a denial of justice to avoid the high threshold applicable to such claims that the Claimants cannot meet under the circumstances of this case.

575. The three remaining parts of the Claimants' FET/MST claim are manifestly false and are baseless.

(1) The Claimants have failed to establish that MST covers legitimate expectations and, in any event, Mexico did not frustrate the Claimants' legitimate expectations

576. The Claimants contend that Mexico violated the MST standard through the following actions:

> (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; [657]

577. The Respondent's position is twofold. *First*, the Claimants have not established the existence of a State practice and/or of *opinio juris* that the minimum standard of treatment according to customary international law incorporated into Article 1105 provides protection of an

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655 *Id.*, ¶ 564.

656 *Id.*, ¶¶ 567, 575-579.

657 *Id.*, ¶ 564(i).

investor's legitimate expectations under NAFTA. *Second*, the Claimants did not and could not have legitimate expectations regarding their permit. In the following paragraphs, the Respondent will explain these two points in more detail.

578. In *Eli Lilly*, the United States took the position that legitimate expectations are not a component item of the FET under customary international law because there is no State practice or *opinio juris*.

> The concept of "legitimate expectations" is not a component item of "fair and equitable treatment" under customary international law that gives rise to an independent host State obligation. An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment. The United States is aware of no general and consistent State practice and opinio juris establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations; instead, something more is required than the interference with those expectations.[658]

579. On the other hand, in *Mesa Power v. Canada*, Canada submitted that:

> Indeed, as the United States indicates, there is "no general and consistent State practice and opinio juris establishing an obligation under the minimum standard of treatment not to frustrate investors' 'expectations.'"[659]

580. As previously mentioned, the Note of Interpretation of the Free Trade Commission dated July 31, 2001, states: "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party."[660] Furthermore, it clarifies that: "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 the customary international law minimum standard of treatment."[661] Therefore, claimant that wishes to present a claim for violations to Article 1105(1) based on frustration of legitimate expectations must first prove that the MST according to customary international law actually protects legitimate expectations. The Claimants have simply omitted this necessary step and, by doing so, have failed to meet their burden of proving that the NAFTA offers protection against the frustration of legitimate expectations.

581. Even assuming that the Claimants had met this burden (they did not) and that the Tribunal agreed that frustration of legitimate expectations can give rise to claims pursuant to Article 1105(1), the Claimants' claim would fail on the facts. Legitimate expectations refer to expectations created through declarations or commitments of the host State on which an investor relied in making the decision to invest.

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658 Exhibit RL-055, *Eli Lilly and Company v. The Government of Canada*, CIADI Case No. UNCT/14/2, "Submission of the United States of America," March 18, 2016, ¶ 13.

659 Exhibit RL-079, *Mesa Power Group, LLC v. Government of Canad*a, UNCITRAL, PCA Case No. 2012-17, "Government of Canada Response to 1128 Submissions," June 26, 2015, ¶ 12.

660 Exhibit RL-054, Note of Interpretation of the Free Trade Commission, July 31, 2001, sub-section B.

661 *Id*.

> 340. The stability of the legal and business environment is directly linked to the investor's justified expectations. The Tribunal acknowledges that such expectations are an important item of fair and equitable treatment. At the same time, it is mindful of their limitations. To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment. The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural, and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest.[662]

582. The Claimants have not identified any such statements or commitments made by the Respondent. In fact, it is obvious that the measures on which the claim is based are not and cannot be related to commitments or obligations made by the Respondent at the time the investment was made.

583. As mentioned above, the claim to legitimate expectations is based on the annulment of the permit, the closure of the Casinos, interference with judicial processes and allowing the Claimants' competitors to reopen the Claimants' casinos. However, as explained in the Memorial and in the statement of facts of this Counter Memorial, the Claimants requested their permit many years *after* they made their investment. Their investment was not based on a commitment from Mexico to grant a permit, to not cancel a permit, or not close the Casinos. The Claimants initiated the operation of their casinos by exploiting a legal device (the Monterrey Decision) that allowed them to establish a "casino" disguised as a "videogame arcade."[663] To be clear, the Claimants did not have a permit in 2005 when they opened their first casinos despite the fact that by then the Regulations had already been published and, therefore, it was already a requirement to have one.

584. Next, the Respondent shall address the facts regarding the specific measures that, according to the Claimants, gave rise to the frustration of their legitimate expectations.

585. *First*, the statement of facts explains in detail that the permit was declared void due to following the orders of the court.[664] There was no unlawful application of domestic law in Amparo 1668/2011 or in the measures taken by SEGOB to comply with the judgment. Both the Seventh Collegiate Court and the Sixteenth Court ruled that SEGOB had complied with the judgment given of January 31, 2013, by declaring void the 2009-BIS Oficio but also all related and subsequent measures, including the Permitholder Oficio and Permitholder-BIS Oficio. This has been confirmed by Mr. Lazcano and Dr. Mijangos, the Respondent's legal experts.

586. After analyzing the amparo proceedings, the Respondent's constitutional law expert has concluded that all decisions were based on legal principles and applicable case law. Furthermore,

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662 Exhibit RL-097, *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, CIADI Case, No. ARB/04/19, "Award," August 18, 2008, ¶ 340. See also, Exhibit RL-098, *Frontier Petroleum Services Ltd. v. The Czech Repub*lic, CNUDMI, "Final Award," November 12, 2010, ¶¶ 288 and 468.

663 See Section II.C.2 *supra*.

664 See Section II.L.2 *supra*

the courts' rulings were consistent with the Constitution and applicable laws. None contains any obvious error of law.[665]

587. *Second*, the closure of the Casinos was a direct consequence of the court's determination to annul (to declare as "*insubsistente*") the 2009-BIS Oficio and any subsequent actions flowing from it. By declaring the permit void, SEGOB had no choice but to close the Claimants' Casinos because the Law and its Regulations forbid the operation of a casino without a permit. It was the Claimants' reckless decision to continue operating their Casinos under an "interim measure" It was the Claimants' imprudent choice to continue to operate their Casinos pursuant to a precautionary measure order (i.e., "medida cautelar") that they knew or should have known was not applicable, what led to the closure of the Casinos.

588. In relation to the alleged violation of the precautionary measure, the Respondent would also like to add that this issue was fully litigated in domestic courts. The Claimants, through E-Games, challenged the closure of the Casinos, alleging that SEGOB had violated the precautionary measures, and lost. This part of their claim is just another attempt to litigate this issue before the Tribunal, as if it were a supranational court of appeal.

589. Upon the closure of the Casinos, the Juegos Companies defaulted on their respective lease agreements with the owners of the venues where the Casinos were located. These owners, in turn, initiated a host of civil and commercial actions to recoup their property. Once these proceedings were ruled in favor of the owners, the authorities were ordered to remove the seals and return the properties to their rightful owners. The Respondent had nothing to do with what these individuals chose to do with their property. Therefore, it is incorrect to suggest that the Respondent "let some of [the casinos to] be reopened illegally by Claimants' competitors."

590. *Third*, the Respondent categorically rejects the Claimants' baseless accusation that the Respondent's actions were motivated by political reasons or were otherwise discriminatory. The Claimants have not produced evidence in supports of these allegations. However, the Respondent has provided witness statements from SEGOB' officers that categorically reject any political motivation the Claimants. The Respondent invites this Tribunal to examine the witness statement of Mrs. Marcela González, who explained the following:

- She never received any instruction to acts against or in favor of E-Games or any other permit holder.[666]
- E-Mex initiated an amparo proceeding challenging the 2009-BIS Oficio (referred to by the Claimants as "Independent Operator Resolution"). The Sixteenth Court and the Seventh Collegiate Court ruled, in the amparo proceeding, that SEGOB violated the constitutional rights of E-Mex by issuing the 2009-BIS Oficio and ordered SEGOB to annul it, together with any other resolution flowing from 2009-Bis Oficio. It is simply untrue that SEGOB pressured the courts to rule against E-Games' interests.[667]

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665 Exhibit RER-1; expert report by Dr. Mijangos, ¶¶ 299 -300.

666 Exhibit RWS-1 Exit, Witness Statement of Mrs. Marcela González, ¶¶ 13 and 19.

667 *Id.*, ¶ 29.

- The annulment of the E-Games' permit resulted from the judgement of the Sixteenth Court in the above-mentioned proceedings. SEGOB's revocation of the permit was challenged in Court by E-Games and was upheld by the Seventh Collegiate Court.[668]

591. Mr. Landgrave, SEGOB attorney involved in Amparo 1668/2011, also testifies that he never received any instruction to affect E-Games and that, on the contrary, his mandate was to defend SEGOB's acts:

> 24. I specify that all the juridical acts related to this trial were with the objective to defend SEGOB. The acts that I performed in this case were consistent with the standards that we applied in all the matters related to games and raffles. There was no moment before, during or after complying the amparo sentence that I received an instruction different than the defense of SEGOB. Thus, I reject allegations that imply that I acted under pressure or guided by "the highest levels of t[sic] Peña Nieto's administration", implementing illegal, discriminatory and arbitrary measures with the objective to damage E-Games. In no moment I received instructions to damage E-Games.
>
> 25. In respect of the alleged influence of E-Mex inside SEGOB, I denied that there had been such influence in my acts as SEGOB's lawyer in the 1668/2011 amparo. [669] [Emphasis added]

592. Finally, Mr. García, at the time Deputy Director of Regulation and Verification at DGJS, in charge of verifying the Claimants' casinos on April 24, 2014, explained:

> During the time that I worked in the DGJS, we adopt a policy of reviewing the legal operation of all the casinos in the country, carrying out many inspections of verifications to various permit holders and operators, I have to specify that I never received any instruction to go against a permit holder in specific. The instruction was always to give compliance with the LFJS and its Regulation.[670] [Emphasis added]

593. It must also bears noting that the allegations of political animus against the Claimants are baseless because SEGOB did not revoke their permit when notified of the judgment in Amparo 1668/2011. Initially, SEGOB only annulled Oficio 2009-BIS, and E-Games' permit was not revoked until after E-Mex complained of the lack of compliance of the judge's judgment and SEGOB was ordered to put an end to the consequences of any other decision derived from Oficio 2009-BIS. If what the Claimants argue were true, SEGOB would have revoked the permit at the first opportunity, but it did not do so.

594. Because SEGOB's actions were challenged by E-Games and confirmed in national courts, the Respondent holds that the only course of action for the Claimants by virtue of the NAFTA is a denial of justice (as will be explained in detail in the corresponding section). In words of the *Azinian* tribunal (presided by Jan Paulsson): "[a] governmental authority surely cannot be faulted

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668 *Id.*, ¶¶ 27-28.

669 Exhibit RWS-2, Witness Statement of Mr. José Raúl Landgrave, ¶¶ 25-26.

670 Exhibit RWS-3, Witness Statement of Mr. Marcos García Hernández, ¶ 10.

for acting in a manner validated by its courts unless the courts themselves are disavowed at the international level)."[671]

(2) Mexico did not violate the FET standard with the alleged interference of the Claimants' casino operations nor by refusing to grant Claimants new permits

595. The Claimants argue that Mexico breached its FET obligations by "treating Claimants in an arbitrary and discriminatory manner by interfering with Claimants' Casino operations and refusing to grant Claimants new permits citing pretextual reasons."[672] They also claim that Mexico illegally closed the Mexico City Casino for 34 days in June 2013, alleging that the facility did not comply with safety Regulations and that none of the Claimants' competitors had to close due the alleged violation.[673]

596. According to the Claimants, the local authorities temporarily shut down the Mexico City Casino in June 2013 because of "fabricated" violations of public safety regulations.[674] However, the Claimants did not provide evidence to support this part of their claim. In any event, the Claimants had domestic remedies at their disposal to challenge this closure and they used them. As a result, the Claimants were able to obtain a favorable court order that allowed them to reopen after 34 days of closure. If the Claimants considered that the actions taken by local authorities were illegal and involved corruption, they could have filed a criminal complaint, but they did not.[675] For that reason, their claim cannot be heard now. It is also worth mentioning, in the context of this claim, that the Claimants are not claiming damages for the temporary closure of the Mexico City Casino in June 2013.

597. With regard to the Claimants' application for new permits, they assert these were denied by inventing a new requirement: "the requirement that a permit applicant should have open and operating gaming facilities prior to the granting of a permit."[676] This misconstrues the reason for the denial.[677] The SEGOB did not require the Claimants to have their casinos open and operational to be granted a permit. The SEGOB denied their application because the casinos that the Claimants intended to open with these new permits had been shut down because they had operated without permits and, as a consequence of the closure, an administrative proceeding was initiated to make a final determination. The SEGOB simply could not issue a new permit until the administrative proceeding had concluded.

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671 Exhibit CL-192, *Robert Azinian, Kenneth Davitian, & Ellen Baca v. Mexico*, CIADI Case No. ARB (AF)/97/2, Award, November 1, 1999, ¶ 99.

672 Memorial, ¶ 564(ii).

673 *Id.*, ¶ 588.

674 *Id.*, ¶ 194.

675 For more context on these facts, see Section II.J *supra*.

676 Memorial, ¶ 589.

677 See Section II.P *supra*.

598. In any event, the Claimants had every opportunity to challenge the decision if they though it was arbitrary, unfair, insufficiently justified or motivated by corrupt intent or political agendas. The resolution denying the request explicitly states that the decision could be challenged through a review proceeding ("*recurso de revisión*"). The Claimants, however, failed to do so. Since they refused to challenge the measure at the time, they cannot complain now of wrongdoing.

599. The Mexican judicial system, like most judicial systems in the world, provide legal recourses against governmental decisions deemed to be taken in error or in abuse of private parties' rights. The Claimants were in no way forced to pursue those legal recourses, however, their failure to even attempt to exercise those rights bar any possible claim for failure to accord fair and equitable treatment.

(3) Mexico did not interfere with Claimants' efforts to salvage their investments

600. The Claimants allege that, following closure of the Casinos, SEGOB refused to reopen them and refuse to let Claimants mitigate the damages by interfering in their efforts to sell their assets to third parties.[678] In her witness statement, Mrs. González Salas explained that the Casinos could not reopen because there were pending criminal and administrative proceedings:

> 22. […] I specifically recall meeting with Jose Antonio Garcia, Vice President of Televisa Corporate Management, who related interest in acquiring the E-Games establishment in Cuernavaca. However, this space along with the five other casinos belonging to this company could not open because they were subject to administrative proceedings that were still pending a decision and criminal complaints still in process. It is important to clarify that when a casino is closed for operating without a valid permit, SEGOB files criminal charges for illegal gambling, pursuant to Article 12(II) of the Federal Games and Sweepstakes Law. This happens to all casinos closed under these conditions without exception. As such, the establishments could not be reopened until the proceedings had concluded.
>
> 23. Jose Antonio Garcia (PlayCity) said they were considering acquiring them to operate them under the permit the company already had. However, I suggested that he find out what the status was of the casinos he considered acquiring. For example, if they had the necessary municipal permits, and if the properties where casinos were operated were leased or owned. I offered to continue with our conversation, but he never came back to discuss this this matter further.
>
> 24. There was a similar situation with Juan Cortina Gallardo, who approached the DGJS with the same intentions. I personally met with him and I told him the same thing that I had told Mr. Jose Antonio Garcia: those establishments were not in any legal condition to be reopened. This legal condition was separate from the investment process (foreign or national) and was outside the scope of the DGJS's authority.[679]

601. It is clear from these passages that Ms. González Salas did not interfere with the sale of the Casinos and that there was no malicious intent. Mr. José Antonio García and Mr. Juan Cortina

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678 Memorial, ¶¶ 590-592.

679 Exhibit RWS-1, witness statement of Mrs. Marcela González, ¶¶ 22-24.

Gallardo asked her if the Casinos could be reopened under another person's permit, and she simply explained that could not occur before the administrative proceeding and criminal investigation that were opened as a result of the closure of the Claimants' casinos had ended. These potential investors were carrying out their own due diligence and SEGOB could not to misrepresent the legal status of the casinos to avoid an alleged "interference" with the sale.

602. The Respondent has submitted as evidence a sworn statement by Mr. Taylor (one of the Claimants), which was used in in a lawsuit filed by him in the United States against B-Mex and B-Mex II, who are also Claimants in these proceedings. The sworn statement contains the copy of an e-mail from Mr. Burr to "Tery" from Caddis Capital (one of the Claimants) declaring, *among other things*, that "John [Conley (another Claimant)] sent an email in which he said that the Televisa deal was never real and he had been duped into providing information to Televisa and going along with the purported deal. In hindsight, crazy? Yes! As a result of these failed efforts to sell our assets, our debt in Mexico is now so high that even if there is a buyer it will be a miracle if we ever recover a penny or peso."[680] It is clear from the foregoing that the transaction with Play City (owned by Televisa) did not fail because of the alleged interference with the Claimant.

603. Evidently, the Claimants had this information and, as explained above, the Claimants' attorneys received a copy of this sworn statement. If this e-mail is authentic –and the Respondent has no reason to doubt that it is so– it would not only prove that there was no interference from SEGOB, but that the Claimants have purposely tried to deceive this Tribunal into thinking that there was one. This conduct cannot be tolerated by this Tribunal.

(4) Mexico did not subject the Claimants to harassment and retaliatory measures (illegal tax audits and criminal investigations)

604. In the Memorial, it is argued that the PRI administration's attack on the Claimants was not limited to the destruction of their casinos, but that it also included harassment and retaliatory measures in breach of Mexico's obligations pursuant to the FET standard.[681] It is further argued that the SAT (the Mexican tax agency) issued a resolution determining that E-Games had failed to comply with its reporting obligations and ordered E-Games to pay MXN $170,475,625.02 pesos.[682] The Claimants also contend that after submitting their notice of intent to present a claim for arbitration (May 23, 2014), Mexico, through the PGR, commenced a criminal investigation against E-Games representatives.[683]

605. The Respondent shall first briefly address these baseless allegations, beginning with the measures attributed to tax authorities, and shall then address the criminal investigation issue. For the complete factual context, the Respondent will refer s the reader to Section II.R *supra*.

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680 Exhibit R-075, sworn witness statement of Mr. Taylor, p. 32, *item* 5.

681 Memorial, ¶ 593.

682 *Id.*, ¶ 595.

683 *Id.*, ¶ 596.

606. *First*, regarding the alleged actions taken by the SAT, the Respondent submits that the Claimants cannot present a claim related to tax measures pursuant to Article 1105(1) because Article 2103 of the NAFTA unequivocally establishes that:

> **Article 2103: Taxation**
>
> 1. Except as set out in this Article, nothing in this Agreement shall apply to taxation measures.

607. None of the exceptions to the enforcement of paragraph 1 in the following sub-paragraphs of Article 2103 allow for Article 1105(1) to be applied to tax measures. As explained by the tribunal in *Cargill v. Mexico*, tax measures cannot be used as grounds for a claim of breach of Article 1105(1).[684] Therefore, this Tribunal has no jurisdiction over the Claimants' claims against the SAT's actions to enforce its tax obligations.

608. Even if this Tribunal were to find that it has the jurisdiction over a claim of this nature, the Claimants have not proven that the actions of which they complain were frivolous, unjustified, or meant to harass them in in any way. These are nothing but unsubstantiated claims.

609. At paragraph 461 of the Memorial, the Claimants allege that, in February 2014, the SAT issued a resolution finding that E-Games had with its reporting obligations and ordered it to pay $170,475,625.02 (approximately USD $12,796,600) in back taxes. Claimants go on to argue that, after appealing the SAT's resolutions, the Supreme Court dismissed E-Games' appeal and that, in the view of its local counsel, "the matter was politically charged."[685]

610. The Claimants have not proven that the SAT acted in breach of applicable laws or in an abusive manner. On the contrary, the evidence shows that the SAT resolution was issued according to its verification powers and is duly justified.[686] More importantly, the SAT resolution was appealed in national courts escalating all the way to the Mexican Supreme Court, which confirmed the decision made by the tax authority. Unless the Claimants can prove that there was a denial of justice by local courts, the correctness of the SAT's resolution is a legal fact that this Tribunal must accept. The Claimants owe the Mexican Government an amount equal to USD $12.9 million dollars in back taxes and to date have not satisfied this debt.[687]

611. *Second*, the Claimants also argue that SEGOB used the Attorney General's Office (PGR) in "an unlawful and arbitrary manner to trump up unwarranted criminal charges against E-Games' representatives" and that "[o]n 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 rescind all resolutions derived from the May 27, 2009

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684 Exhibit CL-192, *Cargill, Incorporated v. Mexico*, CIADI Case No. ARB(AF)/05/2, Answer, September 18, 2009, ¶ 297. See also Exhibit CL-96, *Marvin Roy Feldman Karpa v. Mexico*, CIADI Case No. ARB(AF)/99/1, Award, December 16, 2002, ¶ 141.

685 Memorial, ¶ 463.

686 See Section II.R.1 *supra*.

687 *Id*, ¶ 428.

Resolution, until April 2014 when SEGOB closed down all of the Casinos."[688] These allegations appear to be based solely on "information and belief". If Claimants had any evidence of wrongdoing to support their Article 1105 claim, they should have provided it in their Memorial. They did not.

612. Ms. Marcela González explains in her witness statement that SEGOB always files criminal charges when a casino is shut down for operating without a permit because it is a crime to operate a casino without a permit:

> It is important to clarify that when a casino is closed because it does not have a valid permit and is in operation, SEGOB files a complaint for the illegal gambling offence, which is crime pursuant article 12, fraction II of the Federal Law on Games and Sweepstakes.[689] This was done with all casinos that were closed under these conditions, without exception. In this regard, the casinos were unable to reopen until the ongoing legal proceedings were completed.[690] [Emphasis added]

613. The applicable provision of the LFJS establishes that:

> ARTICLE 12.- Three months to three years of prison and a fine from five hundred to ten thousand pesos shall be imposed, and dismissal from employment, where applicable: […]
>
> II.- On owners, organizers, managers, or administrators of a house or facility, whether open or closed, in which unlawful gaming or betting takes place without authorization from the Secretariat of the Interior, and on those who have any interest in the company in any way;[691] [Emphasis added]

614. The Claimants could not have reasonably expected Mexican authorities to turn a blind eye to presumably criminal acts. The fact is that the Claimants chose to keep their Casinos open even when they knew they no longer had a permit. They also knew, or should have known, that the precautionary measure ("medida cautelar") under which they purportedly operated their Casinos since the permit was declared null and void was no longer enforceable because it was left without substance when the permit was annulled. This is explained in detail in Section II.M.3 *supra*.

615. Notwithstanding the foregoing, it bears noting that: (a) legal remedies were available to E-Games to challenge any criminal determination; (b) there is no evidence of arbitrary, unlawful, or politically motivated actions against E-Games, and, in any event, (c) the PGR did not file criminal charges against E-Games or its representatives; it simply opened an investigation as it was required to do when criminal charges are filed.[692]

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688 Memorial, ¶ 464.

689 Exhibit R-030, "Article 12.- Three months to three years of prison and a fine from five hundred to ten thousand pesos shall be imposed, and dismissal from employment, where applicable: II.- On owners, organizers, managers, or administrators of a house or facility, whether open or closed, in which unlawful gaming or betting takes place without authorization from the Department of the Interior, and on those who have any interest in the company in any way."

690 Exhibit RWS-1, witness statement of Mrs. Marcela González Salas, ¶¶ 22.

691 Exhibit R-030, LFJS

692 See Section II.R.2 *supra*.

616. Lastly, the Respondent would like to note that the Claimants are not claiming any damages from the decision of the SAT, the actions of the PGR or any other kind of alleged harassment. The claim for damages is entirely based on those arising from what the Claimants have incorrectly characterized as a "*creeping expropriation*."

C. Denial of Justice under Article 1105 (Minimum Standard of Treatment)

1. The Claimant's position

617. The Claimants assert that, according to customary international law (English acronym "CIL"), due process guarantees constitute an important part of the fair and equitable treatment standard.[693] The Claimants argue that the concept of due process overlaps with the international delict of denial of justice, i.e. a breach of due process itself is a denial of justice.[694] The Claimants assert that in addition to the denial of justice committed by the judiciary, the Government's administrative power can also be charged with denial of justice when acting in its adjudicatory capacity.[695] For the Claimants, a denial of justice committed by the judiciary includes: (1) denial of access to courts and undue delays; (2) breach of fundamental due process and serious procedural errors; (3) lack of judicial independence and impartiality; and (4) clear and malicious misapplication of the law.[696] Denial of justice committed by the administrative branch includes: (1) not providing notices and the opportunity to be heard; and (2) failure to provide reasons to its decisions.[697]

618. The Claimants allege that the Respondent violated denial of justice through its judiciary in the following ways: (1) the Sixteenth District Court and the Seventh Collegiate Court failed to dismiss E-Mex's third amendment of the amparo notwithstanding that it was untimely filed under the Amparo Law; (2) the Seventh Collegiate Court failed to examine the admissibility argument made by E-Games. This procedural error, together with sub-argument (1) mentioned above, irrevocably tainted the proceedings of Amparo 1668/2011; (3) the Sixteenth Court did not notify E-Games about the resolution in the first Compliance and denied E-Games the right to be heard and its appeal rights; (4) the Sixteenth Court did not request SEGOB to issue new decisions in response to E-Games' initial application, whereas it did order SEGOB to annul all decisions derived from the Resolution of May 27, 2009 (the 2009-BIS Oficio). This omission deprived E-Games of its right of access to the courts; (5) the Seventh Collegiate Court erred in its the *ultra petita* decision for finding that the Non-Compliance Complaint 82/21013 was baseless and that SEGOB had not exceeded its authority by fulfilling the Order of the Sixteenth Court dated January 13, 2013 (i.e., Amparo 1668/2011). The Seventh Collegiate Court also erred when reviewing the legality and constitutionality of the Permitholder-BIS Oficio dated November 16, 2012, which should not have occurred given that E-Mex consented to this government action in Amparo

693 Memorial, ¶ 601.

694 *Id.*, ¶¶ 602-604.

695 *Id.*, ¶ 607.

696 *Id.*, ¶ 632.

697 *Id.*, ¶ 613.

1152/2012. In any case, the Permitholder-BIS Oficio must be appealed by means of a separate and independent judicial procedure in order to thus grant E-Games its right to due process. Amparo 1668/2011 deprived E-Games of its right to a defense; (6) the Seventh Collegiate Court failed to provide reasons for its conclusion that the Order of January 31, 2013, of the Sixteenth Court was unconstitutional in view of the principle of "acquired rights"; (7) the two aforementioned courts failed to consider the final and binding ruling in the Amparo 1151/2012, determining that Permitholder-BIS Oficio constituted E-Mex's implicit consent for not challenging Amparo 1668/2011; (8) the refusal of the Supreme Court of Justice of Mexico to hear E-Games' "appeal of nonconformity"("recurso de inconformidad") on the fund, thus depriving the Claimants of their right of appeal.[698]

619. The Claimants also allege that the Respondent violated denial of justice through its administrative branch –SEGOB– by: (1) eliminating the Permitholder-BIS Oficio during the enforcement stage of Amparo 1668/2011;[699] (2) committing procedural irregularities in the decision-making process;[700] (3) illegally closing down the Claimants' Casinos; (4) dismissing the Claimants' Motion for Review ("*recurso de revisión"*);[701] (5) breaching due process in the closure administrative review proceeding;[702] (6) allowing the Claimants' competitors to operate the Claimants' Casinos;[703] and (7) denying E-Games' request for new permits.[704]

2. The Respondent's position

620. The Respondent submits that denial of justice in its customary sense can only apply to a nation's entire judicial system and its threshold is very high. International tribunals are not courts of appeal charged with reviewing the decisions of national courts unless there has been a denial of justice. The Respondent further submits that the Claimants misconstrued some components of denial of justice by presenting them as substantial items or examples of instantaneous denial of justice. To the contrary, denial of justice is procedural in nature and, and there is no instantaneous denial of justice committed by isolated court decisions under international law. Accordingly, the Claimants bear the onus to demonstrate that the outcome of the Respondent's judicial system violated the high threshold of international law, not national laws.

a. International tribunals are not appellate courts to review domestic judicial decisions based upon domestic laws

621. In its customary sense, denial of justice applies to the entire judicial system of a country. The three NAFTA parties agree that: (1) the threshold for finding a violation of denial of justice

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698 *Id.*, ¶ 672.

699 *Id.*, ¶ 677.

700 *Id.*, ¶ 678.

701 *Id.*, ¶ 682.

702 *Id.*, ¶ 683.

703 *Id.*, ¶ 685.

704 *Id.*, ¶ 686.

under international law is very high; (2) a mere mistake or an incorrect application of internal law by a national court is not equivalent to denial of justice according to international law (consequently, international tribunals are not courts of appeal for national judicial decisions); and (3) denial of justice is the only cause of action pursuant to the NAFTA and to customary international law by which an investor may file a claim whose origin is a decision of the judicial branch of a State.

(1) NAFTA State Practice

622. The United States' 1128 Submission of the in *Eli Lilly v. Canada* correctly summarizes the position of the three NAFTA Parties on denial of justice:

> As noted above, the obligation to provide "fair and equitable treatment" under Article 1105(1) includes, for example, the customary international law obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings. Denial of justice in its historical and "customary sense" denotes "misconduct or inaction of the judicial branch of the government" and involves "some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process." Aliens have no cause for complaint at international law about a domestic system of law provided that it conforms to "a reasonable standard of civilized justice" and is fairly administered. "Civilized justice" has been described as requiring "[f]air courts, readily open to aliens, administering justice honestly, impartially, [and] without bias or political control[.]
>
> A denial of justice may occur in instances such as when the final act of a State's judiciary constitutes a "notoriously unjust" or "egregious" administration of justice "which offends a sense of judicial propriety." More specifically, a denial of justice exists where there is, for example, an "obstruction of access to courts," "failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment." Instances of denial of justice also have included corruption in judicial proceedings, discrimination or ill-will against aliens, and executive or legislative interference with the freedom of impartiality of the judicial process. At the same time, erroneous domestic court decisions, or misapplications or misinterpretation of domestic law, do not in themselves constitute a denial of justice under customary international law. Similarly, neither the evolution nor development of "new" judge-made law that departs from previous jurisprudence within the confines of common law adjudication, implicates a denial of justice.
>
> The international responsibility of States may not be invoked with respect to non-final judicial acts unless recourse to further domestic remedies is obviously futile or manifestly ineffective. The high threshold required for judicial measures to rise to the level of a denial of justice in customary international law gives due regard to the principle of judicial independence, the particular nature of judicial action, and the unique status of the judiciary in both international and municipal legal systems. As a result, the actions of domestic courts are accorded a greater presumption of regularity under international law than are legislative or administrative acts. Indeed, as a matter of customary international law, international tribunals will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice.
>
> In this connection, it is well-established that international tribunals such as NAFTA Chapter Eleven tribunals are not empowered to be supranational courts of appeal on a court's application of domestic law. Thus, an investor's claim challenging judicial

> measures under Article 1105(1) is limited to a claim for denial of justice under the customary international law minimum standard of treatment. A fortiori, domestic courts performing their ordinary function in the application of domestic law as neutral arbiters of the legal rights of litigants before them are not subject to review by international tribunals absent a denial of justice under customary international law. Moreover, an investor bringing an Article 1105(1) claim may not invoke an alleged host State violation of an international obligation owed to another State or its home State, for example an obligation contained in another treaty or another Chapter of NAFTA such as Chapter Seventeen. A violation of that Chapter, which is subject to the State-to-State dispute resolution provisions of NAFTA Chapter Twenty, may be the basis of a claim by one NAFTA Party against another, but that violation does not provide a separate cause of action for an investor, who may only bring claims against a host Party for alleged breaches of Chapter Eleven, Section A. And, as stated previously, the FTC Interpretation provides that a "determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of" the minimum standard of treatment.
>
> For the foregoing reasons, judicial measures may form the basis of a claim under the customary international law minimum standard of treatment under Article 1105(1) only if they are final and if it is proved that a denial of justice has occurred. Were it otherwise, it would be impossible to prevent Chapter Eleven tribunals from becoming supranational appellate courts on matters of the application of substantive domestic law, which customary international law does not permit. Nor may judicial measures be challenged under Article 1105(1) for violating another rule of international law. Such a result would extend the obligations of the NAFTA Parties well beyond the customary international law minimum standard of treatment and what they consented to under Article 1105(1), as reflected in the FTC Interpretation.[705]
>
> [Emphasis added]

623. The United States reaffirmed the above[706] in its submissions as a non-disputing Party in in the NAFTA's case *LMC v. United Mexican States* and in *Gramercy Funds v. Republic of Peru* under the Trade Promotion Agreement between Peru and the United States.[707]

624. In its Counter-Memorial in the *Eli Lilly* case, Canada explained why a misapplication of domestic law per se denial of justice is not (which did not take place in this arbitration). To claim a denial of justice under the NAFTA, an investor must prove that the failure by a country's justice administration system is equal to a breach of international law, not domestic law. Also, according to Canada, denial of justice is the only cause of action for the claim of an investor against the judicial branch of a State:

> It is well-settled, and has been affirmed in a long line of NAFTA and other international awards and academic texts, that judgments of national courts interpreting domestic law

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705 Exhibit RL-055, *Eli Lilly and Company v. The Government of Canada*, CIADI Case No. UNCT/14/2, "Submission of the United States of America," March 18, 2016, 20-24.

706 Exhibit RL-056, *Lion Mexico Consolidated L.P. v. United Mexican States*, CIADI Case No. ARB (AF)/15/2, "Submission of the United States of America," June 21, 2019, ¶ 6-9.

707 Anexo RL-057. *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, CIADI Case No. UNCT/18/2, "Submission of the United States of America," June 21, 2019, ¶¶ 44-46.

> cannot be challenged as a violation of international law in the absence of a denial of justice – for example, refusal to entertain a suit or serious failure to adequately administer justice or if there has been a "clear and malicious misapplication of the law." There must be a very serious failure in the administration of justice before a State can be found in violation of international law for the domestic law decisions of its domestic courts. This rule stems from the recognition of the independence of the judiciary and the great deference afforded to domestic courts acting in their bona fide role of adjudication and interpretation of a State's domestic law. Professor Douglas aptly summarizes the customary international rule: "Denial of justice is the sole form of international delictual responsibility towards foreign nationals for acts or omissions within an adjudicative procedure for which the State is responsible."
>
> Even if the decisions of Canada's Federal Courts were viewed as "incorrect" either in their interpretation of the concept of utility in the Patent Act or in their conclusions on the factual evidence presented during the litigations, States do not incur liability in international law for erroneous decisions or misapplications of national law. As Professor (now Judge of the International Court of Justice) Greenwood wrote, "error on the part of the national court is not enough, what is required is 'manifest injustice' or 'gross unfairness.'" This has also been the consistent position of the three NAFTA Parties.
>
> Accordingly, liability under Article 1105(1) cannot be found based on whether Canadian courts made an error in interpreting domestic law or substitute its own preferred interpretation of Canadian law unless "it is impossible for a third party to recognize how an impartial judge could have reached the result in question." [708]
>
> [Footnotes omitted; Emphasis added]

625. In its Article 1128 Submission in *Eli Lilly*, Mexico pointed out that international tribunals defer to the acts of domestic courts for their judicial expertise and their special role in the organization of the State. As such, denial of justice is the only cause of action for the claims of an investor filed against the judicial branch of a State by virtue of the NAFTA and customary international law.

> [T]here are "… fundamental distinctions that international law has made and continues to make between acts of the judiciary and the acts of other organs of the State. International tribunals defer to the acts of municipal courts not only because the courts are recognized as being expert in matters of a State's domestic law, but also because of the judiciary's role in the organization of the State."
>
> Thus, because of the particular role of the adjudicative power within the organization of states, Mexico agrees with Canada that, with respect to judicial acts, denial of justice is the only rule of customary international law clearly identified and established so far as part of the minimum standard of treatment of aliens[…] Thus, if a claimant asserts a breach of Article 1105(1) based on a different concept, that party has the burden of identifying the relevant obligation under the customary international law based on State practice and *opinio juris*. However, it should be noted that decisions of international

[708] Exhibit RL-058, *Eli Lilly and Company v. The Government of Canada*, CIADI Case No. UNCT/14/2, "Canada's Counter-Memorial," ¶¶ 231-233.

> tribunals do not constitute State practice that can assist to identify a rule of customary international law[.][709]

626. The arguments presented by the three NAFTA Parties in the *Eli Lilly* case demonstrate that the threshold for finding a violation of denial of justice is very high. It only occurs when the result of the judicial system is "notoriously unjust" or is an "egregious" administration of justice "which offends a sense of judicial propriety." Moreover, international tribunals are not appellate courts of domestic judgments because a mere misapplication of domestic law is not equivalent *per se* to a denial of justice. Lastly, denial of justice is the only cause of action for an investor's claims against a State's judicial branch due to its experience and its special role in the functioning of the State.

(2) NAFTA case law

627. As previously stated, the NAFTA case law affirms the above NAFTA State practice. The NAFTA cases reinforce the Respondent's position that: (1) the threshold for finding denial of justice is high; (2) the mere misapplication of domestic law is not by per se denial of justice, more is needed: the investor must demonstrate that the outcome of the Respondent's court system complies with the high threshold of denial of justice under international law; (3) international tribunals are not appellate courts to judge the application of domestic law by national courts.

(a) *Azinian v. Mexico*

628. The *Azinian* tribunal established that NAFTA tribunals are not international courts of appeal and that an error of law by a national court does not constitute a denial of justice *per se*. The investor must prove breach of international law:

> 99. The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA. What must be shown is that the court decision itself constitutes a violation of the treaty. Even if the Claimants were to convince this Arbitral Tribunal that the Mexican courts were wrong with respect to the invalidity of the Concession Contract, this would not per se be conclusive as to a violation of NAFTA. More is required; the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end. [710][Emphasis added]

(b) *Mondev v. United States*

629. After affirming that it was not "the function of the NAFTA tribunals to act as courts of appeal," the *Mondev* tribunal examined the test in depth to determine the existence of a denial of justice. The *Mondev* tribunal declared that denial of justice is not produced when an individual

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709 Exhibit RL-059, *Eli Lilly and Company v. The Government of Canada*, CIADI Case No. UNCT/14/2, "Submission of Mexico Pursuant to NAFTA Article 1128," March 18, 2016, ¶¶ 13-14.

710 Exhibit CL-192, *Robert Azinian, Kenneth Davitian, & Ellen Baca v. México*, CIADI Case No. ARB (AF)/97/2, Answer, November 1st, 1999, ¶ 99.

court makes a mistake. Rather, denial of justice occurs when the result of the actions of the judicial system is "clearly improper and discreditable." In words of the *Mondev* tribunal:

> The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end the question is whether, at an 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. This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities.[711]
>
> [Emphasis added]

630. The *Mondev* tribunal applied the above high threshold test to the unanimous decision of the Supreme Court of Massachusetts, which was a final resolution of the judicial system of the United States.[712] In the end, the tribunal did not find denial of justice.[713] Notably, Mondev argued that the decision of the Supreme Court of Massachusetts implied a "significant and serious departure" from previous case law and that dismissing the LPA claim "was arbitrary and profoundly unjust."[714] In rejecting this argument, the *Mondev* tribunal explained that national courts have broad discretion to apply their own laws:

> In the Tribunal's view, it is doubtful whether the SJC made new law in its application of the principle in Leigh v. Rule. But even if it had done so its decision would have fallen within the limits of common law adjudication. There is nothing there to shock or surprise even a delicate judicial sensibility.[715]
>
> [Emphasis added]

631. *Mondev* also argued that the Supreme Court of Massachusetts failed to remand the questions of facts to the jury regarding Mondev's willingness and ability to perform the contract.[716] The *Mondev* tribunal agreed with the position of the United States and found that the application of local procedural rules could not violate Article 1105(1).

> Questions of fact-finding on appeal are quintessentially matters of local procedural practice. Except in extreme cases, the Tribunal does not understand how the application

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711 Exhibit CL-17, *Mondev International Ltd. v. United States of America*, CIADI Case No. ARB(AF)/99/2, "Award," October, 11 2002, ¶ 150. Ratified by the tribunals of *Loewen* and *Waste Management II*. See *Loewen*, ¶133; *Waste Management*, ¶ 95.

712 *Id.*, ¶ 128.

713 *Id.*, ¶ 157.

714 *Id.*, ¶ 131.

715 *Id.*, ¶ 133.

716 *Id.*, ¶ 135.

> of local procedural rules about such matters as remand, or decisions as to the functions of juries vis-à-vis appellate courts, could violate the standards embodied in Article 1105(1). On the approach adopted by Mondev, NAFTA tribunals would turn into courts of appeal, which is not their role. Conceivably there might be a problem if the appellate decision took into account some entirely new issue of fact essential to the decision and there was a substantial failure to allow the affected party to present its case. But LPA had (and exercised) the right to apply for a rehearing and then to seek certiorari to the Supreme Court. In these circumstances there was no trace of a procedural denial of justice.[717]
>
> [Emphasis added]

(c) *Loewen v. United States*

632. The *Loewen* tribunal established the important precedent that denial of justice examines the outcome of a nation's entire judicial system, not individual court decisions.[718] It concurred with the Mondev tribunal in indicating that the threshold to determine denial of justice is high under international law:

> the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to 'unfair and inequitable treatment'.[719]

633. The tribunal in the *Loewen* case emphasized that the mandate of international tribunals is to determine whether the impugned decision was clearly improper and discreditable under international law; not whether the conduct of the trial has breached domestic law.

> If that question be answered in the affirmative, then a breach of Article 1105 is established. Whether the conduct of the trial amounted to a breach of municipal law as well as international law is not for us to determine. A NAFTA claim cannot be converted into an appeal against the decisions of municipal courts.[720]
>
> [Emphasis added]

634. The *Loewen* tribunal in the end cautioned:

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717 *Id.*, ¶ 136.

718 Exhibit RL-041, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, CIADI Case No. ARB(AF)/98/3, "Award," June 26, 2003, ¶ 54: "we have reached the firm conclusion that the conduct of the trial by the trial judge was so flawed that it constituted a miscarriage of justice amounting to a manifest injustice as that expression is understood in international law. Whether this conclusion results in a violation of Article 1105 depends upon the resolution of Respondent's submissions still to be considered, in particular the submission that State responsibility arises only when final action is taken by the State's judicial system as a whole."

719 *Id.*, ¶ 133.

720 *Id.*, ¶ 134.

> Too great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself.[721]

(d) *Waste Management II*

635. In *Waste Management II*, the investor argued that Mexican courts did not provide proper relief to protect its investment. The tribunal in *Waste Management II* dismissed this argument and declared that NAFTA arbitration is not a new kind of amparo:

> Turning to the actual reasons given by the federal courts, the Tribunal would observe that it is not a further court of appeal, nor is Chapter 11 of NAFTA a novel form of amparo in respect of the decisions of the federal courts of NAFTA parties.
>
> […]
>
> In any event, and however these cases might have been decided in different legal systems, the Tribunal does not discern in the decisions of the federal courts any denial of justice as that concept has been explained by NAFTA tribunals, notably in the *Azinian, Mondev, ADF and Loewen* cases. The Mexican court decisions were not, either ex facie or on closer examination, evidently arbitrary, unjust, or idiosyncratic. There is no trace of discrimination on account of the foreign ownership of Acaverde, and no evident failure of due process. The decisions were reasoned and were promptly arrived at. Acaverde won on key procedural points, and the dismissal in the second proceedings, in particular, was without prejudice to Acaverde's rights in the appropriate forum.[722]
>
> [Emphasis added]

(e) *Grand River v. United States*

636. The tribunal in *Grand River v. United States* also held that NAFTA tribunals are not courts of appeal for the application and interpretation of domestic law:

> Such questions about the permissible reach of state regulation over Indian peoples and lands under U.S. law were raised in connection with the Claimant's argument of a reasonable expectation that the MSA and related measures would not apply to them, an argument the Tribunal addressed above. As before, the Tribunal is loath to purport to address these delicate and complex questions of U.S. constitutional and Indian law, which are posed by Arthur Montour's new argument. These issues of national law belong in national courts, not in an international tribunal. If a national court system fails to address these questions in a proper way, there may be grounds for a true claim of denial of justice within the ambit of the customary minimum standard under NAFTA Article 1105. That is not what is presented here.[723]
>
> [Emphasis added]

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721 *Id.*, ¶ 242.

722 Exhibit CL-37, *Waste Management, Inc. v. Mexico II,* CIADI Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶ 129-130.

723 Exhibit CL-213, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, "Award (Redacted Version)," January 12, 2011, ¶ 234.

(f) *Eli Lilly v. Canada*

637. In the same way, the tribunal in the *Eli Lilly* recognized that NAFTA tribunals are not courts of appeal with respect to domestic courts' application of their own laws. To challenge a State's judicial organ's application of its domestic laws, the investor bears the burden to provide "clear evidence of egregious and shocking conduct":

> [T]he Tribunal emphasizes that a NAFTA Chapter Eleven tribunal is not appellate tier in respect of the decisions of the national judiciary. It is not the task of a NAFTA Chapter Eleven tribunal to review the findings of national courts and considerable deference is to be accorded to the conduct and decisions of such courts. It will accordingly only be in very exceptional circumstances, in which there is clear evidence of egregious and shocking conduct, that it will be appropriate for a NAFTA Chapter Eleven tribunal to assess such conduct against the obligations of the respondent State under NAFTA Article 1105(1).[724]
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> [Emphasis added]

(3) Non-NAFTA case law

638. Non-NAFTA cases show that non-NAFTA tribunals have imposed a high threshold when determining the denial of justice. Non-NAFTA tribunals also dismissed the idea that international tribunals have the authority to determine whether national courts applied their internal laws correctly.

(a) *Oostergetel v. Slovakia*

639. As in previous NAFTA cases, the tribunal in *Oostergetel v. Slovakia* ruled that a simple mistake made by a national court is not itself denial of justice:

> The Tribunal notes that a claim for denial of justice under international law is a demanding one. To meet the applicable test, it will not be enough to claim that municipal law has been breached, that the decision of a national court is erroneous, that a judicial procedure was incompetently conducted, or that the actions of the judge in question were probably motivated by corruption. A denial of justice implies the failure of a national system as a whole to satisfy minimum standards.[725]
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> [Emphasis added]

(b) *Arif v. Moldova*

640. Endorsing *Loewen*,[726] the tribunal in *Arif v. Moldova* ruled that international tribunals cannot act as international courts of appeals because a simple difference of opinion between the

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724 Exhibit CL-112, *Eli Lilly and Company v. The Government of Canada*, CIADI Case No. UNCT/14/2, "Final Award," March 16, 2017, ¶ 224.

725 Exhibit CL-158, *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, "Final Award (Redacted Version)," April 23, 2012, ¶ 273.

726 Exhibit CL-189, *Mr. Franck Charles Arif v. Republic of Moldova*, CIADI Case No. ARB/11/23, "Award," April 8, 2013, ¶ 440.

international tribunal and the national judiciary is not enough to conclude that denial of justice has occurred.

> Indeed, international tribunals must refrain from playing the role of ultimate appellate courts. They cannot substitute their own application and interpretation of national law to the application by national courts. It would blur the necessary distinction between the hierarchy of instances within the national judiciary and the role of international tribunals if "[a] simple difference of opinion on the part of the international tribunal is enough" to allow a finding that a national court has violated international law. The opinion of an international tribunal that it has a better understanding of national law than the national court and that the national court is in error, is not enough. In fact – as Claimant formulated – arbitral tribunals cannot "put themselves in the shoes of international appellate courts."[727]
>
> [Emphasis added]

641. After considering the different decisions made by different levels of the Moldavian courts, the tribunal in *Arif v. Moldova* determined that no denial of justice took place in spite of some procedural mistakes made by national courts.

> The Tribunal has carefully studied the different decisions of the Economic Circuit Court, the Economic Court of Appeal and the Supreme Court dealing with the provisional measures. It has come to the conclusion that the Moldovan judiciary and in particular the Economic Circuit Court have committed procedural errors, but that these errors do not amount to such a manifest disrespect of due process that they offend a sense of judicial propriety[.][728]
>
> [Emphasis added]

642. Consequently, the tribunal in *Arif v. Moldova* dismissed the investor's denial of justice claim because the high threshold test was not met:

> When appreciating these facts, the sequence of the decisions, the partial success of Le Bridge's appeal and the reasons given by the higher instances (including a dissenting opinion), the Tribunal is not convinced that the judiciary acted in collusion with outside plaintiffs, that it was guided by a spirit of bias and partiality and that it was grossly incompetent as a system.[729]

(c) *GEA Group v. Ukraine*

643. In *GEA v. Ukraine*, the investor questioned decisions made by Ukrainian courts, arguing that denial of justice had occurred. The tribunal summarized the arguments of the investor in the following terms:

> [T]he Claimant argues that the decisions of national courts are not "insulated from international consideration," particularly where, as here, "the decisions of the Ukrainian courts were so manifestly wrong." In the Claimant's view, the Tribunal should examine

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727 *Id.*, ¶ 441.

728 *Id.*, ¶ 447.

729 *Id.*, ¶ 448.

> the "grossly improper decisions in the application of the law" taken by the courts of Ukraine, in light of the fact that they refused enforcement without ever addressing "the arbitral tribunal's grounds for finding an agreement to arbitrate to exist – grounds reiterated by GEA in its application." In the Claimant's view, this gives rise to "justified concerns as to the judicial propriety" of the outcome of the enforcement proceedings.[730]

644. The tribunal in the *GEA v. Ukraine* case categorically rejected the investor's above arguments, arguing that an ICC award is not an "investment" protected by the treaty. It added that even if an ICC award constituted an investment, it would dismiss the investor's denial of justice claim based on the high threshold test set by the *Mondev* tribunal.[731] Relying on *Mondev*, the tribunal in *GEA v. Ukraine* ruled that there was nothing improper in the actions of the Ukrainian courts and that the record merely showed that those courts rejected, but did not refuse to take into consideration, the investor's arguments.[732]

(d) *Krederi Ltd v. Ukraine*

645. Concurring with *Azinian*,[733] the tribunal in *Krederi Ltd v. Ukraine* determined that international tribunals are refrained from making judgments regarding domestic judgments based on domestic laws:

> Finally, it is generally accepted that the standard of review of domestic court decisions is very limited. Investment tribunals are neither intended, nor empowered to sit as appellate instances to rule on the correctness of domestic court decisions. Rather, it is their task to assess whether such court decisions amount to a denial of justice. This was clearly acknowledged by Claimant, correctly stating that the Tribunal cannot be expected "to review or to provide the judgment as to whether the Ukrainian courts have decided the matter substantively correctly, but whether [Company D] has been afforded a fair process in Ukraine.[734]
>
> [Emphasis added]

(4) Scholarly opinion

646. Scholars agree that denial of justice in the customary sense examines the results of the outcome of a nation's judicial system, and that international tribunals are not appellate courts for investors to dispute domestic court's misapplication of their laws.

647. In this regard, Christopher Greenwood QC notes that: "it is well established that a mistake on the part of a court or an irregularity in procedure is not in itself sufficient to amount to a violation of international law; there must be a denial of justice. […] [W]hat constitutes a denial of justice is

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730 Exhibit RL-060, *GEA Group Aktiengesellschaft v. Ukraine*, CIADI Case No. ARB/08/16, "Award," Thursday, March 31, 2011, ¶ 310.

731 *Id.*, ¶¶ 311-312.

732 *Id.*, ¶¶ 313-319.

733 Exhibit RL-061, *Krederi Ltd. v. Ukraine*, CIADI Case No. ARB/14/17, "Award," Monday, July 2, 2018, ¶ 487.

734 Id. ¶ 486.

a failure of the *system* of justice within the State."[735] Similarly, Andrew Newcombe and Luis Paradell mention that: "denial of justice arises where a national legal *system* fails to provide justice – not where there is a single procedural irregularity or misapplication of the law at some level of the judicial system."[736] Patrick Dumberry has noted that: "a simple error, misinterpretation or misapplication of domestic law is not per se a denial of justice."[737]

648. In his treatise on denial of justice, Jan Paulsson confirms that a denial of justice claim pursuant to international law is procedural in nature and does not condemn the erroneous application or interpretation of national law made by national courts:

> A thesis of this study is that the category of substantive denial of justice may now be jettisoned. […] To the extent that national courts disregarded or misapply *national* law, their errors do not generate international responsibility unless they have misconducted themselves in some egregious manner which scholars have often referred to as *technical* or *procedural* denial of justice.
>
> [Emphasized in original text]
>
> […]
>
> Once a judicial body takes up a matter, violations of procedural codes may naturally be the subject of appeals. This is the daily fare for appellate courts, but such grievances have no reason to refer to the concept of denial of justice; the fact that they are being heard means that justice is not being denied.[738]
>
> [Emphasis added]

649. Based on the aforementioned thesis, Paulsson added:

> First, we will discover that international fora have no reason to recognize a category of substantive denials of justice. In international law, denial of justice is about due process, nothing else – and that is plenty.
>
> Secondly, many definitions of denial of justice are misleading. The flaw lies in their concentration on individual instances of miscarriage of justice, using an infinite variety of adjectives to convey the egregiousness which undoubtedly is required to conclude that the international delict has indeed occurred. But international law does not impose a duty on states to treat foreigners fairly at every step of the legal process. The duty is to create and maintain *a system of justice* which ensures that unfairness to foreigners either does not happen, *or is corrected*[.][739]

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735 Exhibit RL-062, Christopher Greenwood QC, "State Responsibility for the Decisions of National Courts" in M Fitzmaurice and D Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart Publishing 2004), p. 61.

736 Exhibit RL-099. Andrew Newcombe & Luis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Kluwer, 2009, p. 240-41 (emphasized in original text).

737 Exhibit RL-045, Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (The Netherlands: Kluwer Law International, 2013), p. 229.

738 Exhibit RL-063, Jan Paulsson, *Denial of Justice in International Law* (Cambridge: Cambridge University Press, 2005), p. 5.

739 *Id.*, p. 7.

[Emphasis added]

b. The contents of denial of justice

650. The Claimants hold that, even though the content of denial of justice is "open-ended,"[740] the following judicial shortcomings may give place to denial of justice: (1) denial of access to courts by not addressing the "material aspect" of a claim (citing *Phillip Morris v. Uruguay*) and unreasonable delays;[741] (2) breach of due process and serious procedural errors (citing *Flughafen v. Venezuela*, *Thunderbird*, *Dan Cake v. Hungary*, *Arif v. Moldova* and *Pantechniki v. Albania*);[742] (3) lack of judicial independence and impartiality (citing *Binder v. Czech Republic*, *Chevron II*, *Loewen*, *Petrobart v. Kyrgyzstan* and *Siag v. Egypt*);[743] and (4) a clear and malicious misapplication of the law (citing *Flughafen v. Venezuela*, *Azinian v. Mexico*, *Pantechniki v. Albania* and *Arif v. Moldova*).[744]

651. The Respondent affirms that the Claimants have mistakenly interpreted the contents of the rule of customary international law on denial of justice by: (1) erroneously characterizing access to courts –a procedural right as a substantive right; (2) wrongly considering errors made by individual courts as instantaneous denial of justice; (3) mistakenly pleading denial of justice due to lack of judicial independence before having exhausted local remedies; and (4) erroneously arguing that the wrong application of national laws constitutes an immediate denial of justice.

(1) Access to courts is procedural in nature

652. The Claimants incorrectly argue that, according to international law, access to courts is substantive in nature.[745] As pointed out in the *Ambatielos* case, access to courts is procedural in nature:

> [T]he foreigner shall enjoy full freedom to appear before the courts for the protection or defence of his rights, whether as plaintiff or defendant; to bring any action provided or authorised by law; to deliver any pleading by way of defence, set off or counterclaim; to engage Counsel; to adduce evidence, whether documentary or oral or of any other kind; to apply for bail; to lodge appeals and, in short, to use the Courts fully and to avail himself of any **procedural** remedies or guarantees provided by the law of the land in order that justice may be administered on a footing of equality with nationals of the country.[746]
>
> [Emphasis added]

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740 Memorial, ¶ 630.

741 *Id.*, ¶¶ 632, 634-636.

742 *Id.*, ¶¶ 632, 637-647.

743 *Id.*, ¶¶ 632, 648-660.

744 *Id.*, ¶¶ 632, 661-666.

745 *Id.*, ¶ 635.

746 Exhibit RL-064, *The Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland)*, March 6, 1956, United Nations Reports of International Arbitral Awards, vol. XII, p. 111.

653. The *Ambatielos* case establishes that access to courts according to international law guarantees that foreigners have access to courts by means of procedural remedies, such as the right to plead, to defend, adduce evidence or file appeals. The conclusion of the *Ambatielos* tribunal, quoted above, rejected the Claimants' characterization that access to court is substantive in nature.

654. The Claimants also argue that the tribunal in *Philip Morris v. Uruguay* supported the concept of "substantive denial of justice" through access to courts. This is a misreading of the *Phillip Morris* award. The tribunal in *Philip Morris* used the phrase "material aspects" from a claim in the context of its inquiry into whether a domestic court had examined all the claims, which is procedural in nature since it relates to the investor's right to be heard:

> According to the Tribunal, the refusal of courts to address a claim can clearly amount to a denial of justice. However, it is not incumbent on courts to deal with every argument presented in order to reach a conclusion. The question is whether, in substance, the TCA failed to decide material aspects of Abal's claim, such that they can be said not to have decided the claim at all. As noted, the Claimants argue that they put three matters before the TCA and that only the first (regarding the reserva de la ley) was addressed in the decision.[747]
>
> [Emphasis added]

655. The *Philip Morris* tribunal determined that the TCA—Administrative Court ("*Tribunal de lo Contencioso Administrativo*") — indeed considered Abal's three arguments and evidence in a reasonable manner.[748]

656. With regard to the reference in the court's judgment regarding another party's appeal filed in a different case, the tribunal, in its decision on Abal's claims, considered that it was no more than a minor error made by the administrative court. The tribunal then determined that the question was whether those minor errors constituted a *procedural* irregularity.[749] Based on the Thunderbird, *Tokios* and *Loewen* cases, the tribunal in *Philip Morris* acknowledged that the threshold he threshold for finding denial of justice is very high when it comes to procedural improprieties.[750] The tribunal in the *Philip Morris* case concluded that there was no denial of justice in spite of the existence of a number of procedural irregularities:

> This is therefore a case that may hardly be characterized as a denial of justice. Clearly, there were a number of procedural improprieties and a failure of form. […] In substance, Abal's arguments were addressed.[751]

657. As shown above, the phrase "material aspects" used by the *Philip Morris* tribunal refers to whether all the investors' arguments were considered by the national courts. Indeed, it is a matter

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747 Annex-191, *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, CIADI Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), "Award," July 8, 2016, ¶ 557.

748 *Id.*, ¶¶ 558-559 and 563.

749 *Id.*, ¶ 568.

750 *Id.*, ¶¶ 569-571.

751 *Id.*, ¶ 578. See also ¶ 580.

of procedure, because the tribunal reached the conclusion that "Abal's arguments were addressed."[752]

658. In light of the awards in the *Ambiatelos* and *Philip Morris* cases, the Claimants cannot present a claim for substantive denial of justice, *i.e*., whether this tribunal can examine whether Mexican courts correctly applied national laws in their in-depth analysis of this controversy in accordance with the NAFTA. The Claimants must prove the existence of procedural irregularities made by Mexican courts, and not of substantive mistakes; if affirmative, whether these irregularities are enough to support the conclusion that denial of justice occurred according to international law.

659. As the Claimants have no claim for judicial delay, the Respondent will not address its argument of judicial delay and the *Pey Casado v. Chile* case it relied upon.[753]

(2) Procedural defects are not constitute instantaneous denial of justice

660. The Claimants argue that domestic courts must afford an investor proper notification, an opportunity to be heard and to provide reasons to its decisions. If otherwise, then denial of justice would occur.[754] The Claimants also argue that procedural defects, such as: (1) refusal to follow procedures required by domestic law;[755] (2) *ultra petita* decision;[756] and (3) *sua sponte* decision[757] can lead to instantaneous denial of justice, in addition to fundamental due process denials.[758]

661. The Claimants' position is wrong in the light of NAFTA case law such as *Loewen* and *Waste Management II*. The *Loewen* tribunal established that denial of justice is only produced when the outcome of a nation's judicial system has incurred manifest injustice which offends a sense of judicial propriety in international law.[759] The notion of denial of justice under international law prohibits international tribunals to examine the correctness of a court decision under domestic laws t.[760] Therefore, a mistake made by one court cannot give rise to instantaneous denial of justice. The Claimants must demonstrate the outcome created by such errors was a violation of international law and they failed to do so in the Memorial.

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752 *Id*.

753 Memorial, ¶ 636.

754 *Id.*, ¶ 639.

755 *Id.*, ¶ 641.

756 *Id.*, ¶ 644.

757 *Id.*, ¶ 646.

758 *Id.*, ¶ 647.

759 Exhibit RL-041, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, CIADI Case No. ARB(AF)/98/3, "Award," June 26, 2003 ¶ 132.

760 Exhibit CL-37, *Waste Management, Inc. v. Mexico [II],* CIADI Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶ 129-130.

662. The Respondent will now address the case law relied on by the Claimants. As will be seen below, these cases can be distinguished from the present dispute on the facts or simply do not support the Claimants' claims.

(a) *Flughafen* is factually distinguishable

663. The Claimants, rely on *Flughafen* to assert that a local court must provide proper grounds and reasoning for its decisions.[761] They further argue that the tribunal in *Flughafen* established that *sua sponte* decisions could amount to denial of justice.[762]

664. The Respondent notes that the underlying facts leading the *Flughafen* tribunal to find that denial of justice had occurred as a result of the judgment of the Supreme Court of Venezuela issued on March 4, 2009,[763] differ from the facts in this case. The *Flughafen* tribunal determined that the Supreme Tribunal of Venezuela committed denial of justice because its judgment (1) was adopted *ex officio* with serious procedural defects, and (2) lacked judicial justification.[764]

665. Regarding procedural defects, the tribunal in *Flughafen* determined that the Supreme Tribunal adopted a judgment that was not requested by either of the parties in the process. Thus, the tribunal considered that the Supreme Tribunal acted *sua sponte*.[765] Further, the judgment denied the right to be heard not only of the investor, but also of the other parties involved in the domestic proceedings.[766] In contrast to the the *Flughafen* case, in the present case there has not been a single judgment from Mexican courts that has not been requested by at least one party. Moreover, the Mexican courts have not denied any party the right to be heard before issuing its judgments.

666. The *Flughafen* tribunal also found that the judgment of the Supreme Court failed to refer to any law to support its decision.[767] In the present case, there is no such defect. As such, the findings in the *Flughafen* award are factually distinguished from the present case.

(b) *Thunderbird v. Mexico* affirms the high threshold test of Article 1105(1) under the NAFTA

667. The Respondent emphasizes that the tribunal in the Thunderbird case referred to the high threshold to prove a violation of Article 1105(1) and concluded that small irregularities incurred by the administrative branch are far from constituting a breach of Article 1105(1). It underscored that the administrative irregularity in question must be sufficiently serious and cause a shock to the sense of judicial propriety to result in a violation of the MST standard:

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761 Memorial, ¶ 639.

762 *Id.*, ¶ 646.

763 Exhibit CL-103, Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela, CIADI Case No. ARB/10/19, "Award," November 18, 2014, ¶¶ 688-708.

764 *Id.*, ¶ 692.

765 *Id.*, ¶ 694.

766 *Id.*, ¶ 695.

767 *Id.*, ¶ 697.

> The Tribunal does not exclude that the SEGOB proceedings may have been affected by certain irregularities. Rather, the Tribunal cannot find on the record any administrative irregularities that were grave enough to shock a sense of judicial propriety and thus give rise to a breach of the minimum standard of treatment. As acknowledged by Thunderbird, the SEGOB 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. Hence, for instance, even if one views the absence of Lic. Aguilar Coronado (who signed the Administrative Order) at the 10 July hearing as an administrative irregularity, it does not attain the minimum level of gravity required under Article 1105 of the NAFTA under the circumstances.[768]
>
> [Emphasis added]

(c) *Dan Cake v. Hungary* differs from the facts

668. The Claimants affirm that if a court fails to follow the procedures required by domestic laws can produce denial of justice (citing *Dan Cake v. Hungary*). [769] In the *Dan Cake* case, the Hungarian legislation prescribed a composition hearing as mandatory requirement:

> It is impossible, at this stage, for the Tribunal to determine whether a composition agreement would have been reached if a composition hearing had been convened. However, one thing is certain: whatever the chance of a successful composition hearing, it was destroyed by the Bankruptcy Court's decision to refuse to convene a hearing within 60 days, as required by the law. It also results from the above analysis of the decision that it was rendered in flagrant violation of the Bankruptcy Act and that it purported to condition the mandatory convening of the hearing upon several requirements, all of which were unnecessary; two of which were in direct violation of Dan Cake's creditor rights; and at least one of which was impossible to satisfy within a reasonable time. Moreover, the accumulation of seven unjustified obstacles, coupled with the reminder of the liquidator's obligation to proceed with the sale of Danesita's assets, is in the Tribunal's considered view a manifest sign that the Court simply did not want, for whatever reason, to do what was mandatory.[770]

669. Because the Hungarian court did not comply with the above laws and created obstacles for the investor to convene a compulsory composition hearing, the tribunal ruled that the Metropolitan Tribunal of Budapest was in breach of the FET standard:

> By rendering its 22 April 2008 decision, the Metropolitan Court of Budapest deprived Danesita of the chance – whether great or small – to avoid the sale of its assets and its disappearance as a legal person. Hungarian law provides for the possibility of an agreement between the debtor and its creditors. Danesita had the right to the convening of a composition hearing, under certain conditions which it met; the Metropolitan Court of Budapest, for its part, had the obligation to convene the composition hearing. It

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768 Annex-CL07, *International Thunderbird Gaming Corporation v. Mexico*, UNCITRAL, Award, January 26, 2006, ¶ 200.

769 Memorial, ¶ 641.

770 Exhibit CL-197, *Dan Cake S.A. v. Hungary*, ICSID CIADI Case ARB/12/9, "Decision on Jurisdiction and Liability," August 24, 2015, ¶ 142.

> refused to do so, ordering instead Danesita to submit a number of documents which were not required by the law and were obviously unnecessary. At the same time, it imposed changes in the draft composition agreement – such as the elimination of Dan Cake as a creditor having the right to participate in the composition hearing – as well as the withdrawal of pending objections to certain decisions of the liquidator, both of which were in themselves unfair and inequitable. By so doing, it rendered inevitable the sale of Danesita's assets and its demise as a legal person. This is a clear violation by the Hungarian State – of which the Metropolitan Court of Budapest is an organ – of its obligation to treat Portuguese investors in a fair and equitable manner.[771]

670. As explained in Section II.L *supra* and will be addressed below, in this case there was no misapplication of domestic laws or procedural violations during the Amparo 1668/2012.

(d) *Arif v. Moldova* sets high threshold for a violation of denial of justice and the Claimants failed to meet it

671. The Claimants rely on *Arif v. Moldova* to argue that an *ultra petita* or "beyond the request" petition (translated by the Claimants as "not beyond the petition") may produce denial of justice.[772] This misconstrues the conclusion reached by the Tribunal in the *Arif* case. As mentioned by the Claimants, the tribunal in *Arif* determined:

> The Tribunal believes that the Economic Court of Appeal did decide ultra petita by substituting a formal request by its logical deduction. That was an error and remained an error despite the excuses formulated by the Supreme Court.[773]

672. However, the Claimants failed to point out that the tribunal in the *Arif* case also ruled that not all errors, but only manifestly unjust errors that involve impermissible bias or bad faith would give rise to a denial of justice. The tribunal in this case found no denial of justice had occurred as no *ultra petita* errors amounted to manifestly unjust errors.

> Is the error [of ultra petita] tainted by impermissible bias or bad faith? The Tribunal is not convinced for the following reasons: the court's decisions had no negative impact on Le Bridge's position and business. […] The erroneous decision of the Economic Court of Appeal had therefore no effect on Le Bridge. It was wrong, but not manifestly unjust.[774]
>
> [Emphasis added]

673. Contrary to the affirmation of the Claimants, *ultra petita* decisions do not constitute instantaneous denial of justice. Whether *ultra petita* decisions amount to or lead to denial of justice is determined by the high threshold test of denial of justice in international law.

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771 *Id.*, ¶ 145.

772 Memorial, ¶ 644.

773 Exhibit CL-189, *Mr. Franck Charles Arif v. Republic of Moldova*, CIADI Case No. ARB/11/23, "Award," April 8, 2013, ¶ 469.

774 *Id.*, ¶ 470.

674. As explained by Mr. Mijangos in his expert report, the Amparo 1668 ruling contained specific instructions for SEGOB to issue a new oficio to replace the 2009-BIS Oficio, which had become legally void as a result of the ruling. This did not occur with respect to the Permitholder Oficio or Permitholder-BIS Oficio, because these acts were not expressly contested in court. Therefore, neither the Collegiate Court nor the District Court were in the position to order the SEGOB to issue new oficios to replace Permitholder Oficio or Permitholder-BIS Oficio. These oficios were annulled because they were considered to be acts deriving from Oficio 2009-BIS, meaning that the legal grounds or basis for their issuance had disappeared and, thus, the request that produced them could not be reanalyzed.[775]

(e) The Claimants have misdescribed *Pantechniki v. Albania*

675. The Claimants erred in presenting the decision from the *Pantechniki v. Albania* case. Indeed Mr. Paulsson, sole arbiter in the case, did consider that it would be a "serious matter" if the Albanian Court of Appeals rejected the claim on a ground which the claimant had not invoked. However, he did not address whether this issue amounted to denial of justice, seeing that the Albanian judicial system did not have the chance to correct itself since the investor did not exercise the remedies available to him.[776] In other words, Paulsson did not determine that a *sua sponte* decision constitutes instantaneous denial of justice. Whether a *sua sponte* decision can lead to denial a justice, a national court must first have the chance to review the decision before it is submitted to international scrutiny. This is important to note because national courts have the competence to judge national laws.

c. The Claimants Claimants have no recourse to a denial of justice claim arising from alleged judicial corruption or a lack of judicial independence and impartiality before a NAFTA tribunal due to failing to pursue domestic remedies in the first place

676. The Claimants assert that a judicial system could violate international standards if the judicial action being scrutinized was affected by political influences or prefers one party over another as a result of bias, discrimination, collusion and corruption.[777] In this vein, the Claimants invoke *Binder v. Czech Republic*, *Chevron II* (Second Partial Award on Track II), *Loewen*, *Siag v. Egypt* and *Petrobart v. Kirguizistan*.[778]

677. According to the well-establish rule of exhaustion of domestic remedies (*Loewen*), to prove denial of justice the Claimants had to first pursue domestic remedies available to them before pursuing with this arbitration under NAFTA (*Loewen*). The case law cited by the Claimants

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775 Exhibit RER-1, expert report by Dr. Mijangos, ¶¶ 150, 153 and 155.

776 Exhibit CL-198, *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, CIADI Case No. ARB/07/21, "Award," July 30, 2009, ¶ 100.

777 Memorial, ¶ 648.

778 *Id.*, ¶¶ 649-660.

confirm that investors must first use the internal remedies before filing an international claim for denial of justice for corruption and lack of judicial independence (*Chevron II*).

(a) The Claimants did not pursue local remedies for the alleged judicial corruption and lack of judicial independence as required by *Loewen*

678. The leading authority on the principle of exhaustion domestic remedies is *Loewen*. The *Loewen* tribunal determined that an investor cannot file a claim for denial of justice if he has not first exhausted all available internal remedies.[779]

679. In this case, the Claimants chose to not to seek domestic remedies regarding the alleged judicial corruption, partiality, or lack of judicial independence. By not doing so, the Claimants kept the Respondent from investigating those issues and they also prevented the Respondent from correcting such issues in the event irregularities were found. Therefore, the Claimants' claim for denial of justice based on corruption and lack of judicial independence and impartiality must be dismissed.

(b) The Claimants failed to pursue local remedies as Chevron did in *Chevron II* (*Second Partial Award on Track II*)

680. In *Chevron II*, Chevron brought a number of corruption allegations to the Lago Agrio Court, before pursuing appeals to higher courts.[780] The tribunal ruled that national courts, including the Court of Appeals, the Court of Cessation and the Constitutional Court failed to investigate the accusations of procedural fraud and undue judicial conduct presented by Chevron.[781] Further, the Court of Appeals, the Court of Cessation and the Constitutional Court did not investigate the supposed corrupt "ghost-writing" of the Lago Agrio judgment.[782] Consequently, the tribunal ruled that Ecuador's judicial system failed the investors:

> In the Tribunal's view, these Courts had sufficient information available to them so as to amount (at least) to a strong prima facie case of judicial misconduct, procedural fraud in the Lago Agrio Litigation and (as regards the Appellate, Cassation and Constitutional Courts) the 'ghostwriting' of the Lago Agrio Judgment.
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> In Chevron's Initial Alegato of 6 January 2011 addressed to the Lago Agrio Court, (extending over 263 pages of written submissions), Chevron contended (inter alia) that… The alleged fraud included the judicial misconduct of Judge Yánez; the improper

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779 Exhibit CL-67, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, CIADI Case No. ARB(AF)/98/3, "Award," June 26, 2003, ¶ 54, 168-170.

780 Exhibit CL-199, *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador (II),* CPA Case No. 2009-23, "Second Partial Award on Track II," August 30, 2018, ¶¶ 8.28-8.32.

781 *Id.*, ¶ 8.28.

782 *Id.*, ¶ 8.28.

> appointment of Mr Cabrera; his corrupt collusion with the Lago Agrio Plaintiffs' representatives, the "fraudulent and flawed" Cabrera Report[.]
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> In Chevron's Appeal to the Lago Agrio Appellate Court of 9 March 2011 (extending over 193 pages), Chevron contended (inter alia) that … These allegations, set out at length, included the judicial misconduct of Judge Yánez; the corrupt collusion with Mr Cabrera; the fraudulent Cabrera Report; the use of information in the Lago Agrio Judgment that was "not in the record as the basis for the decision[.]"
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> In Chevron's Cassation Appeal of 20 January 2012 (extending over 176 pages), Chevron included amongst the grounds for its appeal: the judicial misconduct of Judge Yánez; the "illegal appointment and actions" of Mr Cabrera; the "irregularities" in the Cabrera Report; the violation of Chevron's rights under the 1995 Settlement Agreement; and the Lago Agrio Plaintiffs' "illicit participation in the drafting of" the Lago Agrio Judgment.
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> […]
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> Yet, as the Tribunal finds, no appropriate steps were taken by the Lago Agrio Appellate Court, the Cassation Court, the Constitutional Court, or these prosecutorial authorities to address the allegations of procedural fraud, judicial misconduct and 'ghostwriting' raised by Chevron at the time, sufficient to suspend the enforceability of the Lago Agrio Judgment and to comply with the Tribunal's several Orders and Awards on Interim Measures.[783]
>
> [Emphasis added]

681. As demonstrated in the above excepts, Chevron vigorously litigated its allegations against corruption and lack of judicial independence in different levels of Ecuadorian courts before it filed a claim under the treaty. Chevron's exhaustion of local remedies ripened its treaty claim under the CIL rule of denial of justice and formed the basis of the Tribunal's findings.

682. Unlike *Chevron*, the Claimants in this case did not pursue any judicial proceedings alleginge judicial corruption, lack of independence and impartiality in the Respondent's judicial system. In short, according to international law, the Claimants do not have legal grounds to claim denial of justice for alleged judicial corruption, partiality, and lack of independence of the Respondent's judicial system.

(c) The other cases cited by the Claimants do not support their position

683. The Claimants also cite *Binder v. Czech Republic*, *Petrobart v. Kyrgyzstan* and *Siag v. Egypt*. Neither of these supports their position in this arbitration.

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783 *Id.*, ¶ 8.28-8.31, 8.34.

684. *Binder v. Czech Republic* provides an overall statement on judicial independence and impartiality.[784] In the end, the tribunal rejected the investor's denial of justice claim.[785]

685. In *Petrobart v. Kyrgyzstan*, Petrobart, the investor, obtained a judgment from the Bishkek Court. The judgment authorized Petrobart to execute it on KGM's assets. After the Court decided to execute this judgment, the Vice Prime Minister intervened and, in a letter, requested the national court to grant postponement of the execution. Afterwards, the Court granted the motion for postponement of the execution on KGM, citing the Vice Prime Minister's letter in the decision.[786] In finding administrative interference in judicial proceeding, the tribunal in *Petrobart v. Kyrgyzstan* opined as follows:

> The Arbitral Tribunal considers that Minister Silayev's letter must be regarded as an attempt by the Government to influence a judicial decision to the detriment of Petrobart. It cannot be easily established what decision would have been taken by the Court on KGM's request for a stay of execution if Minister Silayev's letter had not been sent to the Chairman of the Court. In fact, Article 178 of the Code of Arbitration Procedure, applicable to this case, would seem to have given the Bishkek Court a wide discretion in deciding whether or not to suspend execution. However, the fact that the Court, in its decision, specifically referred to the Government's intervention indicates that the Court attached some weight to Mr. Silayev's letter and that this was one of the items which the Court took into account in the exercise of its discretion.[787]
>
> [Emphasis added]

686. According to the decision in *Petrobart v. Kyrgyzstan*, the threshold for finding administrative interference in the judicial system is stringent. There must be written instruction from the administrative branch to the judicial branch and the court must have indicated its deference to the administrative organ in its judicial decision. In the present case, there was no such written instruction from the Respondent's administrative agency to the judicial branch; Nor do the decisions of the Mexican courts refer to such an administrative instruction.

687. Lastly, the Claimants argue that denial of justice is caused by violation of judicial independence when judicial decisions are not observed by the Executive powers in government.[788] This is not an accurate representation of the discussion in the *Siag* case. The relevant part of that award discusses whether the expropriation performed by Egypt complied with the requirement of due process.[789] This has nothing to do with judicial independence, as the Claimants argue.

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784 Exhibit CL-144, *Rupert Joseph Binder v. Czech Republic*, UNCITRAL, "Final Award (Redacted)," July 15, 2011, ¶ 448.

785 *Id.*, ¶ 467.

786 Exhibit CL-202, *Petrobart Limited v. The Kyrgyz Republic*, SCC Caso No. 126/2003, "Arbitral Award," March 29, 2005, p. 75.

787 *Id*.

788 Memorial, ¶ 659.

789 Exhibit RL-065, *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, CIADI Case No. ARB/05/15, "Award," June 1, 2009, ¶¶ 453-455.

(2) The improper application of national law does not constitute denial of justice *per se*

688. The Claimants erroneously argue that incorrect domestic decisions can lead to instantaneous denial of justice.[790] This flawed position derives from the Claimants' incorrect interpretation of the award in the *Azinian* case.

(a) *Azinian v. Mexico*

689. In *Azinian*, the tribunal ruled as follows:

> There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of "pretence of form" to mask a violation of international law. In the present case, not only has no such wrong-doing been pleaded, but the Arbitral Tribunal wishes to record that it views the evidence as sufficient to dispel any shadow over the bona fides of the Mexican judgments. Their findings cannot possibly be said to have been arbitrary, let alone malicious.[791]
>
> [Emphasis added]

690. Here, the *Azinian* tribunal established that misapplication of internal law can only rise to a denial of justice when there is a pretense of form to mask a violation of international law. In other words, misapplication of domestic law is not *per se* denial of justice unless it was a State's disguised effort to breach international law. In this context, the Claimants bear the burden of proof to establish that the Respondent's courts had the intention of breaking international law by means of an incorrect application of internal law. This was affirmed by Jan Paulsson, president of the *Azinian* tribunal, in his treatises on denial of justice.[792]

> The erroneous application of national law cannot, in itself, be an international denial of justice. Unless somehow qualified by international law, rights created under national law are limited by national law, including the principle that by operation of the fundamental rule of res judicata a determination by a court of final appeal is definitive. So even if an instance of municipal mal jugé is given weight by international adjudicators when determining that there has been a denial of justice, on the footing that rights created under national law have been so blatantly disregarded as to compel conviction with respect to violation of international standards proscribing discrimination, bias, undue influence, or the like, it remains the case that the international wrong is not the misapplication of national law.[793] [Emphasis added]

691. Paulsson reiterated this interpretation in the *Pantechniki v. Albania* case. In that case, as sole arbiter, Paulsson reaffirmed that a mere error in the interpretation of national law does not *per*

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790 Memorial, ¶ 661.

791 Exhibit CL-192, *Robert Azinian, Kenneth Davitian, & Ellen Baca v. Mexico*, CIADI Case No. ARB (AF)/97/2, Award, November 1, 1999, ¶ 103.

792 Exhibit RL-063, Jan Paulsson, *Denial of Justice in International Law* (Cambridge: Cambridge University Press, 2005), pp. 80-81.

793 *Id.*, p. 81.

se give rise to State responsibility. Though erroneous application of domestic law may provide some evidence of denial of justice, he indicates that the threshold test is extremely high:

> The general rule is that "mere error in the interpretation of national law does not per se involve responsibility." Wrongful application of the law may nonetheless provide "items of proof of a denial of justice." But that requires an extreme test: the error must be 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.[794] [Emphasis added]

692. These cases prove that errors made by domestic courts are not equivalent to instantaneous denial of justice. The investor must prove that national courts deliberately violated international law by misapplying national law. Therefore, the Claimants must give evidence that proves that Mexican courts knowingly misapplied Mexican laws to mask an international violation of international law. No such evidence has been presented.

(b) *Krederi v. Ukraine*

693. In *Krederi v. Ukraine*, one of the investor's arguments was that Ukrainian courts failed to reject the Prosecutor's claim as it was time-barred.[795] As for the investor's argument that Ukrainian tribunals did not prevent the attorney's complaint from being filed, the tribunal determined that its mandate was not to issue judgments on the conformity with Ukrainian law, but rather to focus on whether a breach of international law had occurred:

> For this Tribunal, the question is not whether there was an extension of the statute of limitations or an assessment of the compliance with the required limitation period that was compliant or contrary to Ukrainian law. Rather, the issue – from an international due process perspective - is whether the decisions of the Ukrainian courts permitting the Prosecutor to bring his claims were made on the basis of manifestly abusive reasoning and whether this would constitute a sufficiently grave error that can be qualified as a denial of justice.[796] [Emphasis added]

694. Based on this guiding principle, the *Krederi* tribunal ruled as follows: "the limitation period had not expired a long time before the institution of the Prosecutor's invalidation proceedings and there was obviously some judicial practice in Ukraine to grant extensions on a routine basis."[797] Therefore, the tribunal determines: "the permission granted to the Prosecutor to institute the proceedings, by either extending the limitation period or considering that the Prosecutor acted within the prescribed time-frame, in and of itself constitutes no violation of due process."[798] In the end, the tribunal determined that denial of justice did not occur.[799] It is obvious that, from the

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794 Exhibit CL-198, *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, CIADI Case No. ARB/07/21, "Award," July 30, 2009, ¶ 94.

795 Exhibit RL-061, *Krederi Ltd. v. Ukraine*, CIADI Case No. ARB/14/17, "Award," July 2, 2018, ¶¶ 509-512.

796 *Id.*, ¶ 523.

797 *Id.*, ¶ 527.

798 *Id.*, ¶ 528.

799 *Id.*, ¶ 745.

Kederi tribunal's perspective, allowing a State attorney to institute litigation after the limitation time is not a sufficiently grave error that can qualify as a violation of due process or denial of justice.

d. The Claimants are prohibited from bringing a denial of justice claim for the Mexican courts' alleged misapplication of its domestic laws

695. Under the light of the practices of NAFTA's States, case law and the scholarly authorities already cited, the Respondent affirms that the Claimants' arguments for denial of justice according to international law must be rejected. This would be the case even if the tribunal had determined that the Mexican courts had mistakenly applied internal law, which did not occur. In this context, the Claimants' bear the onus of proving that the result of the actions of the Respondent's judicial system is a manifest injustice that offends the sense of judicial propriety, that is, the judicial result as a whole is "notoriously unjust, shocking and egregious."

696. The Claimants have misapplied the test of denial of justice in international law. Instead of proving that the actions of the Respondent's judicial system violated international law, the Claimants focused on the wrong application of Mexican law by Mexican courts. This NAFTA tribunal is not a court of appeals with a mandate is to review Mexican courts' application of its own laws. In this case, Mexican courts correctly applied Mexican laws. In any case, the result from any judicial irregularity (if any existed, which is denied), is not enough to pass the high threshold test for denial of justice according to international law.

697. According to the Claimants, Mexico defaulted on its obligations to respect due process and not incur in denial of justice because:

- the actions of the judiciary in Amparo 1668/2011 constituted a shocking failure of the judicial system that involved serious violations of due process and the incorrect and malicious application of Mexican laws; and in this amparo proceedings, independence and impartiality were lacking;[800]
- the SEGOB committed severe violations to due process and denied justice to the Claimants in their administrative decision-making process which resulted the rescission of Permitholder-BIS Oficio, the permanent and illegal closure of the Casinos, and arbitrary and illegal denial of E-Games' applications to obtain new permits.[801]

698. The Respondent will now address these two items:

(1) Amparo 1668/2011 was not plagued with irregularities, misapplications of domestic law or violations of due process

[800] Memorial, ¶ 669.

[801] *Id.*, ¶ 770.

699. At paragraph 672 of the Memorial, the Claimants list 8 measures attributable to the judicial power (that is, the Sixteenth Court, the Seventh Collegiate Court, and the Supreme Court) that, as they argue, constitute a violation of MST. The Tribunal will note that most of these measures are the same as those which according to the Claimants, gave rise to an expropriation pursuant to Article 1110 and constitute a violation of MST under Article 1105. The measures are:

- The Sixteenth District Judge and Collegiate Tribunal failed to dismiss E-Mex's Third Amendment in Amparo 1668/2011 even though it was filed untimely according to Mexican law.
- The Seventh Collegiate Court failed to review E-Games' admissibility argument. This procedural error, together with sub-argument (1) mentioned above, irrevocably tainted the Amparo 1668/2011;
- The Sixteenth Court failed to notify E-Games of the First compliance by SEGOB, thus depriving E-Games of the right to due process and the right to appeal.
- The Sixteenth Court failed to require the SEGOB to issue new resolutions answering E-Games' initial request, when it ordered the SEGOB to rescind all resolutions derived from the Resolution of May 27, 2009 (Oficio 2009-BIS). This omission deprived E-Games of the right of access to courts;
- The Collegiate Tribunal erred in its *ultra petita* decision when it determined that the Non-Compliance Complaint ("*Incidente de Inejecución*") 82/2013 was unsubstantiated and that the SEGOB had not exceeded its authority by complying with the court order of the Sixteenth Court r of January 31, 2013. The Collegiate Court also made a mistake when reviewing the legality and constitutionality of Permitholder-BIS Oficio, which should not have occurred given that E-Mex consented to this government action during the proceedings. In any case, Permitholder-BIS Oficio had to be appealed in a separate and independent judicial proceeding, to grant E-Games its right to due process. Amparo 1668/2011 deprived E-Games of its right of defense;
- The Seventh Collegiate Court failed to give reasons for its conclusion regarding why the Sixteenth District Court's judgment of January 31, 2013, ruled that the principle of "vested rights" was unconstitutional;
- The two courts mentioned above failed to consider the final and binding ruling in the Amparo 1151/2012 proceeding, which determined that Permitholder-BIS Oficio constituted the implicit consent of E-Mex to no longer challenge Amparo 1668/2011.
- The Mexican Supreme Court's refusal to hear E-Games' motion of reconsideration ("*recurso de inconformidad*") in depth, thus depriving the Claimants of their right of appeal.[802]

700. The Claimants claim as denial of justice and violation of due process the judicial decisions that did not favor them. When doing so, they do not mention the administrative and judicial

[802] *Id.*, ¶ 672.

procedures in which they did prevail. In this sense, the Claimants are trying to relitigate claims that have already been decided against them by national courts.

701. As already mentioned, a claim for denial of justice is only feasible when the whole system fails. This was not the case. The system worked and the Claimant had the chance to be heard and to exercise the available remedies.

702. The Respondent will address these measures as briefly as possible, trying to avoid unnecessary repetitions.

(a) The Sixteenth Court and the Seventh Collegiate Tribunal appropriately admitted E-Mex's Third Amendment in Amparo 1668/2011

703. The Claimants allege that the Sixteenth Court and Seventh Collegiate Court inappropriately admitted the third amendment in the Amparo 1668/2011 in relation to SEGOB's Permitholder-BIS Oficio, in spite of irrefutable evidence that it was filed in an untimely manner and thus required it to be immediately dismissed. They also affirm that this decision constitutes a clear and flagrantly erroneous application of Mexican Amparo law. Finally, they affirm that the Sixteenth Court and the Collegiate Court did not perform an *ex officio* review of the admissibility of the third amendment.[803]

704. According to the Amparo law (both the repealed and the valid one), a court cannot deny the claimant party the right to admit or extend the scope of a claim on the grounds that it was filed in an untimely manner unless there is manifest and unquestionable evidence that it was untimely filed.[804] In this this regard, the Respondent's constitutional law expert concludes that:

> 59. In the specific case, I consider that the decision to admit the extension of the claim was correct, since the arguments relating to the untimeliness of the official communication's claim of May 27, 2009 do not reveal a manifest and unquestionable inadmissibility.
>
> 60. As indicated by the Supreme Court, an amparo claim -or in its absence, an extension of the claim as in the specific case- cannot be dismissed if it is necessary to resort to reports from authorities or evidence that the parties may present in the proceedings in order to prove the cause of inadmissibility. In other words, the cause of action must be evident from the statement of claim and its exhibits.
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> [...]
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> 69. I reiterate that the core conclusion of the Collegiate Tribunal in the motion of complaint is correct: **at that point in time, the cause for the inadmissibility due to untimeliness of the official communication of May 27, 2009 was neither manifest nor unquestionable**, since in fact, at the time the initial resolution was issued with respect to the extension, there was no reliable evidence that E-Mex would have had

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803 *Id.*, ¶ 672 (i).

804 Exhibit RER-1, expert report by Dr. Mijangos, ¶ 52.

> knowledge of the official communication on a date prior to such it stated, for the reasons I indicated above. [Emphasized in original text]

705. With respect the Claimants' allegation that the Sixteenth Court and the Seventh Collegiate Court did not carry out an *ex officio* review of the admissibility of the third amendment, the Respondent's expert explains that the courts' legal power to examine questions of inadmissibility of their own motion does not imply that the courts must examine all the grounds for inadmissibility, nor that it is sufficient for the parties to make mere baseless allegations,[805] and that courts have discretion to decide whether the grounds for inadmissibility have been fully established:

> 89. In this sense, the arising of a cause for inadmissibility translates, beyond a technical issue, into a statement that the judge will not be able to analyze whether or not a certain act violates the fundamental rights of the complainant who is appearing. Therefore, in order to ensure that these technicalities are not contrary to the right of access to effective judicial protection provided for in Article 17 of the Constitution and in paragraphs 8 and 25 of the American Convention on Human Rights, it is necessary, on the one hand, that they respond to a logic within the system of the amparo proceeding that justifies not carrying out a substantive analysis of the act and, on the other hand, that they only arise when they are fully proven.
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> 90. As can be seen, the threshold of analysis is not that of a mere indication, or of a certain degree of plausibility. The threshold for arising is that of conclusive proof, that is, of absolute conviction on the part of the court. In other words, **if the judge has even a margin of doubt as to whether the same has arisen, it must then proceed to dismiss the ground for inadmissibility and conduct a substantive study of the act of authority**. The risk of the opposite position is simply too high within a State governed by the rule of law: preventing individuals from being able to defend themselves against the arbitrary action of the authority, because of a technical obstacle whose existence has not even been proven as such.
>
> 91. Under the above considerations, it seems to me that the determination of the District Judge and the Collegiate Tribunal is correct, since the 3 moments referred to, are only presumptions, that is, procedural moments in which it is possible to consider, only in a presumptive degree, that E-Mex had knowledge of the official communication of May 27, 2009, **but with respect to none of them there is full evidence that such knowledge was indeed given**.[806] [Emphasized in original text]

(b) The Sixteenth Court and the Seventh Collegiate Court did not fail to examine E-Games' admissibility argument

706. The Claimants affirm that the Collegiate Court did not examine *ex officio* E-Games' argument that the third amendment to the E-Mex complaint was inadmissible because the effects of the 2009-BIS Oficio had ceased by virtue of the SEGOB's Permitholder-BIS Oficio –E-Games no longer needed to be considered as an operator under E-Mex's permit because by then it was

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805 *Id.*, ¶¶ 104-105.

806 *Id.*, ¶¶ 89-91.

operating under its own permit. For the Claimants, the Collegiate Court did not follow the procedure required by the law or the applicable law, even though E-Games' argument included an additional motive for the inadmissibility of the third amendment of Amparo 1668/2011.[807]

707. The fact is that E-Games did not present evidence in support of its argument. Even though E-Games pointed out that it had presented Permitholder-BIS Oficio, the Collegiate Court found that there was no evidence of this document in the files. As a result, the Seventh Collegiate Court dismissed the allegation because of lack of evidence and determined that the obligation to analyze *ex officio* did not apply in this case because E-Games had not proved with evidence its objection to admissibility (see paragraphs 237-238 *supra*).

708. The Claimants now mean to transfer the responsibility for their own mistake by arguing that the Collegiate Court was responsible for correcting E-Games' mistake. The Respondent's expert confirms that the Collegiate Court correctly decided that the motive for inadmissibility could not be considered because E-Games did not meet the minimal requirements for its analysis:

> 104. It is true that the grounds for inadmissibility are of a public nature and are to be studied *ex officio*, but as the Collegiate Tribunal has rightly pointed out, that does not mean that each judgment must *ex officio* study all the grounds and include a section analyzing them, as is clear from the following criteria of the Supreme Court Plenary: […]
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> 105. In addition, the Collegiate Tribunal pointed out that the cause for inadmissibility was unattainable, since, although the causes for inadmissibility are studied ex officio, this should not be taken to the extreme of analyzing causes that are simply invoked, since this **requires that they be obvious and objectively established**.
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> […]
>
> 107. That is, the Collegiate Tribunal only indicated that Exciting Games had not exposed or accredited the minimum elements so that the alleged cause of inadmissibility - stay of effects - was as such analyzed, that is, it did not go beyond a mere invocation that did not require further study, while the company did not provide sufficient elements to the contrary.
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> 108. The above is correct according to the technique of amparo. Indeed, when cases of inadmissibility are asserted in the review phase, the Collegiate Tribunals do not automatically proceed to study them in depth, but rather require that the party invoking them provide sufficient elements for a basis of objective verification to be considered, or, to put it another way, **minimum elements for their arising to be considered possible, and not simple manifestations without further support**. [808] [Emphasized in original text]

(c) E-Games was notified of the SEGOB's First amendment declaring the annulment of Oficio 2009-BIS

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807 Memorial, ¶ 672(ii).

808 Exhibit RER-1, expert report by Dr. Mijangos, ¶¶ 104-105 and 107-108.

709. The Claimants affirm that the Sixteenth Court failed to notify E-Games about the First amendment (the SEGOB's resolution of July 19, 2012), which declared the 2009-BIS Oficio to be null and void ("*insubsistente*"), in accordance with the judgment passed on January 31, 2013, by the Sixteenth Court, which constitutes a violation of Mexican law and to the due process rights of E-Games.[809]

710. The Claimants were notified of the First amendment. Exhibit C-272 is a communication from the DGJS to E-Games' legal representative, with stamp dated July 24, 2013. In this communication, the General Director informed E-Games that on July 19, 2013, the SEGOB executed the order issued by the Sixteenth Court, afterwards confirmed by the Collegiate Court, in which the 2009-BIS Oficio was declared null and void ("*insubsistente*").[810] But more importantly, E-Games did not suffer any restriction or violation to its right to due process, because on August 23, 2013, it had the chance to contest before the TFJFA the resolution in the First amendment, as described in Section II.M.3 *supra*.

(d) The Sixteenth Court was not obligated to require new oficios and, in any case, this would have been futile

711. The Claimants affirm that the Sixteenth Court failed to require SEGOB to issue new resolutions in response to E-Games' initial request, when it ordered the SEGOB to rescind all resolutions derived from Oficio 2009-BIS. They add that this omission deprived E-Games from its right to access national courts.[811] The specific measure to which the Claimants refer is an agreement issued by the Sixteenth Court on August 26, 2013, ordering the SEGOB to revoke the Permitholder Oficio and Permitholder-BIS Oficio, among others.

712. However, there is no fault or irregularity in the Sixteenth Court's order. The judge issued the order to make void all acts as a consequence of Oficio 2009-BIS, to ensure that the judgment of January 31, 2013, was effective. Dr. Mijangos explained the reasons for that order:

> 135. The granting of an *amparo* would be meaningless if it only rendered void -in an isolated manner- the specific act that was claimed, but did not also invalidate its direct consequences, since only in that manner would the protection be understood as comprehensive, which is ultimately the purpose of the amparo proceeding.[812]

713. The judge was not obligated to order the SEGOB to issue new resolutions, because the sole purpose of the order was to ensure that the judgment of January 31, 2013, had full effects, which implied the annulment of all consequences of Oficio 2009-BIS.[813] As described in paragraph 157

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809 Memorial, ¶ 672(iii).

810 *See* Exhibit C-272.

811 Memorial, ¶ 672 (iv).

812 Exhibit RER-1, expert report by Dr. Mijangos, ¶ 135.

813 Dr. Mijangos confirmed this conclusion in his report ("Neither the District Court nor the Collegiate Tribunal were able to order the issuance of new communications, as it is to be reiterated, they were not analyzed because of proper defects, but because they were consequence of the analyzed act in the merits of the amparo proceeding.") Exhibit IED-1, legal report by Dr. Mijangos, ¶ 153.

supra, E-Games' initial request, presented on February 22, 2011, was expressly based on Oficio 2009-BIS, among other things. Dr. Mijangos supports this conclusion.

> 154. Additionally, once the May 27, 2009 official communication was declared invalid and a new act was issued, then the legal situation of E-Mex and Exciting Games changed. The communications following the May 27, 2009 official communication were not able to be simply substituted for other communications in which their submissions were to be analyzed anew, as the basis and legal context in which they were issued were gone.[814] [Emphasis added]

714. Also, the Claimants were not deprived of their right to access the courts because, after the permit was declared null and void, the Claimants had the opportunity to request a new permit from the SEGOB and, in fact, did so on April 1, 2014. The SEGOB rejected the request and, though the Claimants had the chance to appeal the decision, there is no evidence that they did.[815] The Claimants were not deprived of their rights; they decided not to exercise them.

715. It must also be noted that the Claimants (once again) try to use this arbitration to present an argument that they did not put before Mexican courts when they had the chance to do so. On September 10, 2013, E-Games presented a grievance before the Sixteenth Court, precisely to challenge the agreement of August 26, 2013 –i.e.s, the one that they now argue was irregular.[816] However, the Claimants did not argue at the time that the judge should have ordered the SEGOB to issue new resolutions. The motion for complaint (Recurso de Queja) was the adequate forum to assess this allegation made by the Claimants.

(e) The decision of the Seventh Collegiate Court determined that the SEGOB did not exceed its authority in complying with the the order of the Sixteenth Court

716. The Claimants affirm:

> (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 Order). 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.

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814 Exhibit RER-1, expert report by Dr. Mijangos, ¶ 154.

815 See Section II.C.2 *supra*.

816 See ¶ 251 *supra*.

> 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*. 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.[817]

717. First, the Collegiate Court did not determine that Permitholder-BIS Oficio (November 16, 2012) was unconstitutional in itself. The Oficio was declared null and void because it derived from an unconstitutional act (i.e., Oficio 2009-BIS). Dr. Mijangos explained that the grant of an amparo would make no sense if the act it challenges were merely declared unconstitutional and its consequences were not annulled:

> 135. The granting of an *amparo* would be meaningless if it only rendered void -in an isolated manner- the specific act that was claimed, but did not also invalidate its direct consequences, since only in that manner would the protection be understood as comprehensive, which is ultimately the purpose of the amparo proceeding.
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> 136. The opposite position would imply a scenario of enormous gravity, since if the claimed act were invalidated, but not the others that derive therefrom, in practice this would mean that, in spite of the judge's resolution, the effects of the claimed act would continue to subsist to the fullest, so that the amparo ruling, far from being integral, would be absurd.
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> 137. The foregoing is extremely recurrent in the dynamics of this trial, i.e., it is very common to find cases in which, although there is an administrative act that is expressly claimed -"an act that is being challenged"- the truth is that the meaning of the judgment necessarily encompasses not only that act in isolation, but also all subsequent administrative acts that have been a consequence thereof, or whose effects are a direct derivation of the one that was challenged in the trial.[818]

718. Second, the scope of a decision made by the Collegiate Court is limited to a case in particular, to the evidence and arguments presented by the parties, and it cannot be automatically extended to different proceedings, such as Amparo 1668/2011, even when the two proceedings share some similar aspects. In Amparo 1151/2012, the Collegiate Court ruled that the E-Mex appeal of the Permitholder-BIS Oficio was inadmissible because it was presented out of time. Thus, according to the Amparo law, it was considered that E-Mex tacitly consented to the resolution of that trial. However, this specific result was not mandatory for the Sixteenth Court, in which Amparo 1668/2011 was passed. As explained by Dr. Mijangos:

> 259. By the nature of the amparo proceeding, the decision of the Collegiate Tribunal only means that, **in the specific case, in view of the evidence available to it, and because of the arguments and claims of the parties, it was notorious and manifest**

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817 Memorial, ¶ 672(v).

818 Exhibit RER-1, expert report by Dr. Mijangos, ¶¶ 135 -137.

> **-it is restated, in the specific case- that the official communication cited had been challenged in an untimely fashion**.
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> 260. The decision of the Collegiate Tribunal translates only into a pronouncement of the concrete case, that is, it attends to an amparo proceeding with certain characteristics, with certain claimed acts, with certain arguments and evidence and, therefore, it cannot be extrapolated to any other trial with which it shares certain common data.
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> 261. In this specific case, the Collegiate Tribunal considered that the evidence and arguments of the parties evidenced the untimeliness of the extension, but this could not imply that in another amparo proceeding a certain District Court or Collegiate Tribunal would necessarily have to share this assessment.
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> […]
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> 265. Therefore, the determination of the Fourth Circuit Court in motion of complaint 30/2013 is nothing more than a resolution limited to the specific case, in the sense that due to the manner in which such litigation was carried out, in the judgment of such court the extension of the claim was untimely; but it could not be translated, under any scenario, into a decision that binds any court of the Mexican State to consider that E-Mex tacitly consented to such official communication in any trial, procedural means and moment.[819]

719. Lastly, regarding the Claimants' affirmation that they were denied their right to due process because Amparo 1668/2011 was not the adequate procedure to defend the legality of Permitholder-BIS Oficio, the Respondent's expert considered that E-Games was not deprived of its procedural rights. He also explained that Permitholder-BIS Oficio was annulled because it derived from Oficio 2009-BIS, which is an intrinsic characteristic of an Amparo writ.

> 162. In addition, I do not agree that Exciting Games has been deprived of any rights without a prior trial. This is due to the fact that Exciting Games was a party to the amparo proceeding 1668/2011, which culminated in the granting of an amparo against the official communication of May 27, 2009 -and, therefore, with its consequent invalidity. In the enforcement phase, a later official communication was also invalidated, but this does not imply a deprivation of rights. On the contrary, as explained above, it is a direct and logical consequence of the effects of the amparo ruling.
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> 163. The fact that the official communications of August 15, 2012 and November 16, 2012 were rendered void answered a technical question inherent to the amparo proceeding, and is not a deprivation of rights as such. **Such official communications of 2012 were not invalidated because of their own defects, but because they were acts derived from or dictated in consequence of another that contained a primary defect.** As to the position that the official communications could not be invalidated if Exciting Games was not given the opportunity to prove and argue their validity, I consider it necessary to restate that they were not analyzed by their own defects, but only because they were a direct consequence of the official communications of 2009, so that the company would not have been able to prove and argue the validity of the official communications of 2012.[820][Emphasis added]

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819 *Id.*, ¶¶ 260-261 y 265.

820 *Id.*, ¶¶ 162-163.

720. When a government measure is challenged by an amparo action, the challenge not only to the act itself, but to its effects and consequences. In this case, E-Mex expressly appealed the effects and consequences of the 2009-BIS Oficio in the third amendment ("all and any effects and consequences").[821] Via a Non-Compliance Complaint, the Collegiate Court reviewed the SEGOB's compliance with the judgment rendered on January 31, 2013, by the Sixteenth Court, and found that the Permitholder and Permitholder-BIS Oficio were a consequence of the 2009-BIS Oficio, which had been declared unconstitutional. The courts reviewed the SEGOB's actions and found that they were consistent with the Amparo judgment.

721. There was no legal mistake or erroneous application of national law. Dr. Mijangos also pointed out that, though the oficios of August 15, 2012 (Permitholder Oficio) and November 16, 2012 (Permitholder-BIS Oficio) were not specifically mentioned as challenged actions in the *Amparo* complaint, E-Mex included as claimed acts all acts derived from Oficio 2009-BIS:

> 126. Once I have analyzed the records of the amparo proceeding 1668/2011, as well as the procedural consequences of compliance with the amparo ruling handed down therein, and the ancillary proceeding of non-execution 82/2013, I consider that the courts involved did not incur in procedural or substantive violations and, consequently, I do not believe that it is possible to conclude that they rise any legal error through ignorance of the applicable regulations or jurisprudential criteria.
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> 127. For illustrative purposes only, it should be briefly recalled what happened at this stage of the case: the District Judge granted the amparo against a first official communication -dated May 27, 2009-, and when the responsible authority complied with the sentence, the Judge indicated that not only that official communication had to be rendered void, but also all the others that were a consequence thereof.
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> […]
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> 134. For this reason, it is true that the official communications of August 15, 2012 and November 16, 2012 were not expressly mentioned as acts claimed in the amparo proceeding 1668/2011, but in that trial **E-Mex did challenge all the effects and consequences that derived from the official communications of May 27, 2009.** Therefore, if later in the procedural sequence -in the compliance phase- it was determined that those official communications were a consequence of such declared unconstitutional, this was sufficient to invalidate them, since this was expressly requested by the plaintiff company, **without the same being required to issue a list of all the acts that derived or were a consequence of the official communication of May 27, 2009**.
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> 144. For all the above reasons, I believe that the District Judge in the specific case could not have sustained a decision different from the one he issued: if the official communication of May 27, 2009 is unconstitutional, then all administrative acts that have derived therefrom should be rendered void. Not only is this not an irregular or peculiar decision; on the contrary, **it is a logical, natural and binding decision in light**

821 Exhibit C-269.

> **of the purpose of the amparo proceeding and the way in which the administrative acts take effect**. [822]
>
> [Text underlined by the Respondent; bold type comes from the original]

722. Dr. Mijangos emphasized that the fact that a court rules against the interests of one party does not imply irregularity, error, or violation of procedural rights:

> 240. It is important to emphasize that the fact that a court may rule in a manner contrary to the interests of a certain party, and also the fact that such a ruling comes from the competent body and not from the one that the party would prefer to hear the case, are not aspects that reveal legal irregularities or errors. On the contrary, such a conclusion can only be reached through a substantive analysis of the decision, which, once it has been made in the specific case, shows that there was no violation of the right to effective judicial protection.[823]

(f) The Seventh Collegiate Court declared that since the 2009-BIS Oficio was declared unconstitutional, E-Games did not have "vested rights"

723. According to the Claimants, the Collegiate Court did not give reasons "for its conclusion that the Sixteenth District Judge's January 31, 2013 Order ruled the principle of 'acquired rights' unconstitutional."[824] They also point out the following:

> 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. In its February 19, 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. 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.[825]

724. Dr. Mijangos explained that the Collegiate Court did not rule that the "acquired rights" principle was unconstitutional, but rather that, in that specific case, it was unconstitutional to consider that the 2009-BIS Oficio had created vested rights in favor of E-Games because the concept does not exist in applicable laws and Regulations:

> 159. As indicated in the above transcript, the Collegiate Tribunal did not hold that the figure of the acquired rights had been declared unconstitutional, but rather that since the official communication of May 27, 2009 had been rendered void, due to the

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822 Exhibit RER-1, expert report by Dr. Mijangos, ¶¶ 126-127 and 134.

823 *Id.*, ¶ 240.

824 Memorial, ¶ 672 (vi).

825 *Id.*, ¶ 672 (vi).

> consideration that the figure of the "*autonomous operator*" is not provided for in the Regulations of the Federal Law of Games and Raffles**, Exciting Games did not have "*acquired rights*" in that area**, which impacted subsequent actions by the authority, among which was the official communication of November 16, 2012.
>
> 160. In other words, it is not that the figure of the acquired rights had been considered unconstitutional within the context of the games and raffles, but in the specific case, **it was unconstitutional to consider that the official communication of May 27, 2009 had generated some kind of acquired right in favor of Exciting Games because it had as a basis a figure not provided for in the applicable regulations**: This ultimately led to the invalidity of all those acts that had been based on the premise that Exciting Games had an acquired right on the basis of the provisions of the above-mentioned official communication, a situation that consequently impacted the official communication of August 15, 2012, as well as the official communication of November 16, 2012.[826]
>
> [Emphasized in the original]

(g) There was no judicial error in rescinding Permitholder-BIS Oficio of November 16, 2012

725. According to the Claimants, the Respondent made a serious judicial error when it rescinded Permitholder-BIS Oficio. In particular, the Claimants allege that the omission of the Sixteenth Court and the Seventh Collegiate Court to consider what was ruled in Amparo 1151/2011 (the Order of October 17, 2013), which determined that Permitholder-BIS Oficio constituted a government action to which E-Mex had tacitly consented, meant that E-Mex could no longer challenge such action in any other amparo proceedings. Also, given the Order of October 17, 2013, Permitholder-BIS Oficio was beyond the scope of Amparo 1668/2011 and, therefore, could not be annulled as a result of Amparo 1668/2011. For the Claimants, even though both the Sixteenth Court and the Collegiate Court were legally bound to the order of October 17, 2013, they did not do so and illegally confirmed the annulment of Permitholder-BIS Oficio issued by the SEGOB, thus falling into a serious judicial error.[827]

726. As explained in Section (e) *supra*, the decision in Amparo 1151/2012 was not mandatory for the courts involved in Amparo 1668/2011 or the SEGOB. A ruling by a Collegiate Court is not binding on another court of the same level. Its previous decisions and criteria do not even bind the Seventh Collegiate Court itself, because all cases have particularities of their own and this can give place to different results.[828] Therefore, the decision issued in Amparo 1151/2012 could not oblige the Collegiate Court in Amparo 1668/2011.

727. On the other hand, in Amparo 1668/2011, the Sixteenth Court was only bound to what the Seventh Collegiate Court ordered by the Non-Compliance Complaint in Amparo 1668/2011. Since the Mexican Federal Judiciary (*Poder Judicial de la Federación*) has a hierarchical court system,

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826 Exhibit RER-1, expert report by Dr. Mijangos, ¶¶ 159 -160.

827 Memorial, ¶ 672 (vii).

828 Exhibit RER-1, report from Dr. Mijangos, ¶¶ 262 -264.

the Sixteenth Court could not question or diverge from the order given by the Seventh Collegiate Court in the Non-Compliance Complaint.

728. Finally, regardless of whether the SEGOB was aware or not of what was ruled in Amparo 1151/2012, it could not distance itself from what the Sixteenth Court and the Seventh Collegiate Court ordered, because otherwise it could have been penalized by the authorities in charge. The SEGOB could not analyze the impact of Amparo 1151/2012 in Amparo 16668/2012, because this would have amounted to assuming the role of judges that rule on trials and appeals for amparo actions. On this issue, the role of the SEGOB was limited to enforcing what the Sixteenth Court and the Seventh Collegiate Court, as the proper authorities, ordered. [829]

(h) There was no violation of domestic law or international obligations by the Supreme Court

729. The Claimants affirm that an alleged refusal of the Supreme Court to conduct an in-depth analysis of the motion for reconsideration constitutes a clear violation of Mexican law, the American Convention on Human Rights, and the NAFTA, which protects the right to an effective remedy before the competent judicial authorities.[830]

730. The Claimants misconstrue the ruling rendered by the Supreme Court. This is fully explained in Section II.L.3. In short, the Supreme Court addresses two issues: a) the appeal to the judgment rendered in the non-compliance complaint 82/2013 (Non-Compliance Complaint the SEGOB's excessive compliance), and b) the appeal on the ruling dated March 10, 2014, issued by the Sixteenth Court (decision on the enforcement of the amparo judgment). The Supreme Court dismissed the first issue because the Amparo law does not establish that kind of remedy. Regarding the second issue (the agreement of the Sixteenth Court), it was remitted to the Collegiate Court to render a decision.

731. The Supreme Court remitted the agreement of March 10, 2014, because internal Regulations of the Supreme Court establish that this kind of proceedings must be resolved by Collegiate Courts, and only in exceptional cases may they be resolved by the Supreme Court.

732. The Supreme Court analyzed E-Games' arguments and determined that it did not prove that its case was exceptional because it did not have special or relevant characteristics, i.e., E-Games' appeal referred only to the enforcement of the amparo judgment. [831]

733. On the other hand, the reason for which the motion for reconsideration did not proceed against the judgment of Non-Compliance Complaint is because the Non-Compliance is in itself a revision (of what the District Court determined during the compliance stage):

> 232. The logic that the appeal does not proceed in such a case derives from the fact that a Collegiate Tribunal, upon issuing a decision of this nature, has already "*controlled*" or "*reviewed*" the compliance procedure, that is, it is not a matter of a

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829 *Id.*, ¶¶ 269-270.

830 Memorial, ¶ 672 (viii).

831 Exhibit C-26, p. 42-43.

> resolution that declares complied with -or not complied with- an amparo ruling -supposing that the appeal does proceed so that the decision may be reviewed, **but of a resolution that consists essentially of the culmination of a process of compliance, in which, in a certain sense, a Collegiate Tribunal has already ruled on the proceedings of the District Court with respect to its sentence**.[832]
>
> [Emphasized in original text]

734. In this sense, Dr. Mijangos reaches the following conclusion: "the fact that a court may rule in a manner contrary to the interests of a certain party, and also the fact that such a ruling comes from the competent body and not from the one that the party would prefer to hear the case, are not aspects that reveal legal irregularities or errors."[833] Dr. Mijangos also explained that there was no irregularity in the actions of the Supreme Court.

> 296. In addition, the mere fact that the court responsible for resolving the matter that subsisted in the appeal of non-conformity was the same Collegiate Tribunal that resolved the ancillary proceeding of non-execution 82/2013, and not the Supreme Court of Justice of the Nation, does not in itself reveal the existence of any kind of procedural irregularity or violation, since the only thing that would be resolved in the appeal of non-conformity was whether or not the order issued by the District Court was legal, for which, ultimately, it would have to be analyzed whether or not the Court duly complied with what the Collegiate Tribunal had indicated.[834]

(2) The SEGOB did not commit serious violations of due process or deny justice to the to the Claimants in its administrative decision-making

735. As the Claimants themselves have pointed out, denial of administrative justice refers to the jurisdictional faculties of the administrative branch.[835] When the administrative branch of a State does not act in its jurisdictional function, there can be no claim of denial of administrative justice.

736. In this case, the SEGOB was acting in an administrative capacity by enforcing the decisions of Mexican courts. Therefore, the Claimants cannot allege "denial of administrative justice."

737. The Claimants affirm that the SEGOB committed severe violations of due process and denied justice to the Claimants in its decision-making process, particularly in the following measures:

- revocation by the SEGOB of Permitholder-BIS Oficio in the compliance stage of Amparo 1668/2011,[836]

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832 Exhibit RER-1, expert report by Dr. Mijangos, ¶ 232.

833 *Id.*, ¶ 240.

834 *Id.*, ¶ 296.

835 Memorial, ¶ 637.

836 *Id.*, ¶¶ 677-678.

- closure of Casinos by the SEGOB and the subsequent administrative proceedings, and[837]
- rejection by the SEGOB of E-Games' requests for new permits.[838]

738. The Tribunal can see that these measures are the same as those that the Claimants affirm violated the FET in terms of Article 1105. To prevent unnecessary repetitions, the Respondent reiterates what it has already said in previous sections of the Legal Argument (III.B) and the Facts section II.L.2 (Permitholder-BIS Oficio), II.M.2 (Closure of casinos), II.N.2 (Administrative proceedings after the closures) and II.P (Requests for new permits).

739. Further, since the revocation by the SEGOB of Permitholder-BIS Oficio originates from orders given by Mexican courts, the Claimants cannot claim an isolated violation of the Treaty caused by the SEGOB's actions unless there is denial of justice in the first place. As the *Azinian* tribunal pointed out:

> A governmental authority surely cannot be faulted for acting in a manner validated by its courts *unless the courts themselves are disavowed at the international level*.[839] [Emphasized in original text]

740. Regarding the closure of casinos and subsequent administrative review proceedings, the Respondent proves in the statement of facts that the Claimants challenged the SEGOB's measures by all the means that they deemed appropriate: [840]

- The Claimants filed a motion for an administrative review against the closure of the Casinos, which was decided by the Undersecretary of the Interior (*Subsecretario de Gobernación*) on June 4, 2014. The appeal was dismissed because the closure of the Casinos that occurred on April 24, 2014, was not a final resolution against which the Administrative Review was admissible. The SEGOB's decision made it clear that the Claimants had the right to participate in the disciplinary proceedings that followed the closures and to present all the evidence that they considered appropriate. That was the case. The Claimants had the opportunity to participate actively in the disciplinary proceedings and to present evidence.
- The SEGOB issued its decision in the disciplinary proceedings of February 26, 2015, confirming the closure of the Casinos. The Claimants then filed a new motion for revision to the SEGOB's Undersecretary, but it was dismissed and the decision to close the Casinos was confirmed.

The Claimants challenged this decision before the Federal Administrative Court (TFJA). However, the Claimants withdrew the appeal when they decided to launch this arbitration.

741. Regarding the refusal of E-Games' requests for new permits, the exposition of facts explains the reasons why the SEGOB refused to grant new permits. Notwithstanding whether the

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837 *Id.*, ¶¶ 679-685.

838 *Id.*, ¶ 686 -687.

839 Exhibit CL-192, *Robert Azinian, Kenneth Davitian, & Ellen Baca v. Mexico*, CIADI Case No. ARB (AF)/97/2, Award, November 1, 1999, ¶ 97.

840 See Section II.N *supra*.

Claimants agree or not with the decision, it is relevant to point out the SEGOB clearly indicated in its decision that the Claimants could challenge such decision with a motion of reconsideration, in accordance with applicable law. However, the Claimants did not appeal that decision.

D. Indirect expropriation

1. The Claimant's position

742. In their Memorial, the Claimants argue that the Respondent indirectly expropriated its Casinos.[841] The Claimants further submit that indirect expropriation has the following characteristics. Firstly, indirect expropriation occurs when the measures taken by the State have the same effect of direct expropriation.[842] Secondly, it can appear in form of a creeping expropriation through a series of measures over time.[843] Thirdly, it is the effect of the measure and not its intent what determines whether an expropriation occurred.[844] Fourthly, according to international law, "rights and interests under government permits or licenses may be expropriated."[845] Lastly, expropriation can occur or crystalize through judicial measures by the State.[846]

743. Given the above, the Claimants allege that they had a bundle of rights and legitimate expectations that were expropriated by the Respondent by means of a creeping indirect expropriation.[847]

744. In the Claimants' view, this "bundle of rights" includes the investments they made in E-Games, Juegos Companies, their permit, and their ability to operate Casinos as E-Games using the independent permit that the SEGOB finally granted to them.[848] The Claimants further argue that the alleged actions of the Respondent were unlawful because they were not implemented for public purpose, contrary to the due process requirement per Article 1105(1), were discriminatory and failed to compensate the Claimants.[849]

2. The Respondent's position

745. The Respondent submits that there was no expropriation because the measures that allegedly constitute an expropriation were adopted as a consequence of a judicial order and the applicable treaty –the NAFTA– does not recognize the notion of "judicial expropriation."

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841 Memorial, ¶¶ 475, 477.

842 *Id.,* ¶ 479.

843 *Id.,* ¶ 485.

844 Id. ¶¶ 489-490.

845 *Id.,* ¶ 495.

846 Id. ¶¶ 501-502.

847 *Id.*, ¶¶ 503-505. See also ¶ 469.

848 *Id.,* ¶ 506.

849 Id. ¶¶ 508-531.

746. Under the NAFTA, decisions made by domestic courts acting as neutral and independent arbiters do not give rise to claims of expropriation under Article 1110(1). Even if this Tribunal could make such a determination, it would first have to conclude that, in this case, the tribunals committed denial of justice, in order to then conclude that a judicial decision had an effect tantamount to an illegal expropriation.

747. Moreover, the jurisprudence that the Claimants have relied upon stand is mostly irrelevant for the purposes of these proceedings, because the underlying treaties in those disputes contain different standards of protection and are not consistent with the applicable general principles. Lastly, the Claimants have tried once again to present a claim of denial of justice under the guise of "judicial expropriation" without being able to distinguish between the two concepts.

748. The Respondent submits that the Claimants' "judicial expropriation" claim ought to be rejected by this Tribunal.

a. The NAFTA does not recognize the concept of "judicial expropriation"

749. Article 1110 (1) of the NAFTA sets out the following:

> No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
>
> (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.

750. On the issue of whether Article 1110(1) includes the concept of "judicial expropriation," the NAFTA parties have been unequivocal and clear that it does not. For example, in *Eli Lilly v. Canada*, the United States submitted the following in its non-contending Party submission under Article 1128:

> Separately, decisions of domestic courts acting in the role of neutral and independent arbiters of the legal rights of litigants do not give rise to a claim for expropriation under Article 1110(1). It is therefore not surprising that commentators have acknowledged the particular "dearth" of international precedents on whether judicial acts may be expropriatory. Moreover, the United States has not recognized the concept of "judicial takings" as a matter of domestic law.[850]
>
> [Emphasis added]

[850] Exhibit RL-055, *Eli Lilly and Company v. The Government of Canada*, CIADI Case No. UNCT/14/2, "Submission of the United States of America," March, 18, 2016, ¶ 29.

751. The United States reaffirmed its position on judicial expropriation under the NAFTA in the *LMC v. United Mexican States*[851] and in *Gramercy Funds v. Peru* under the United States – Peru Trade Promotion Agreement through non-contending party submissions.[852]

752. Canada has also systematically maintained that judicial actions cannot give rise to a "judicial expropriation" claim. In its *Eli Lilly* Counter-Memorial, Canada stated that:

> The only rule of customary international law that relates to the acceptability of domestic court determinations of domestic rights is the rule against denial of justice.[853]

753. Canada further stated that:

> If a domestic court's adjudication of property rights can be transformed into an expropriation by alleged inconsistency with any of these other international law obligations, then NAFTA Chapter Eleven tribunals will be transformed both into tribunals with plenary jurisdiction over all international treaties and supranational courts of appeal in domestic property law issues.[854]

754. In its Rejoinder in *Eli Lilly v. Canada*, Canada emphasized that:

> The concept [of judicial taking] is unknown to Canadian law. Similarly, in the United States judicial decisions cannot "take" property within the meaning of the Fifth Amendment takings clause.[855]

755. The Respondent has consistently taken the same position. When national courts act as neutral and independent arbiters, they cannot commit expropriation. Accordingly, a judicial decision taken against the interest of a party that happens to be a foreign investor is not equivalent to the expropriation of its investment. If it were, any decision made by national courts against a foreign investor related to property ownership would be subject to a possible review by an international tribunal in the context of an expropriation claim. There would be an increasing body of precedents on the subject, both within the framework of Chapter 11 of the NAFTA and the wider body of jurisprudence on investment treaty arbitration. In this regard, scholars such as Been and Beauvais have cautioned that, unless it is firmly rejected in the future, the notion that a judicial decision can give rise to an expropriation under the NAFTA, the NAFTA will become a powerful tool for those who have lost disputes on property rights before domestic courts:

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851 Exhibit RL-056, *Lion Mexico Consolidated L.P. v. Mexico*, CIADI Case No. ARB (AF)/15/2, "Submission of the United States of America," June 21, 2019, ¶ 20.

852 Exhibit RL-057, *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, CIADI Case No. UNCT/18/2, "Submission of the United States of America," June 21, 2019, ¶ 28.

853 Exhibit RL-058, *Eli Lilly and Company v. The Government of Canada*, CIADI Case No. UNCT/14/2, "Canada's Counter-Memorial," January 27, 2015, ¶ 333.

854 *Id.,* ¶ 334.

855 Exhibit RL-066, *Eli Lilly and Company v. The Government of Canada*, CIADI Case No. UNCT/14/2, "Canada's Counter-Memorial," December 8, 2015, ¶ 214.

> unless that any notion that a judicial decision can be considered expropriations under NAFTA is soundly rejected in the near future, NAFTA will become a powerful tool for property owners who have lost disputes over property rights in domestic courts.[856]

756. This does not reflect the intentions of the NAFTA Parties. The NAFTA was never meant to preclude adverse findings against foreigners in domestic litigation proceedings involving disputes over property rights. To dispute the systemic failure of the host State's judiciary, the Claimants are limited to asserting a claim under Article 1105(1) to prove the existence of a denial of justice.

757. In this case, both the revocation of the permit and the subsequent closure of the Claimants' Casinos, on which the Claimants' expropriation claim is based, were direct consequences of a judicial ruling. The Claimants' position is that, even if this Tribunal were to accept that judicial expropriation could take place, a claim of that nature cannot prosper without a prior finding of denial of justice. It would be an anomaly for an international tribunal to determine that a State has illegally expropriated the investment of the claimant party through measures adopted in compliance with a valid Court order without determining that the host State's legal system failed as a whole. As explained in the last section, it is well established that international tribunals do not sit as supranational courts of appeal for decisions made by domestic courts.

758. The Claimants invoke four cases in support of their position: *Eli Lilly v. Canada*, *Rumeli v. Kazakhstan, Sistem v. Kyrgyzstan* and *Saipem v. Bangladesh*.[857] The four cases are either irrelevant (*Eli Lilly*), lack adequate legal reasoning (*Rumeli*, *Sistem*) or establish the incorrect precedent in international law of "judicial expropriation" (*Saipem*). The Respondent will examine next each of these cases for the benefit of this Tribunal.

759. With respect *Eli Lilly*, the Claimants ignore the fact that the tribunal's decision on "judicial expropriation" was *obiter dictum* and does not belong to the binding decision of the tribunal. The tribunal specifically indicated that, for reasons of judicial economy, it did not rule on the parties' arguments before expressing its non-binding position on "judicial expropriation."

> The question that follows is whether conduct that does not constitute a denial of justice may nonetheless be capable of qualifying as a violation of NAFTA Articles 1105 and 1110.
>
> For the reasons and conclusions set out in the section that follows on the utility requirement under Canadian law, the Tribunal does not need to reach a decision on the Parties' submissions on these issues, and judicial economy dictates that it should not do so.[858]
>
> [Emphasis added]

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856 Exhibit RL-094, Vicki Been & Joel C. Beauvais, "The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International 'Regulatory Takings,'" 2003, 78:1 NYU Law Review 30, p. 83.

857 Memorial, ¶¶ 501-502.

858 Exhibit CL-112, *Eli Lilly and Company v. The Government of Canada*, CIADI Case No. UNCT/14/2, "Final Award," March 16, 2017 ¶¶ 219-220.

760. Within this context, the brief *obiter dictum* in *Eli Lilly* must be interpreted within the context in which it was written. First, the tribunal itself acknowledged that it did not consider the parties' arguments or the arguments of non-disputing Parties, before expressing its non-binding opinion on "judicial expropriation." Second, it did not explain under what "broad proposition" "it is possible to contemplate circumstances in which a judicial act (or omission) may engage questions of expropriation under NAFTA Article 1110[.]"[859]

761. The tribunal in *Rumeli v. Kazakhstan* relied on the award in *Oil Field v. Texas* and Article 4(1) of the *International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts* of the International Law Commission, to declare that a State can commit expropriation through its judiciary branch, based on the attribution rule of State responsibility.[860] However, the *Rumeli* tribunal misapplied the customary international law standard on attribution of State responsibility. In accordance with customary international law, the rule on attribution only speaks to whether an act of an individual or an organ of the State can give rise to State responsibility. It does not determine what kind of international responsibility the State is to be held responsible. As explained in the Commentary to the Draft Articles on State Responsibility:

> As a normative operation, attribution must be clearly distinguished from the characterization of conduct as internationally wrongful. Its concern is to establish that there is an act of the State for the purposes of responsibility. To show that conduct is attributable to the State says nothing, as such, about the legality or otherwise of the conduct, and rules of attribution should not be formulated in terms which imply otherwise.[861]
>
> [Emphasis added]

762. In other words, although the customary international law standard establishes that a State is responsible for the conduct of its judiciary power by virtue of the rule on attribution, it does not address under which primary rule of the State responsibility the State would be held accountable. This issue must be decided by the primary rule of international law –i.e., treaties and customary international law. The *Rumeli* tribunal misapplied the attribution rule in customary international law in concluding that "judicial expropriation" exists in international law. Similarly, the tribunal in *Sistem v. Kyrgyzstan* incorrectly applied the rule of attribution, as in *Rumeli*.[862] In the context of the NAFTA, the only crystalized rule of customary international law on State responsibility that has been incorporated in the Treaty deriving from its judiciary is denial of justice.

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859 *Id.*, ¶ 221, cited in the "Memorial," ¶ 501.

860 Exhibit CL-113, Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, CIADI Case No. ARB/05/16, "Award," July, 29, 2008, ¶ 702-703.

861 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 38-39. Online: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

862 Exhibit CL-114, *Sistem Mühendislik In aat Sanayi ve Ticaret A. v. Kyrgyz Republic*, CIADI Case No. ARB(AF)/06/1, "Award," September 9, 2009, ¶ 118.

763. In *Saipem*, the applicable treaty only allowed an investor to file an expropriation claim before an international tribunal.[863] The investor could not bring a denial of justice claim based on the conduct of the courts of Bangladesh. Thus, to avoid such jurisdictional obstacle, the investor chose to bring a "judicial expropriation" claim. Without defining "judicial expropriation" or explaining how it is different from denial of justice, the *Saipem* tribunal in fact opened the door for investors to argue for "judicial expropriation," although the claim is fundamentally one of denial of justice. As Sattorova observed:

> As the Tribunal did not dwell on the reasons underlying this distinction [between denial of justice and "judicial expropriation"], one is left to speculate as to whether labelling a denial of justice as "a judicial expropriation" served the sole purpose of justifying the inapplicability of the local remedies rule in the case before the tribunal. While affirming the rule of judicial finality, Saipem has controversially opened the door to the possibility of avoiding the application of the local remedies rule by presenting a denial of justice claim as of one of expropriation.[864]

764. Unlike the investor in *Saipem*, the Claimants in this case have access to Article 1105(1) of the NAFTA, which allows claims for denial of justice. Consequently, denial of justice is the only proper cause of action that the Claimants have in this case, and they cannot reargue their denial of justice claim as one of "judicial expropriation."

b. The Claimants seek to reargue their denial of justice claim as "judicial expropriation" without distinguishing between the two concepts

765. The allegedly improper actions of the Respondent were carried out either by the judiciary or by the executive branch in good faith compliance with the decisions of the judiciary. The facts in this case prove that the crux of the Claimants' claim is their dissatisfaction with the Respondent's Court's decisions and the administrative conduct implemented in compliance of those decisions. Fundamentally, the Claimants' underlying claim stems from a dispute with a private third party that is irrelevant for the Respondent in this arbitration proceeding under the NAFTA.

766. As Greenwood QC points out, when the original cause of the damage is the act of a private party is not in itself contrary to international law, no State responsibility will arise.[865] In other

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863 Exhibit RL-067, Article 9 of the bilateral investment treaty between Italy and Bangladesh sets out that: "Any dispute arising between a Contracting Party and the investor of the other, relating to compensation for expropriation, nationalization, requisition or similar measures including disputes relating to the amount of the relevant payments" could be submitted to arbitration. Online: https://www.italaw.com/sites/default/files/laws/italaw6029.pdf/

864 Exhibit RL-068, Mavluda Sattorova, "Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct" (2012) ICLQ 223, p. 234-235.

865 Exhibit RL-062, Christopher Greenwood QC, "*State Responsibility for the Decisions of National Courts*" in M Fitzmaurice and D Sarooshi (eds), Issues of State Responsibility before International Judicial Institutions (Hart Publishing 2004) p. 59-60.

words, the original cause of damage, for example, a contractual controversy, cannot be imputed to the respondent State and cannot constitute a cause of action against the State in international law.

> If there is to be a cause of action at all it can only be denial of justice, arising either because the respondent State denies the alien access to the courts or because those courts behave in a way which is discriminatory or manifestly contrary to international standards of behaviour.[866]

767. The facts in this case fit perfectly within the situation addressed by Greenwood QC. The conduct denounced by the Claimant revolves around a legal challenge brought by E-Mex against certain measures taken by SEGOB. The allegedly improper judicial decisions include the following: (1) Amparo 1668/2011 initiated by E-Mex, a third party that is not related to the Respondent; and (2) the remit of the case by the Supreme Court to the Seventh Collegiate Court.[867] Non-judicial actions that implemented the aforementioned judicial decisions include: (1) SEGOB's revocation of E-Games' permit; and (2) SEBOG's closure of the Claimants' Casinos.[868]

768. In the aforementioned court proceedings, the Mexican courts were applying Mexican laws to resolve the legality of the 2009-BIS Oficio issued by SEGOB. The adjudication of the dispute by the Mexican courts cannot, in and of itself, engage the Respondent's international responsibility, unless systematic denial of justice occured. SEGOB's subsequent enforcement of the court orders is established by Mexican law. They cannot engage Mexico's international responsibility unless a denial of justice is proven in the first place, as the SEGOB's conduct flows from the court orders mentioned above. Therefore, the Claimants' potential claim is reduced to one of denial of justice.

769. The Respondent would also like to emphasize that the Claimants do not distinguish between "judicial expropriation" and "denial of justice" in their Memorial. Instead, the Claimants improperly borrow characteristics from their denial of justice claim to define their judicial expropriation claim. For example, the Claimants argued that, in this case, judicial expropriation took place because Mexico erroneously applied its domestic laws and the Supreme Court denied them access to the courts and breached their right to due process.[869] These are the same grounds used for its denial of justice claim which, are not usually associated with an expropriation claim.[870]

770. Even if this Tribunal were to accept the notion of judicial expropriation and that the type of allegations that the Claimants are making in this case, if proven, could lead to a judicial expropriation, it is difficult to see how such a conclusion could be reached without concluding that there was a denial of justice. This proves that the high threshold for a denial of justice claim cannot be circumvented, even if the claim repackaged as expropriation claim is accepted.

771. In short, the Claimants have failed to establish that the NAFTA and/or customary international law recognize the concept of "judicial expropriation." The Claimants fail to define

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866 *Id.,* 60.

867 Memorial, ¶ 506.

868 *Id.,* ¶ 506.

869 See, for example, Memorial, ¶ 506.

870 See, for example, *id*., ¶ 672., ¶ 672.

"judicial expropriation" and do not distinguish between "judicial expropriation" and denial of justice. Given this situation, the Respondent submits that the Claimants' "judicial expropriation" claim is unfounded at international law and must be dismissed, as it is nothing more than a denial of justice claim in disguised as expropriation.

3. Application to the facts

772. At Paragraph 506 of the Memorial, the Claimants provide a list of alleged expropriatory measures:

- The 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.
- The SEGOB illegally revoked E-Games Permitholder-BIS Oficio declaring it null and void ("insubsistente") and thus no longer valid.
- Mexico, through the Sixteenth Court and the Collegiate Court, approved a series of improper actions and issued a series of undue resolutions that resulted in the undue annulment of Permitholder-BIS Oficio dated November 16, 2012.
- The Peña Nieto administration illegally lobbied the Supreme Court to decline to exercise jurisdiction over the Claimants' motion for reconsideration ("*recurso de inconformidad*" 406/2012).
- Mexico illegally closed the Claimants' Casinos on April 24, 2014.
- Mexico illegally removed the closure seals placed on Claimants' Casinos without notifying the Claimants and returned the possession of the premises and the assets therein to individuals or companies other than E-Games.

773. As can be seen, the majority of the allegedly expropriatory measures are judiciary measures or actions that stem from a judicial order. The Respondent will first address these measures and then discuss the delay in the issuance of the permit and the closure of the Casinos.

a. Judiciary measures

774. The Claimants argue that, regarding the judicial proceedings, the Sixteenth Court, the Seventh Collegiate Court, and the Supreme Court adopted a series of improper measures and decisions that resulted in the annulment of their permit which constitutes expropriation under NAFTA:

- The Sixteenth Court and the Seventh Collegiate Court improperly admitted the third amendment of the Amparo action filed by E-Mex.[871]
- The Sixteenth Court and the Seventh Collegiate Court should have dismissed the third amendment after it was erroneously accepted.[872]

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871 Memorial, ¶ 506, iv, item i.

872 *Id.*, ¶ 506, iv, item ii.

- The Sixteenth Court and the Seventh Collegiate Court failed to consider in Amparo 1668/2011 that the Permitholder-BIS Oficio constituted an implicitly consented act (*acto consentido tácitamente*) by E-Mex because of the final and binding judgment in another amparo.[873]
- The SEGOB seized its opportunity in the Amparo 1668/2011 proceeding and unlawfully revoked the resolution that granted E-Games' permit, declaring it "*insubsistente*" by (i) improperly introducing Permitholder-BIS Oficio in the enforcement stage of the Amparo 1668/2011 proceeding, incorrectly claiming that Permitholder-BIS Oficio was based on Oficio 2009-BIS, which is in direct contradiction with its own previous conclusions that Permitholder-BIS Oficio and the decision to grant the Claimants' permit were not based on Oficio 2009-BIS; and (ii) in 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 (through the third amendment of the claim). [874]
- The Seventh Collegiate Tribunal, irregularly, unlawfully, and against the Sixteenth District Judge's interpretation of its own ruling, determined that *Incidente de Inejecución* 82/2013 was baseless and that the SEGOB had not exceeded its authority in fulfilling the Sixteenth District Judge's order of January 31, 2013, by revoking the Permitholder-BIS Oficio.[875]
- The Peña Nieto administration illegally lobbied the Supreme Court to decline to exercise jurisdiction over the Claimants' motion for reconsideration (*recurso de inconformidad*) 406/2012 and remit the case to the same appellate court that had issued the decision that was the subject of the appeal to the Supreme Court.[876]
- The Supreme Court denied the Claimants access to justice and violated their procedural rights.[877]
- The Seventh Collegiate Tribunal upheld its prior decision, which was virtually unexplainable, and thus confirmed the Sixteenth Court's order of March 10, 2014, affirming the SEGOB's resolution to rescind *all* administrative resolutions issued to E-Games, including Permitholder-BIS Oficio that granted E-Games its casino permit.[878]

775. Each of the purportedly expropriatory measures identified above is directly related to the domestic judicial proceedings explained in Section II.L. *supra*, where demonstrates that none of these decisions were incorrect in accordance with domestic law or reached the level of denial of justice. The facts can be summarized as follows:

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873 *Id.*, ¶ 506, iv, item iii.

874 *Id.*, ¶ 506, iii.

875 *Id.*, ¶ 506, iv, Item iv.

876 *Id.*, ¶ 506, v.

877 *Id.*, ¶ 506, vi.

878 *Id.*, ¶ 506, vii.

- E-Mex challenged the constitutionality of the 2009-BIS Oficio issued in May 2009 (labeled by the Claimants as Independent Operator Oficio) and the acts derived from such *oficio*, through the amendment of Amparo 1668/2011 (that is, the third amendment).[879] E-Games participated in the amparo proceedings as an "interested third party" because the result could potentially affect its interests.
- E-Games challenged the admissibility of the third amendment but did not succeed and the extension was admitted. As a result, issuance of the 2009-BIS Oficio was admitted as a reclaimed act.[880]
- Subsequently, the amparo judge ruled that the 2009-BIS Oficio was unconstitutional and ordered SEGOB to annul it ["insubsistente"]. SEGOB did precisely that but E-Mex complained that SEGOB did not fully complied with the Sixteenth Court's judgment.[881]
- The Sixteenth Court sided with E-Mex and, as a result, ordered SEGOB to annul any act derived from Oficio 2009-BIS. Only then did SEGOB annul a series of *oficios*, including the Permitholder Oficio dated August 15, 2012, granting E-Games its own permit (E-Mex's permit) and Permitholder-BIS Oficio of November 16, 2012 (with the same permit number as E-Mex but ending in the termination BIS).[882] The relation between the 2009-BIS Oficio and Permitholder-BIS Oficio has been explained in detail in the fact section of this submission.[883]
- E-Games subsequently challenged the revocation of Permitholder-BIS Oficio, alleging that the SEGOB acted in excess of the order of the Sixteenth Court.[884] The domestic courts adjudicated E-Games' dispute and dismissed its challenge. SEGOB's actions were upheld by these tribunals.[885]

776. As can be seen, the Claimants are simply trying to relitigate before this Tribunal, issues that have already been decided by domestic courts. As explained in the section on denial of justice, *supra*, this Tribunal does not sit as a court of appeal and, therefore, it is not for this Tribunal to second guess Mexican courts in the correct application of Mexican law. Only a failure in Mexico's legal system as a whole (that is, a denial of justice) could give rise to international responsibility regarding decisions made by Mexican courts.

777. In addition, the Respondent submits that none of the decisions described by the Claimants as "illegal," "improper" or "irregular" are, in fact, illegal, improper, or irregular. In Dr. Mijangos'

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879 Section II.L.1.a *supra*.

880 Section II.L.1.b *supra.*

881 Section II.L.2.a *supra.*

882 *Id*.

883 Section II.I.2 *supra*.

884 Section II.L.3 *supra.*

885 *Id*.

words, the fact that a party disagrees with a court's decision does not mean that the decision is wrong:

> 33. In other words, both the procedure and the issuance of sentences within an amparo proceeding require, in most cases, the exercise of certain discretion by the judges. Not all the procedural assumptions of such trial are outlined at the constitutional and legal level and, even to date, the Supreme Court of Justice and the rest of the federal courts that hear the amparo proceedings, continue to issue criteria on cases where there are no clear rules from the applicable laws.
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> 34. Many of these matters are not resolved by unanimous votes of the collegiate jurisdictional bodies that hear these issues, which highlights that many aspects of the way in which an amparo proceeding is processed and resolved are debatable and questionable, without necessarily implying that any of the positions held are, per se, wrong in legal terms.
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> 35. In this sense, the fact that a certain position of an amparo judge is not fully shared does not, for that reason alone, reveal that the criteria is wrong or erroneous, while I reiterate that most of the procedural problems that arise in this trial are debatable due to their enormous complexity, the constant modification of the applicable laws, and the issuance of numerous criteria on the subject.
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> 36. For the purposes of this statement, I will not consider a jurisdictional determination to be wrong or erroneous in legal terms, simply because I do not fully agree with the criteria in question.
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> 37. On the contrary, the standard or parameter that I will apply will consist of concluding that a judicial decision falls under such an assumption -that is, of considering it "erroneous" in legal terms- when it is directly contrary to the Constitution, to the applicable laws -primarily the Amparo Law, the Organic Law of the Judicial Power of the Federation or the Federal Code of Civil Procedure- or to any criteria of jurisprudence that may be applicable and, therefore, binding in the specific case.[886]

778. Towards the end of his report, Dr. Mijangos concludes that none of the decisions adopted in the amparo proceedings is "erroneous" or contrary to applicable laws:

> 299. Once I have analyzed the records of the *amparo* proceedings whose subject matter dealt with the operation of and title to various permits related to betting centers and raffle halls, I conclude that the decisions in question are vested of legal and jurisprudential support, or that they are determinations made in cases where there is a margin of discretion, or in cases where there are divergent solutions, but the positions are valid in legal or argumentative terms.
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> 300. As I indicated at the beginning of this report, a judicial decision may be considered "*erroneous*" in legal terms only when it is directly contrary to the Constitution, the applicable laws, or certain criteria of jurisprudence that may be applicable and, therefore, binding in the concrete trial; aspects that I do not notice in

[886] Exhibit RER-1; expert report by Dr. Mijangos, ¶¶ 33 -37.

> this case and, therefore, I consider that none of the analyzed determinations fit in the case of a legal error or mistake.[887]

779. Putting aside the fact that the correctness of Mexican Courts' decisions in compliance with Mexican law is not properly before this Tribunal, it should also be borne in mind that the Claimants, at all times, had the opportunity to challenge the decisions, did challenge them and lost. As noted before, this is nothing more than an attempt to relitigate issues that have already been decided, in order to provide support for a denial of justice claim disguised as an expropriation claim.

b. The alleged delay in the issuance of the permit

780. At Paragraph 506 (i) of the Memorial, the Claimants argue that SEGOB's delay of over a year and a half in the issuance of E-Games' independent permit is one of the measures that constitute a "creeping expropriation." They argue that "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."[888]

781. The Respondent observes that the same allegation of "political motivation" that the Claimants attribute to the Calderón administration (from the PAN party) was also made against decisions adopted by Mrs. Marcela González Salas (during the PRI administration). The Claimants have not even tried to explain why two rival political parties would have any reason (political or otherwise) to harm the Claimants, nor have they presented any evidence that may prove that their decisions were indeed politically motivated. These are nothing more than unsubstantiated allegations.

782. SEGOB's decision to briefly delay the issuance of a new permit until E-Mex's permit was revoked is fully explained in the Oficio of November 18, 2011 (DGAJS/SCEV/546/2011). In that document, SEGOB recognizes that E-Games had fulfilled the requirements but explains that it would have to wait until E-Games' permit was revoked in order to keep the number of authorized casinos from increasing.

> Regarding the request of the petitioner to continue operating the establishments that it currently has authorized under the capacity of operator of the permit DGAJS/SCEVF/P-06/2005 issued in favor of the company Entretenimiento de México S.A. de C.V., it should be noted that since the permit holder has not set up the declaration of bankruptcy, and therefore the ground for revocation provided for Article 151, Section V is not updated; this Authority is not able to issue a final decision regarding the process of changing the status from operator to permit holder that concerns us. The above in view of the fact that such establishments are part of the Remote Betting Centers and Number Sweepstakes Rooms for which the aforementioned permit holder has a permit, so it is not appropriate for this Deputy Directorate-General to decide at this time on the reasons given, since the number of establishments would be increased, which is contrary to the policy of not encouraging the increase in the number of authorized establishments at

887 *Id.*, ¶¶ 299-300.

888 Memorial, ¶ 506 (i).

> present. Therefore, the change of status requested should result in equal or lesser number of those existing to date within the universe of said permit, and this can only happen until the update of the revocation of permit DGAJS/SCEVF/P-06/2005 issued in favor of the company Entretenimiento de México S.A. de C.V."[889] [Emphasis added]

783. Also, in this Oficio, SEGOB recognized that E-Games was in compliance, and therefore allowed it to "continue operating the establishments currently authorized under permit DGAJS/SCEVF/P-06-2005 (E-Mex's permit)":

> This Authority considers Exciting Games S. de R.L. de C.V., to be compliant with the requirements of Article 22, Section l, II, III, IV, VI, VIl, VIII, IX, X, XI and XII of the Regulations of the Games and Raffles to continue operating the establishments that it currently has authorized under the permit DGAJS/SEVF/P-06/2005.[890] [Emphasis added]

784. On June 14, 2012, E-Games informed SEGOB that E-Mex was declared in bankruptcy and, on August 15, 2012, SEGOB issued the Permitholder Oficio. As can be seen, once E-Mex was declared bankruptcy, the SEGOB promptly granted the request. There was no delay.

785. It bears noting that the Claimants acknowledge in their Memorial that SEGOB was not issuing new permits when E-Games applied for one.[891] This is further confirmed by the fact that the *oficio* by which the SEGOB granted E-Games its own permit (Permitholder Oficio of August 15, 2012), specifically states that the permit granted to E-Games was no other than E-Mex's permit (albeit limited to the number of casinos that E-Games operated under E-Mex's permit):

> Ownership of the acquired rights is determined and recognized, on the use and exploitation of the permit Number DGAJS/SCEVF/P-06/2005, dated on May 25, 2005, and its amendments, in favor of "Exciting Games S. de R.L. de C.V." in terms of the documents [oficios] … dated on May 27, 2009, DGAJS/SCEV/0260/2009-BIS, dated on May 27, 2009, … which specifically refer to (7) seven Remote Betting Centers and (7) Number Drawing Rooms. Recognized rights that cannot be infringed, regardless of any prior or precedent contractual relationship.[213] [Emphasis added] (FN 213 – C-254, p. 6)

786. In any event, it is hard to understand how the purported delay in the issuance of a permit that was afterwards granted and that allowed the continuous functioning of the Claimants' Casinos for almost two years could be interpreted as part of a creeping expropriation; particularly when the Claimants have not sued for any harm that arose from the purported delay and have not offered any proof of harm to their investments caused by such delay. It is a well-established principle that expropriation requires something being "taken" by a government authority. Besides, an

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889 Exhibit C-352, Resolution DGAJS/SCEV/546/2011, p. 4. The SEGOB's answer matches the newspaper article that the Claimants present in their Memorial (Exhibit C-366): "*After the fire at the Casino Royale in Monterrey, Nuevo León, where 52 people lost their lives, the Secretary of the Interior argued that "we will continue to regulate the industry by not granting more permits". In an interview… Blake Mora said that the Secretary of the Interior is reviewing all casinos and gambling houses in the country, in order to detect irregularities in their operation or update their operating data"*

890 Exhibit C-254, Oficio DGAJS/SCEV/546/2011, p. 6.

891 Exhibit CWS-50, Third Witness Statement by Mr. Burr, ¶ 35.

expropriation implies a final and definitive measure that causes irreversible and permanent deprivation. The taking must be permanent and not ephemeral or temporary.[892] In this case, no items of an expropriatory measure can be identified, simply because there are none. On the contrary, as previously explained, the SEGOB recognized, in the midst of the alleged "delay," that E-Games had fulfilled its obligations and it was able to continue operating its permits.

c. Closure of the casinos

787. The Memorial states that the Respondent deprived the Claimants of the use, value, and benefits of the investment by interfering with its operations and, also, that Mexico's various expropriatory actions include the following:

- Mexico illegally closed the Claimants' Casinos on April 24, 2014, and the closure was illegal because (a) the Claimants' appeal against the enforcement and execution of Amparo 1668/2011 had not been yet resolved and Mexican law establishes that the competent authorities cannot act against any party that is waiting for a final resolution; and (b) that there was a judicial order that implicitly impeded the SEGOB from acting against E-Games until the Amparo 1668/2011 proceedings had been definitively resolved.[893]
- Mexico illegally lifted the closure seals placed on the Claimants' Casinos without notifying the Claimants, returned the possession of the premises and the assets therein to individuals or companies other than E-Games, which led to the pilfering of the Claimants' remaining assets located inside the Casinos, and forbade the Claimants from accessing the Casino facilities and obtaining their property from within.[894]

788. The closure of the Casinos was just a consequence of the Claimants' violation of the law by continuing their operations without a permit. Once the Sixteenth Court issued its decision on March 10, 2014, determining that the SEGOB had complied with the amparo judgment, which included the revocation of E-Games' permit, the Claimants were *de facto* operating their Casinos without a valid permit. Under Mexican law, the SEGOB must close down all gaming establishments operating without a permit. Therefore, the closure of the Casinos was not illegal.[895] It was the duty of SEGOB to enforce the LFJS.[896]

789. Contrary to what the Claimants maintain, there was no legal impediment for the closure of the Casinos. As explained in the fact section of this document (Section II.M.3 *supra*), neither the appeal proceedings nor the judicial order impeded SEGOB from enforcing the LFJS. Indeed, the Claimants seem to agree with this conclusion because, after the Sixteenth Court determined that

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892 Exhibit RL-100, *Fireman's Fund Insurance Company v. Mexico*, CIADI Case No. ARB(AF)/02/01, Award, July 17, 2006, ¶ 176.

893 Memorial, ¶ 506 (viii).

894 *Id.*, ¶ 506 (ix).

895 Article 8 of the LFJS reads as follows. All open-air or enclosed establishments where prohibited gaming, gambling or lotteries are carried out without legal authorization, shall be closed by the Department of the Interior (SEGOB), without prejudice to any applicable penalities.

896 See Section II.M.1 *supra*.

the amparo judgment was complied with, on March 10, 2014, the Claimants applied for new permits on April 1st of the same year. Had there been any legal impediments (for example, a standing judicial order) for the closure of the Casinos, there would have been no need for the Claimants to request a new permit. The LFJS requires only one permit to operate a Casino, not two. Therefore, it is reasonable to conclude that the Claimants knew that, after March 10, 2014, they were in violation of LFJS by operating without a valid permit.

790. The Claimants' decision to continue the operation of their Casinos, after SEGOB complied with the amparo ruling on August 29, 2013, and even after March 10, 2014, is what exposed them to a violation of the LFJS. The Claimants' conduct must be compared to that of Megasport, a permitholder who also had its permit revoked. A few days after the SEGOB issued a resolution revoking Megasport's permit, this permitholder decided to close its 40 casinos in the entire country, which prevented the SEGOB from shutting them down. Megasport then challenged SEGOB's decision to revoke its permit before domestic courts.[897]

791. Regarding the allegation that Mexico illegally lifted the closure seals placed on the Claimants' venues without giving notice, Section II.O *supra* describes in detail that the SEGOB lifted the closure seals in compliance with court orders issued by different judges in judicial proceedings initiated by the owners of the properties where the Casinos were located.

792. The Claimants were aware that the owners were trying to reclaim their property a long time before the SEGOB lifted the closure seals. However, the Claimants were evasive during these legal proceedings. The Juegos Companies rented the property where the Casinos were located from several owners and, afterwards, subleased these properties to E-Games. After the closure of the Casinos, the owners started legal actions to recover their properties. The Juegos Companies were notified to appear before the courts, but the Claimants chose not to do so. In the case of the Villahermosa Casino, the owners informed the SEGOB that the Claimants had evaded service.[898]

793. The judicial proceedings ended, and the courts ordered SEGOB to lift the closure seals and return the properties to their rightful owners. One bank (Scotiabank) even sought and obtained a court order to recover the ATMs located inside the Casinos. Finally, the SEGOB executed the court orders and lifted the seals to allow the bank to recover its ATMs. While other companies adopted an active stance to seek and obtain judicial orders and reclaim their properties, the Claimants adopted a passive attitude (and, in some cases, even evasive). They now claim that SEGOB should have informed them of the lifting of the seals. This allegation is not credible.

794. In any case, the Claimants have not quantified the damages caused by the Casinos' closure and the lifting of the seals.

d. The Peña Nieto administration did not illegally lobby the Supreme Court

795. The Respondent denies that the Peña Nieto administration illegally lobbied the Supreme Court. Mr. Landgrave, former attorney of the SEGOB during the Peña Nieto administration and

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[897] See Section II.P.2 *supra*.

[898] See Section II.O.4 *supra*.

who was involved in Amparo 1668/2011, points out in his witness statement that the allegation is not credible. He was never consulted by the Office of the Legal Counsel to the Presidency (*Consejería Jurídica de la Presidencia*) regarding Amparo 1668/2011, including the motion for reconsideration. He also denies having received any instructions from the President's Office Legal Consultancy about how to behave or act before the courts regarding Amparo 1668/2011.

> In respect of the alleged influence that Humberto Castillejos, the President's Legal Counsel, had in the SCJN related to the appeal of non-conformity,[4] I think it is inconceivable that it occurred. This is so because I never received an instruction from the Presidential Legal Counsel or from a member of that team, or a request of information of that area in relation to the 1668/2011 amparo.[899] [Emphasis added]

796. If the President's legal counsel had any interest on the matter, Mr. Landgrave would have been aware of it, given his high office and position within the SEGOB regarding judicial proceedings. In the Federal Government, the President's legal counsel hierarchy makes it easy for that office to collect information (public and confidential), by communicating with the corresponding administrative unit to request reports or documents from the areas that are involved in any case in particular. In this regard, Mr. Landgrave testifies as follows:

> Supposing without conceding, that the President's Legal Counsel had an interest in the case, I would have known as SEGOB´s lawyer directly involved in the 1668/2011 amparo. The reason for the aforementioned is that the legal areas of the Ministries usually have communication with the Presidential Legal Counsel when there is a matter that is followed up or in which it is participating, either they ask for information or documents.[900] [Emphasis added]

797. Mrs. González-Salas, then General Director of the DGJS, also denies the existence of a political agenda against E-Games, much less a lobbying campaign to harm the Claimants because they were not PRI sympathizers, as the Claimants allege. Considering that Mrs. González-Salas was appointed General Director of DGJS at the beginning of the Peña Nieto administration, if there was a campaign against the Claimants, Mrs. González-Salas would have been key to its implementation. In that regard, Mrs. González-Salas states:

> This allegation is categorically rejected and is completely false. I never received any instructions or was given any order to harm E-Games or any other particular permitholder. In 2014, the Bureau I headed had closed 55 casinos from many different operators. As I said before, as detected in the initial 2013 diagnosis, we began to verify all gambling establishments. These actions were the result of the casino verification and legalization powers of the DGJS established by the LFJS. During my administration as General Director, I took on the task of legalizing the overall industry by taking the actions stated above and promoting a new legal framework."[901] [Emphasis added]

798. The reason why the Supreme Court declined jurisdiction over the motion for reconsideration is simple and Section L.3 *supra* of this document explains it in detail. In 2013, the

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899 Exhibit RWS-2, Witness Statement of Mr. Juan Raúl Landgrave Fuentes, ¶ 32.

900 *Id* ¶ 32.

901 Exhibit RWS-1, Witness Statement of Mrs. Marcela González, ¶ 13.

Supreme Court delegated its authority to decide on all motions for reconsideration to the Circuit Collegiate Courts, except in exceptional cases. Given the extraordinary nature of the standard, the submissions must be convincing in order to reach the "exceptional" threshold. The Supreme Court assessed the legal arguments presented by the Claimants and found that there were no exceptional circumstances that justified its intervention. Simply put, the Claimants were heard by the Supreme Court, but their arguments did not prevail.

799. The Claimants also argued that the Respondent's measures targeted them and E-Games in order to benefit local companies, especially Grupo Caliente. Mrs. González-Salas denies that the Peña Nieto administration intended to implement measures targeting the Claimants or their Casinos, much less to benefit local competitors such as Grupo Caliente:

> I deny that we had any political agenda to "divest the Claimants from their casinos" or "to benefit the president's political allies, the Hank Rhon family, owners of the Claimant's competitors in the gaming industry—Grupo Caliente." It is absurd to think that the cancelation of the E-Games permit on six establishments would benefit Grupo Caliente, because this group had roughly 77 authorized establishments, if I remember correctly, and their primary business area was Tijuana, Baja California. This allegation is illogical because E-Games had no presence in that part of the country.[902] [Emphasis added]

E. National Treatment

1. The Claimants' Position

800. The Claimants argue that the Respondent breached its duty to accord national treatment under Article 1102.[903] Specifically, the Claimants argue that: (1) any difference in treatment between domestic and foreign investors in like circumstances breaches Article 1102, absent any legitimate justification;[904] (2) the national treatment standard does not require intent to discriminate based on nationality;[905] and (3) once the Claimants establish the three-part test of the *UPS* award, the burden of proof shifts to the Respondent, who must provide public policy justification.[906] According to the Claimants, the three-part test works as follows: (1) determine whether there were *de jure* and *de facto* differences in treatment;[907] (2) whether there were "like circumstances" regarding the industry or economic sector, the competitive relationships and the regulatory regime;[908] and (3) whether there was less favorable treatment.[909]

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902 Exhibit RWS-1,Witness Statement of Mrs. Marcela González, ¶ 17.

903 Memorial, ¶¶ 689-692.

904 *Id.*, ¶ 693.

905 *Id.*, ¶¶ 695-697.

906 *Id.*, ¶¶ 698-701.

907 *Id.*, ¶¶ 705-706.

908 *Id.*, ¶¶ 713-725.

909 *Id.*, ¶ 726.

801. The Claimants allege that the Respondent breached Article 1102 to benefit local competitors such as: (1) Producciones Móviles, a Mexican-owned company that obtained a permit under "identical circumstances to E-Games";[910] (2) Petolof, a Mexican-owned company that obtained the independent operator status through the principle of "acquired rights";[911] (3) other companies owned by Mexican nationals in like circumstances were granted casino permits before and after the Claimants made the same request to the SEGOB in August, 2014.[912] In the Claimant's view, E-Games and the Mexican companies mentioned above are in like circumstances because they competed in the same casino industry and were subject to the same gaming Regulations.[913] As the Claimants have established that the three-part test of the *UPS* award was met, the onus shifted to the Respondent to demonstrate there was a justification for such discrimination.[914] In view of Respondent's inability to justify the discriminatory treatment given to the Claimants and their investments, it violated Article 1102.[915]

2. The Respondent's position

802. The Respondent submits that the Claimant has not met the three-step test established in *UPS*. Therefore, the onus of justifying the alleged differential treatment for reasons of public policy has not shifted to the Respondent. The Respondent emphasizes that the correct identification of adequate comparables is a multi-dimensional task under the national treatment standard. It requires the examination of all pertinent factors, such as commercial sectors, services provided, the applicable legal regime and the contractual autonomy of the parties. Despite the fact that the burden has not shifted to the Respondent to justify the alleged differential treatment, it nevertheless provides the underlying rationale for its policies.

803. The long-standing position of the Respondent on national treatment, which is entirely aligned with the two other NAFTA parties, has been summarized in its Article 1128 submission in *Mercer v. Canada*:

> The NAFTA Parties have repeatedly made submissions to common effect on the proper interpretation and application of NAFTA Articles 1102 and 1103, both in their own submissions in cases where they are the disputing Party, and in their Article 1128 submissions in cases where one of the other Parties is the disputing Party. Mexico, Canada, and the United States have consistently maintained that:
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> - the national treatment obligation is intended to prevent discrimination against investors of the other Parties (and their investments) on the basis of nationality;

910 *Id.*, ¶ 733.

911 *Id.*, ¶ 750.

912 *Id.*, ¶ 758.

913 *Id.*, ¶ 764.

914 *Id.*, ¶ 698.

915 *Id.*, ¶ 765.

- the claimant bears the onus of proving all of the items required to establish a breach of the national treatment obligation, and this onus does not shift to the respondent State simply because there is an apparent difference between the treatment accorded to the claimant and the treatment accorded to a domestic or third-party investor (or investment);

- the items of the Claimant are required to establish, […] are the following:

  i) that the respondent state has accorded "treatment" (i.e., a measure or measures, as defined in Article 201) to the claimant;

  ii) that such treatment is less favorable than the treatment accorded to domestic investors [and] their investments; and

  iii) that the less favorable treatment of the claimant (or its investment) was accorded "in like circumstances" to treatment accorded to domestic investors (or their investments) that the claimant identifies as comparators; or, put another way, that the claimant and the comparator(s) must be in like circumstances in the context of the measure(s) at issue.

Mexico agrees with the previous submissions of the United States and the current submissions of Canada that the existence or absence of "like circumstances" requires a careful analysis of all of the relevant facts and circumstances. Mexico observes that there may be cases where the claimant and the domestic comparators do not operate in the same business sector but are none the less in like circumstances in the context of the measure(s) at issue (e.g., a discriminatory tax on foreign-owned enterprises). However, there will also be cases where the claimant and the domestic comparator(s) are competitors but are not in like circumstances in the context of the treatment at issue upon taking into account (inter alia) differences in the operations of the comparators (or their investments), the applicable regulatory regime, contractual terms, relative timing of the measures at issue, environmental conditions, specific market conditions, local needs or requirements, and all manner of other differences that may serve to distinguish the treatment that was accorded on either side.

Mexico agrees with Canada that the analysis under NAFTTA Articles 1102 and 1103 is an analysis of the "treatment" accorded to the claimant versus the "treatment" accorded to domestic or third-party investors. The question is whether the "treatment" was accorded in like circumstances, not whether the "investments" are in like circumstances.

Mexico also agrees with Canada that a Claimant must do more than prove a prima facie violation of Articles 1102 and 1103. The burden does not shift to the respondent state to defend the appearance of differential treatment on rational governmental policy grounds. It is the claimant's burden to prove that it has been accorded less favorable treatment in like circumstances to other domestic or third-party investors on the basis of nationality. Moreover, NAFTA tribunal should accord significant deference to governmental policy making. It is not the role of a tribunal to sit retrospectively in judgment against the discretionary exercise of sovereign power "not made irrationally and not exercised in bad faith."

Mexico further affirms that a NAFTA tribunal should only find a breach of Article 1102 where the impugned measure facially discriminates on the basis of nationality, or where

> it properly can be inferred in all of the circumstances that a facially neutral measure has the effect of discriminating against foreign investors as a class with no rational or good faith policy objectives. Mexico adds that such a finding will be mostly unlikely in situations where the treatment accorded to domestic investors is not materially different to that accorded to other foreign investors, particularly other investors of the claimant's home State.[916]
>
> [Emphasis added]

804. The Respondent will now demonstrate that the Claimants have failed to fulfill the three-step test pursuant to Article 1102. In particular, they failed to identify adequate comparables and they have failed to establish that less favorable treatment was accorded. The Respondent will address the case law on this issue presented in the Claimants' Memorial.

a. The claimants failed to satisfy the three-step test per Article 1102 as established in the *UPS* award

(1) The *UPS v. Canada* award establishes that the Claimants bear the burden of proving the existence of "treatment," "like circumstances" and "less favorable treatment"

805. The tribunal in *UPS* established the following three-step test:

> a) The foreign investor must demonstrate that the Party [Canada] accorded treatment to it [the Claimant or UPS Canada] with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investment.
>
> b) The foreign investor or investment must be in like circumstances with local investors or investments; and
>
> c) The NAFTA Party must treat the foreign investor or investment less favorably than it treats the local investors or investments.[917]

806. The tribunal in *UPS* emphasized that the burden of proving "like circumstances" is on the investor. It is not the responsibility of the Respondent to prove the absence of "like circumstances."

> Failure by the investor to establish one of those three items will be fatal to its case. This is a legal burden rests squarely with the Claimant. The Burden never shifts to the Party, here Canada. For example, it is not for Canada to prove an absence of like circumstances between UPS Canada and Canada Post regarding article 1102.[918]

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916 Exhibit RL-069, Submission of Mexico Pursuant to Article 1128 of NAFTA in *Mercer International Inc v. Government of Canada*, CIADI Case No. ARB(AF)/12/3, May 8, 2015, ¶¶ 11-15.

917 Exhibit RL-070, *United Parcel Service of America Inc. v. Government of Canada*, CIADI Case No. UNCT/02/1, "Award on the Merits," May 24, 2007, ¶ 83.

918 *Id.*, ¶ 84.

807. The tribunal in *UPS* also added that all relevant circumstances must be considered for this evaluation:

> The Tribunal must now determine whether Canada Post and UPS are "in like circumstances with respect to" the Customs treatment accorded to them. This determination will require consideration by the Tribunal of all the relevant circumstances in which the treatment was accorded.[919]
>
> [Emphasis added]

808. In this regard, the tribunal in *UPS* dismissed the investor's claim by virtue of Article 1102 because the investor and the comparable were under different legal regimes.[920]

b. The claimants did not determine an adequate comparison in "like circumstances" in the multi-dimensional threshold test

809. The Claimants failed to ascertain the proper comparator or comparators in "like circumstances" as per the multi-dimensional threshold test indicated in investment arbitration jurisprudence. The multi-dimensional threshold requires the Tribunal to examine all circumstances, not only the economic sector (*Merrill & Ring, Apotex*), in the comparison. The proper legal approach emphasizes the importance of applicable legal regimes (*Grand River, Apotex*) and the specific measures in question (*Mercer*). It also weighs the contractual autonomy of the parties (*Parkerings*).

(1) All circumstances must be considered

810. The Tribunal in *Merrill & Ring v. Canada* held that "like circumstances" cannot be simply determined by the economic sector; multiple factors must be considered:

> This explains why NAFTA tribunals have, on a number of occasions, considered various factors in assessing whether investors are "in like circumstances," as evidenced by the references noted above to S.D. Myers, UPS, and Pope & Talbot. The environment, trade, the nature of services and functions, and public policy considerations are found among such factors. This also explains why it is not enough on occasions to undertake the comparison solely in the same sector of economic activity and it might be necessary, as in Occidental, to consider whole sectors of the economy and business.[921]
>
> [Emphasis added]

811. Similarly, the tribunal in *Apotex* reached the following conclusion:

> The Parties accept that the determination of whether NAFTA claimants are in "like circumstances" with the relevant investors or investments (as "comparators") involves a highly fact-specific inquiry. The Parties also accept that it is appropriate in the

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919 *Id.*, ¶ 87.

920 *Id.*, ¶¶ 87-120.

921 Exhibit CL-124, *Merrill and Ring Forestry L.P. v. Canada*, CIADI Case UNCT/07/1, "Award," March 31, 2010, ¶ 88.

> identification of comparators which are in "like circumstances" to look at, inter alia, whether those which are said to be comparators: (i) are in the same economic of business sector; (ii) have invested in, or are businesses that compete with the investor or its investments in terms of goods or services; or (iii) are subject to a comparable legal regime or regulatory requirements, as the Claimants and their investments.[922]

(2) The legal regime is a considerable factor

812. The G*rand River* tribunal determined that the legal system is a significant factor when evaluating "like circumstances" under Article 1102. It succinctly summarized the NAFTA jurisprudence that emphasizes the importance of distinctive legal regimes when evaluating "like circumstances":

> In this regard, NAFTA tribunals have given significant weight to the legal regimes applicable to particular entities in assessing whether they are in "like circumstances" under Articles 1102 or 1103. While each case involved its own facts, tribunals have assigned important weight to "like legal requirements" in determining whether there were "like circumstances." The ADF tribunal thus emphasized that both the claimant and its U.S. competitors were subject to the same U.S. "Buy America" provisions. Pope & Talbot found that the relevant comparators were lumber exporters subject to the same restrictive legal regime as the claimant, so there was no denial of national treatment if exporters in other unregulated provinces were not so limited. Feldman v. Mexico found the relevant comparators for purposes of MFN analysis to be a limited group of cigarette exporters subject to the same legal requirements as the claimant. The Methanex tribunal (citing Pope & Talbot) emphasized the importance of assuring that purported comparators face similar regulatory requirements. Looking at the question from the other direction, UPS v. Canada found a key difference between the parties there to be that Canada Post was subject to legal requirements under national law and international postal agreements that did not affect UPS.
>
> The reasoning of these cases shows the identity of the legal regime(s) applicable to a claimant and its purported comparators to be a compelling factor in assessing whether like is indeed being compared to like for purposes of Articles 1102 and 1103. [923]
>
> [Emphasis added]

813. In *Apotex*, the tribunal dismissed the investor's submission that the three proposed comparators were under "like circumstances" with the investor and the investment.[924] The tribunal determined that, when the investors and the comparators are in the same industry sector, the legal regime is important for the comparison. It held that it is not surprising that the United States' legislation treats national and foreign investors differently:

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922 Exhibit CL-174, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, CIADI Case No. ARB(AF)/12/1, "Award (Redacted)," August 25, 2014, ¶ 8.15.

923 Exhibit CL-213, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, "Award (Redacted)," January 12, 2011, 166-167.

924 Exhibit CL-174, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, CIADI Case No. ARB(AF)/12/1, Award (Redacted), August 25, 2014, ¶ 8.40.

> It is common ground that all of the three domestic comparators proposed by the Claimants were in the same sector as the Claimants, sold like drug products to those sold by Apotex Inc., and were direct competitors in the US market. In these circumstances, in the Tribunal's view, the question of whether the Claimants and their investments were subject to the same legal regime or regulatory requirements (to those to which the identified US-comparators were subject) becomes an important potential differentiator.
>
> […]
>
> Unsurprisingly, the relevant law and practice recognise and provide for differences between domestic and foreign facilities as regards the inspection by the FDA of such facilities, and the tools available to the FDA for the enforcement of the cGMP standard.[925]

814. The *Apotex* tribunal determined that there was no breach of Article 1102 because adequate comparators did not exist under the same legal regime.[926]

(3) Specific measures under question must be compared between comparators

815. The *Mercer* tribunal found that investors bear the burden of proving that the treatment that they or their investors received was in "like circumstances" to the treatment given to the comparable, regarding the specific measures in question:

> Like Circumstances: The next question faced by the Tribunal is whether it is required to determine whether it is the investor or the treatment received by the investor that is to be "in like circumstances."
>
> The Claimant's submissions focus on the circumstances of the investor. The Respondent contends that that is inappropriate and contrary to the plain wording of NAFTA Articles 1102 and 1103, which require the Claimant to prove that the treatment accorded to the investor or its investments was "in like circumstances." In its submission made under NAFTA Article 1128, Mexico agrees with the Respondent on this issue.
>
> The Tribunal agrees with the Respondent and with Mexico. In its view, the clearest explanation of the position is found in the NAFTA award in Cargill v Mexico:
>
> > "*Thus, in both GAMI and Pope & Talbot, 'like circumstances' was determined by reference to the rationale for the measure that was being challenged. It was not a determination of 'like circumstances' in the abstract. The distinction between those affected by the measure and those who were not affected by the measure could be understood in light of the rationale for the measure and its policy objective. Indeed, it is possible that in respect of other, different measures, the mills in GAMI and the lumber producers in Pope & Talbot could have been found to be in "like circumstances"…*"

925 *Id.*, ¶ 8.43, 8.45.

926 *Id.*, ¶¶ 8.56-8.58.

> In this case, therefore, the question for the Tribunal is whether Celgar's treatment is in "like circumstances" with any comparator with respect to the particular measures in question.[927]
>
> [Emphasis added]

(4) Contractual autonomy is another item to be considered in "like circumstances"

816. The tribunal in *Parkerings v. Lithuania* confirmed that contractual autonomy is another important factor when determining "like circumstances":

> Entering into agreements is subject to party autonomy and no one may be forced to contract. Under conditions changing from one law to another, parties may conclude framework agreements and define conditions under which they will have to enter into such agreement. Even when the legislation recognizes the enforceability of such obligation to contract, party autonomy will still play its part in the negotiation and conclusion of the agreements. In casu, the City of Vilnius is a public entity and thus has to act with the defence of public interests as its main yardstick. Public interest does, of course, depend on the policy of the administration running the public entity at any particular time. Thus, it is a difficult endeavour to show discrimination in a public entity entering into an agreement with a certain person and refusing to conclude a similar agreement with another party.[928]

(5) The claimants and the identified comparators are not in "like circumstances"

817. The Claimants and the identified comparators are not in "like circumstances" based on the threshold test described above, that is, legal regimes, specific measures applied to investors and comparators and the terms of the agreements. Unlike E-Games' Permitholder Oficio and Permitholder-BIS Oficio, the permit of Producciones Móviles did not stem from the 2009-BIS Oficio and, more importantly, E-Mex did not challenge a similar *oficio* related to Producciones Móviles. As explained in Section II.L *supra*, the revocation of E-Games' Permitholder Oficio and Permitholder-BIS Oficio was not an isolated act. The permit was revoked as a consequence of the enforcement of a judicial order because it was an act that derived from the 2009-BIS Oficio, which was declared unconstitutional. Thus, whether the permits of E-Games and Producciones Móviles were similar is irrelevant.

818. SEGOB did not act in a discretional or discriminatory manner with the intention to harm E-Games. The SEGOB simply complied with a court order and the courts determined that SEGOB duly complied with the judgment in Amparo 1668/2011.

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927 Exhibit CL-208, *Mercer International Inc v. Government of Canada*, CIADI Case No. ARB(AF)/12/3, "Award," March 6, 2018, ¶¶ 7.18-7.21.

928 Exhibit CL-171, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Republic of Moldova*, CIADI Case No. ARB/03/29, "Award," August 27, 2009, ¶ 402.

819. The Claimants refer, without an explanation, to the purported competitive relationship between E-Games and Producciones Móviles in the following terms: "had the Claimants' Casinos not been closed, E-Games and Producciones Móviles would have competed in some of the same geographic areas."[929] In any case, the Claimants make reference to a future competitive relationship that would take place "in the same geographic[al] areas," and not to a real circumstance.

820. Petolof was not in like circumstances either. Section II.T.3 *supra* explains in detail that the Petolof permit was granted in compliance with a judicial order. In this sense, the SEGOB did not grant that permit at its own discretion.

821. Finally, the Claimants point out that the Respondent breached the National Treatment obligation when it rejected E-Games' requests for new permits for their Casinos by virtue of the venues being closed, even though "operating casinos has never been a requirement for the granting of a permit under the Gaming Regulation."[930] Section II.P. *supra* explains that the permit applications were denied, among other reasons, because they had been closed down, not because it was "required" for the Claimants for the establishments to be open. The closure of the Casinos resulted from their operation without a valid permit, which is in clear violation of the LFJS (see Section II.M.1 *supra*).

822. The Claimants refer to several companies that obtained permits after the enactment of the RLFJS in 2004.[931] However, there is no evidence that these companies where in the same circumstances as the Claimants. That is, they requested a permit from the SEGOB to operate certain establishments that were closed due to violation of the LFJS. The Claimants' position is so abstract that, if accepted, it would imply that all companies that obtained a permit since 2004, to this date, would automatically be in like circumstances.

823. The Claimants also make reference to the case of another company (Pur Umazal) that obtained a permit without having an "open and operational facility."[932] Furthermore, the Claimants point out that the establishments that were authorized to this company belonged to another company (Megasport), whose permit had been revoked by the SEGOB.[933] However, the Claimants once again make a faulty comparison because the difference is, once more, that the Claimants' Casinos had been closed for violation of the LFJS, a situation that the Claimants did not corroborate that took place in the Megasport and/or Pur Umazal case.

824. On the other hand, another difference that must be highlighted is that, as a result of the revocation of its permit, Megasport closed its casinos, thus preventing closure by the SEGOB. In this case, Pur Umazal and the Claimants were not in the same situation. On the contrary, the Claimants decided to keep operating their Casinos without a permit, even when this constituted a clear violation of the LFJS.

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929 Memorial, ¶ 734.

930 *Id.*, ¶ 758.

931 *Id.*, ¶ 759.

932 *Id.*, ¶ 760.

933 See Section II.P.2 *supra*.

825. The Respondent reiterates that the E-Games permit was declared null and void as a consequence of enforcing a judicial order in an amparo proceedings filed by a third party (i.e., E-Mex).

c. The claimants have failed to establish the existence of "less favorable treatment"

826. To prevail in a national treatment claim, the Claimants bear the burden of establishing that they received a "less favorable treatment" when compared to the identified comparators. In this case, even if the Tribunal were to determine that the Claimants and the identified comparators are in "like circumstances," the Claimants did not receive less favorable treatment.

d. In any event, the Respondent's measures are justified by its long-standing public policy concerning the gaming industry

827. In the event that the Tribunal finds that the Claimants received a less favorable treatment when compared to a local investor in like circumstances, the Tribunal still must consider whether the differences can be justified by rational government policy. As the tribunal in *Pope & Talbot* 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.[934]

e. The Claimants' flawed reading of the jurisprudence

828. In the Memorial, the Claimants cite the *Bilcon* and *S.D. Myers* cases to argue that investment tribunals have applied stringent standards when justifying government policy.[935] The Claimants also cite *S.D. Myers, ADM* and *CPI* to argue that the existence of a competitive relationship can point to a finding of "like circumstances," even if the investor and the identified comparators do not operate in the same manner.[936] The Claimants further relied on *Bilcon* to argue that the comparison between legal regimes must be made in a non-restrictive manner.[937]

829. The Respondent will now address the Claimants' problematic characterization of the aforementioned jurisprudence.

(1) *Bilcon* does not suggest a non-restrictive interpretation of Article 1102

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934 Exhibit CL-210, *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, "Award on the Merits of Phase 2," April 10, 2001, ¶ 78.

935 Memorial, ¶ 702.

936 *Id.*, ¶¶ 717-718.

937 *Id.*, ¶¶ 721-725.

830. The Claimants argue that the *Bilcon* Tribunal interpreted Article 1102 in a non-restrictive manner based on the following observation:[938]

> 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."[939]

831. The tribunal in *Bilcon* qualified the aforementioned observation according to the factual and regulatory context of the case:

> Cases of alleged denial of national treatment must be decided in their own factual and regulatory context. In the present case, what is at issue is whether the Investor was treated less favorably for the purpose of an environmental assessment. The federal Canada law in question, the CEAA, is one of very general application. It applies the "likely significant adverse effects after mitigation" standard of assessment as a necessary component of environmental review across a wide range of modes and industries, including any marine terminals or quarries that are assessed under its provisions.[940]
>
> [Emphasis added]

832. Under the guiding principle that each case should be examined in its own factual and regulatory context, the tribunal in *Bilcon* dismissed the investor's argument that the "NAFTA Tribunal should consider all enterprises affected by the environmental assessment regulatory process in like circumstances with Bilcon." In its view, such an approach "would commit this Tribunal to a more abstract and sweeping proposition than is necessary to decide this case."[941] Consequently, the *Bilcon* tribunal determined that three national investors qualified as comparators under the framework analysis of "likely significant adverse effects after mitigation."[942]

833. No part of the *Bilcon* case award suggests that the tribunal applied an exacting standard on the host State's policies, as the Claimants presented.[943] The *Bilcon* tribunal rejected the justification of Canadian policy, not because it passed a high threshold test, but because it considered that the "community core values" presented by Canada did not constitute a "rational government policy," and also because they were against the legislation and policies of Canadian

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938 *Id.*, ¶ 722.

939 Exhibit RL-010, *Bilcon of Delaware et al. v. Government of Canada*, PCA Case No. 2009-04, "Award on Jurisdiction and Liability," March 17, 2015, ¶ 692, cited in the Memorial, ¶ 722.

940 *Id.*, ¶ 694.

941 *Id.*, ¶ 695.

942 *Id.*, ¶ 696.

943 Memorial, ¶ 702.

federal laws by virtue of its analysis of Article 1105.[944] The Respondent referred to this portion of the *Bilcon* decision only to prove that the tribunal in *Bilcon* did not set any "strict" criterion for the "revision" of the justification of the policies of the host State. The Respondent does not agree with the previous suggestion of the *Bilcon* tribunal that an international arbitration tribunal may judge the internal policies of a nation under Article 1102 based on an alleged violation of or inconsistent national law pursuant to Article 1105.

(2) The Claimants are responsible for proving less strict measures and practices for the host state to apply its legitimate policies

834. The Claimants cite *S.D. Myers* to argue that "where the government has the option to achieve its policy objectives through less-discriminatory means, the choice to not do so violates NAFTA Article 1102."[945] The tribunal in *S.D. Myers* ruled that the host State must use less strict measures to achieve its legitimate policy objectives, if there are any:

> CANADA was concerned to ensure the economic strength of the Canadian industry, in part, because it wanted to maintain the ability to process PCBs within Canada in the future. This was a legitimate goal, consistent with the policy objectives of the Basel Convention. There were a number of legitimate ways by which CANADA could have achieved it but preventing SDMI from exporting PCBs for processing in the USA by the use of the Interim Order and the Final Order was not one of them. The indirect motive was understandable, but the method contravened CANADA's international commitments under the NAFTA. CANADA's right to source all government requirements and to grant subsidies to the Canadian industry are but two examples of legitimate alternative measures. The fact that the matter was addressed subsequently, and the border re-opened also shows that CANADA was not constrained in its ability to deal effectively with the situation.[946]

835. The Respondent affirms that, as a sovereign State, it possesses wide discretional faculties to pursue its legitimate policy objectives through diverse measures by virtue of national and international law. It corresponds to the Claimants to establish the existence of any less strict and practical measures through which the host State can achieve its policy objectives.

(3) *S.D. Myers, ADM,* and *CPI*

836. The Claimants cite *S.D. Myers*, *ADM,* and *CPI* to argue that the foreign investor and the local comparable do not need to operate in the exact same way.[947]

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944 Exhibit RL-010, *Bilcon of Delaware et al. v. Government of Canada*, PCA Case No. 2009-04, "Award on Jurisdiction and Liability," March 17, 2015, ¶ 724.

945 Memorial, ¶ 703.

946 Exhibit CL-30, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, "Partial award," November 13, 2000, ¶ 255.

947 Memorial, ¶¶ 717-719.

837. The three cases can be distinguished from the case in this arbitration. In the case of *S.D. Myers*, the tribunal ruled as follows:

> 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. [948]

838. The Claimants erroneously argue that, according to *ADM*, less like comparators may substitute identical comparators if they exist.[949] The Claimants failed to provide the tribunal's finding that fructose and sugar cane producers "compete face-to-face in the same market."[950] The tribunal cautioned that comparators with less resemblance can only be used when identical comparators do not exist and the general circumstances of the case indicate that they are in like circumstances.[951] In other words, when identical comparators can be found, the tribunal cannot use comparators with lesser resemblance.

839. The Claimants rely on the *CPI* case to further their argument that comparators with lesser resemblance may substitute identical comparators when the latter do exist.[952] That was not what the tribunal in *CPI* ruled. The *CPI* tribunal ruled that sugar and HFCS were in like circumstances because national and foreign producers operated in the same business or sector of the economy, compete with each other for customers and are considered as exchangeable by the Mexican legislation.[953]

840. In this case, E-Games is not in like circumstances to Producciones Móviles for the simple reason that the 2009-BIS Oficio, that was revoked pursuant to the Amparo 1668/2011 judgment, only applied to E-Games and not to Producciones Móviles. SEGOB could not revoke the permit of Eventos Festivos per Amparo 16668/2011 because that would have constituted excess compliance. This is the explanation that the Claimants identify as differential treatment: E-Games and Producciones Móviles were in different circumstances.

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948 Exhibit CL-30, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, "Partial award," November 13, 2000, ¶ 251, cited in Memorial, ¶716.

949 Memorial, ¶¶ 717-718.

950 Exhibit CL-86, Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico, CIADI Case No. ARB (AF)/04/5, Award, November 21, 2007, ¶ 202.

951 *Id.*

952 Memorial, ¶ 719.

953 Exhibit CL-204, *Corn Products International, Inc. v. Mexico*, CIADI Case No. ARB (AF)/04/1, "Decision on Responsibility (Redacted)," January 15, 2008, ¶ 120.

F. Most-Favored-Nation treatment

1. The Claimants' position

841. The Claimants argue that Article 1103 allows the importation of more favorable conditions from third-country investment agreements, such as the unqualified and autonomous FET standard,[954] prohibiting discriminatory measures,[955] denial of justice,[956] and the obligation to grant sympathetic consideration.[957]

2. The Respondent's position

a. The correct application of Article 1103 does not allow for the importation of standards from other treaties as the Claimants purport

842. The Claimants support their argument concerning the importation of standards from other treaties based on a generalized concept of the obligation to provide MFN[958] treatment that ignores the specific scope of Article 1103. The Claimants' position would imply the "automatic" importation of any standard included in another treaty, thus annulling the scope and limitations of Article 1103 on which the NAFTA Parties expressly agreed. Such is the case with the exceptions to Article 1103 foreseen in Article 1108, for example.

843. The Respondent maintains that Article 1103 cannot be used to import standards from other treaties into the NAFTA or be used as an excuse to evade any of the treaty's provisions (i.e., Article 1108). Article 1103 applies to real cases of "treatment" given to one or more investor of a third country, or their investments, that is more favorable than the treatment given, in like circumstances, to the Claimants or their investments. Therefore, the fact that another treaty may hypothetically set out a different treatment is not enough to establish that Article 1103 was breached.

844. Canada expressed a similar position in *Mesa Power Group, LLC v. Government of Canada*:

> In making this argument, the Claimant has not even attempted to meet its burden of demonstrating that the requirements of Article 1103 have been met. In particular, it has made no effort to show comparable treatment accorded in like circumstances to investors under the Canada-Czech Republic FIPA, or that the treatment it received was less favourable than that received by a Czech Republic investor. It is not enough to establish a violation of Article 1103 to simply point to different language in another

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954 *Id.*, ¶ 779.

955 *Id.*, ¶ 781.

956 *Id.*, ¶ 783.

957 *Id.*, ¶¶ 785-786.

958 Memorial, ¶ 777 ("[T]he 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 in Mexico is particularly relevant, since the Claimants can avail themselves of the protection of the MFN obligation in Article 1103 by reference to other investment treaties into which Mexico has entered.")

> treaty. Article 1103 is not a tool through which an investor can choose the language it prefers from Canada's various investment agreements. To prove a breach of Article 1103, the Claimant has the burden of providing evidence of actual – not hypothetical – treatment of an investor of a third party to the dispute. Otherwise, it would be impossible for the Tribunal to answer the necessary factual questions, such as whether the treatment was in fact "more favourable" and whether it was accorded in "like circumstances." The Claimant has failed to provide any evidence that it was accorded treatment, in like circumstances, that was less favourable than the treatment accorded to an investor covered under the Canada-Czech Republic FIPA. For this reason alone, this argument should be rejected.[959] [Emphasis added]

845. The Claimants attempt to apply, through Article 1103, Article 2.3 of the bilateral investment treatment between Mexico and Finland, which states that:

> Each Contracting Party shall, within their legal framework, empathetically consider applications for necessary permits relating to investments made within their territory, including authorizations to employ management and technical personnel of their choice originating from abroad.[960]

846. Based on this provision, the Claimants point out that as "there is no comparable provision relating to the granting of permits in the NAFTA…, by way of NAFTA Article 1103, the Claimants are entitled to the benefit of 'sympathetic consideration' available to the investors of Finland."[961] The Claimants do no more than identify the absence of a provision similar to Article 2.4 in the NAFTA to "automatically" analyze the conduct of the Respondent regarding the Claimants' request for permits, and then they reach the conclusion that the Respondent is in breach of Article 2.4. This position ignores the burden of proof carried by the Claimants, who must prove a real case of treatment in breach of Article 1103; instead, the Claimants only identify a "hypothetical" application of treatment. Therefore, the Respondent holds that the Claimants have not proven a violation of Article 1103.

b. The MFN standard in Article 1103 does not modify or alter the contents of the FET obligations established in Article 1105(1)

847. The Respondent affirms that Article 1103 is irrelevant for the application of Article 1105(1) and, therefore, the NAFTA, through Article 1103, cannot be interpreted to provide an autonomous FET standard, the treatment standard that forbids discriminatory measures and the obligation to grant "sympathetic consideration." The NAFTA Parties, through the Free Trade Commission, adopted a binding interpretation of the scope of Article 1105(1).

> 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

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959 Exhibit RL-109, *Mesa Power Group, LLC v. Government of Canada*, Case No. PCA 2012-17, "Rejoinder on the Merits," July 2, 2014, ¶ 42.

960 Exhibit CL-228.

961 Memorial, ¶ 786.

> 2. 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 the customary international law minimum standard of treatment of alien.[962]

848. Given the above, Article 1103 is not relevant for the interpretation of Article 1105(1).

849. The United States summarized the joint position of the NAFTA Parties when, in the submission presented in *Chemtura* pursuant to NAFTA's Article 1128, it said that Article 1103 is not pertinent for the interpretation of Article 1105(1).

> Here, all three NAFTA Parties jointly and expressly issued a binding interpretation on the scope of the fair and equitable treatment obligation under Article 1105(1). Moreover, all three Parties later confirmed, through subsequent submissions commenting on that interpretation, that the MFN obligation under Article 1103 did not alter the substantive content of the fair and equitable treatment obligation under Article 1105(1).
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> In a submission to the Pope & Talbot tribunal, in a section entitled "Implications of Article 1103," Canada stated that "Article 1103 can no longer be relevant or constitute an issue with respect to the interpretation of Article 1105, as the interpretation of the latter is set out in the Note of Interpretation, which is binding on the Tribunal." Canada further stated that "Article 1131(2) interpretations bind tribunals in stating the governing law, and the NAFTA cannot operate so as to create a conflict between Article 1103 and the interpretation."
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> [...]
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> Mexico and the United States agreed with Canada's position. In an Article 1128 submission, Mexico informed the Pope & Talbot tribunal that it "fully concurs with Canada in the views expressed in Canada's letter . . . to the Tribunal regarding the NAFTA Free Trade Commission's interpretation" and "also concurs with Canada that Article 1103 cannot be relevant to, or constitute an issue with respect to, the interpretation of Article 1105."
>
> In its own Article 1128 submission, the United States similarly informed the Pope & Talbot tribunal that it "fully concurs with Canada in the views expressed in Canada's letter . . . regarding the NAFTA Free Trade Commission's interpretation" and "also concurs with Canada that Article 1103 cannot be relevant to, or constitute an issue with respect to, the interpretation of Article 1105."
>
> The NAFTA Parties thus unanimously agreed that the MFN obligation under Article 1103 did not alter the substantive content of the fair and equitable treatment obligation under Article 1105(1).[963]
>
> [Emphasis added]

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962 Exhibit RL-054, Note of Interpretation of the NAFTA Free Trade Commission, July 31, 2001 (https://www.gob.mx/cms/uploads/attachment/file/1755/inter_CLC_ingles.pdf)

963 Exhibit RL-071, "Submission of the United States of America" in *Chemtura Corporation v. Government of Canada*, UNCITRAL, July 31, 2009, ¶¶ 5-9.

850. In the submission presented for *Chemtura* pursuant to Article 1128, Mexico stated that Article 1103 has no legal implications for Article 1105(1).

> Mexico has reviewed the submission of the United States of America dated 31 July 2009 which makes reference to submissions made by Canada, the United States and Mexico to the Pope & Talbot tribunal.
>
> Mexico continues to hold view that Article 1103 cannot be relevant to, or constitute an issue with respect to, the interpretation of Article 1105.
>
> Mexico thus agrees that the MFN obligation under Article 1103 cannot alter the substantive content of the fair and equitable treatment obligation under Article 1105(1).[964]

851. The Claimants misconstrued the conclusions of the tribunals in *ADF v. United States* and *Chemtura v. Canada*.[965] Both tribunals clearly found that Article 1103 has no impact on the functioning of NAFTA's Article 1105(1).

852. In *ADF*, the investor argued that the pertinent provisions in the treaties between the United States and Albania and the United States and Estonia afford investors from Albania and Estonia better treatment than the treatment given to Canadian investors in the United States by virtue of Article 1105(1), in accordance with the interpretation of the FTC.[966] The tribunal in *ADF* determined that the investor did not establish the existence of an autonomous FET rule and, hypothetically, even if it did exist, *ADF* did not establish such a breach by the United States.[967] Consequently, the tribunal in *ADF* concluded that:

> Assuming, once more, for purposes of argument merely, that the U.S.-Albania and U.S.-Estonia treaties do provide for better treatment for Albanian and Estonian investors and their investments in the United States, than the treatment to which the Investor is entitled in the United States under NAFTA Article 1105(1), the Investor still has not thereby shown violation of Article 1103 by the Respondent.[968]

853. In the end, the *ADF* tribunal dismissed the claim based on Article 1103.[969]

854. In *Chemtura v. Canada*, the investor attempted to import a more favorable FET clause from another treaty entered into by Canada pursuant to Article 1103.[970] The tribunal in *Chemtura* rejected this attempt based on the submissions presented by NAFTA's three Parties.

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964 Exhibit RL-072, "Submission of Mexico Pursuant to Article 1128 of NAFTA" in *Chemtura Corporation v. Government of Canada*, UNCITRAL, July 31, 2009, ¶¶ 3-5.

965 Memorial, ¶¶ 744-746.

966 Exhibit CL-18, *ADF Group Inc. v. United States of America*, CIADI Case No. ARB(AF)/00/1, "Award," January 9, 2003, ¶ 193.

967 *Id.*, ¶ 194.

968 *Id.*, ¶ 196.

969 *Id.*, ¶ 198.

970 CL-21, *Chemtura Corporation v. Government of Canada*, UNCITRAL, "Award," August 2, 2010, ¶ 233.

> This said, the Tribunal turns to the alternative claim that the Claimant's investment was treated in breach of a more favorable FET clause applicable through Article 1103 of NAFTA. The Respondent as well as the United States and Mexico in their Article 1128 interventions (US Submission, 31 July 2009; Mexico's Submission, 31 July 2009) firmly oppose of the possibility of importing a FET clause from a BIT concluded by Canada. The Tribunal can dispense with resolving this issue as a matter of principle. Indeed, even if it were admissible to import a BIT FET clause, the conclusions reached by the Tribunal on the basis of the facts would remain unchanged.[971]
>
> [Emphasis added]

855. Consequently, the tribunal in *Chemtura* dismissed the investor's claim of an Article 1103 violation.[972]

856. Considering the previously mentioned practice of the Parties and the NAFTA case law, it is improper for the Claimants to attempt to import into the NAFTA, through Article 1103, an autonomous FET standard, the standard of treatment that prohibits discriminatory measures and the obligation of sympathetic consideration.

857. Lastly, it is observed that the Claimants may only submit to arbitration a claim for a breach to one or more of the obligations established in Section A of Chapter 11, which includes Article 1103. This is evident in the wording of Articles 1116(1)(a) and 1117(1)(a):

> Article 1116: Claim by an Investor of a Party on Its Own Behalf
>
> 1. An investor of a Party may submit to arbitration under this Section a claim that another Party **has breached** an obligation under:
>
> (a) Section A or Article 1503(2) (State Enterprises); [...]
>
> Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise
>
> 1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party **has breached** an obligation under:
>
> (a) Section A or Article 1503(2) (State Enterprises);

858. However, the Claimants did not file a claim for an Article 1103 violation or identify a measure taken by the Respondent that could give rise to such a violation. The Claimants are merely trying to use Article 1103 to import provisions from other treaties, even when the only valid argument they may present before an arbitration pursuant to Chapter 11 is a violation of this provision.

G. The application of the "Clean Hands" doctrine in the present arbitration

1. The Randall Taylor affidavit

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971 *Id.*, ¶ 235.

972 *Id.*, ¶ 237.

859. Attached as Exhibit R-075 is an Affidavit sworn by Mr. Randall Taylor on August 17, 2020 ("Taylor Affidavit"). Mr. Taylor, who is one of the Claimants in this proceeding, swore the Affidavit as part of a court proceeding in Denver, Colorado, U.S.A. In that proceeding, Mr. Taylor is a Plaintiff and B-MEX, LLC and B-MEX II, LLC (who are also Claimants in this proceeding) are Defendants.

860. The Taylor Affidavit is publicly available from the Denver Court file. It includes exhibits referring to various written letters exchanged by some of the Claimants, as well as transcripts of various conversations. The Taylor Affidavit raises serious issues with respect to the conduct of the Claimants operating the Mexican enterprises, including allegations:

- of embezzlement by the managers (Exhibit 2, Page 5 of 53);
- of misuse of funds by the managers (Exhibit 2, Page 5 of 53);
- that managers put family members on the payroll even though no work was performed (Exhibit 2, Page 5 of 53);
- that Gordon Burr and others were improperly removing money from the casino vault (Exhibit 2, Pages 6-8 of 53); •that accounting records were improperly removed from the casino vault (Exhibit 2, Page 6 of 53);
- that millions of dollars were not properly reported on the books (accounting records) vault (Exhibit 2, Page 6 of 53) and/or went missing (Exhibit 2, Page 9 of 53); • that cash was used to pay millions of dollars to third parties without proper controls (Exhibit 2, Page 6 of 53);
- that one of the Claimants, Dan Rudden, wrote a letter to Quinn Emanuel disclosing some or all of the above allegations (Exhibit 2, Page 7 of 53);
- that when asked whether there were "a separate set of books", Dan Rudden advised Mr. Taylor that "we don't want to, you know, poke a major hole in the NAFTA balloon" – referring to this arbitration (Exhibit 2, Page 12 of 53);
- that when asked about improper payments (referred to in the Affidavit as "other payola"), Gordon Burr told Dan Rudden and John Conley that "You guys don't want to know where its going because then you're liable" (Exhibit 2, Pages 13-14 of 53);
- that in a letter dated March 16, 2016, John Conley wrote that problems relating to the collateralization of Notes is "only the tip of the iceberg" (Exhibit 2, Page 6 of 53);
- that Gordan Burr and Erin Burr have alleged that John Conley and Dan Rudden (all claimants in this proceeding) were working with former employees and Benjamin Cow in a conspiracy against the interests of BMEX (Exhibit 2, Page 18 of 53);
- that gaming machines and other equipment were stolen from the casinos after closure (Exhibit 2, Page 18 of 53) by John Conley and/or former employees and/or others working under their direction (Exhibit 2, Page 6 of 53); and
- John Conley and former employees were working to open competing casinos with assets from the Claimant casinos (Exhibit 2, Pages 20-22 of 53).

861. At this stage, without fulsome disclosure from all of the Claimants, it is not possible for the Respondent to assess the veracity of these allegations. However, to the extent that any of these allegations are accurate, then this Tribunal will need to consider whether the Claimants have standing in this investment proceeding, and even if they do have standing, whether the alleged unethical business practices and/or illegal business practices preclude the substantive treaty protection and a reasonable prospect of future damages.

862. Within this context, the Taylor Affidavit represents important circumstantial evidence to be considered by the Tribunal. Whether the Respondent has established the requisite indicia of illegality such that there is an onus is on the Claimant to discharge the burden of proof that it did not engage in illegal and/or unethical conduct in its Mexico operations will become clear after the documentary production process and can be fully debated by the two parties in their Reply and Rejoinder.

863. If any of the allegations made in the Taylor affidavit are true, then the Respondent submits that the "clean hands" doctrine applies in this case.

864. International tribunals have applied the legality requirement that is a manifestation of the "clean hands" doctrine (without using the phrase "clean hands") and have also expressly applied the "clean hands" doctrine. To this end, the Respondent submits that the circumstantial evidence contained in Mr. Taylor's affidavit [Exhibit R-095] triggers this Tribunal's mandate to request the Claimants to produce documents and evidence that refute their unethical and/or illegal business practices at pre- and post- investment stages. Failing to refute its business was tainted by illegality and "unclean hands" in the forthcoming document production and the Claimants' rely, would deprive of their substantive NAFTA treaty protection, and reduce the calculation of damages. Within this context, a failure by the Claimants to refute the alleged unethical and/or illegal activity would result in the Tribunal no longer having jurisdiction to grant the Claimants' investment protection under the NAFTA or would otherwise make the Claims inadmissible.

2. The "Clean Hands" doctrine in investment treaty arbitration

a. Cases applied the legality requirement as a manifestation of the "clean hands" doctrine

865. Investment arbitral tribunals have concluded that an investment would be deprived of treaty protection for their illegality, whether the underlying treaties have or do not have explicit legality requirement. While some tribunals have not used the term "clean hands" per se, they have nevertheless applied the doctrine by referring to the legality requirement or other maxims to the same effect. For example, in *Hamester*, the Tribunal held that:

> An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment

> protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law.[973]

866. In *Inceysa*, the tribunal determined that:

> Applying the first principle indicated above to the case at hand, we can affirm that the foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, 'nobody can benefit from his own fraud.'[974]

867. In *Plama*, the tribunal pointed out that compliance with the domestic law of the host State is an implicit requirement for investors and their investments, even if the treaty is silent on legality:

> Unlike a number of Bilateral Investment Treaties, the ECT does not contain a provision requiring the conformity of the Investment with a particular law. This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law…The Arbitral Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to law.[975]

868. After finding that the investment was made by deceitful conduct and in violation of Bulgaria's domestic law, the tribunal concluded that "granting the ECT's protections to Claimant's investment would be contrary to the principle of *nemo auditur propriam turpitudinem allegans* invoked above. It would also be contrary to the basic notion of international public policy—that a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal."[976] Thus, the tribunal held that it could not grant protection of the ECT to the investor for its failure to provide shareholder information in the investment review process.[977]

869. Endorsing *Plama*, in *Phoenix v. Czech Republic*, the tribunal held that the investors' obligation to comply with the laws of the host State was implicit even when the treaty is silent on legality:

> In the Tribunal's view, States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws. If a State, for example, restricts foreign investment in a sector of its economy and a foreign investor disregards such restriction, the investment concerned cannot be protected under the ICSID/BIT system. These are illegal investments according to the national law of the host State and cannot be protected through an ICSID arbitral process. And it is the

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973 Exhibit CL-52, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, CIADI Case No. ARB/07/24, "Award," June 18, 2010, ¶ 123.

974 Exhibit RL-073, *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, CIADI Case, No. ARB/03/26, "Award," August 2, 2006, ¶ 242.

975 Exhibit RL-074, *Petrobart Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, "Award," August 27, 2008, ¶¶ 138-139.

976 *Id.*, ¶ 143.

977 *Id.*, ¶¶ 144-146.

> Tribunal's view that this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT. This position of the Tribunal has also been adopted in the case of Plama, where the Tribunal was faced with the silence of the relevant treaty on the necessary conformity of a protected investment with the laws of the host country. This did not prevent it to consider that this condition had to be implied[.][978]

870. After recognizing that the underlying treaty between Israel and the Czech Republic has a legality requirement, the tribunal in *Phoenix* added that the legality requirement plays a fundamental role, both in the jurisdiction and the merits stages of a case:

> The core lesson is that the purpose of the international protection through ICSID arbitration cannot be granted to investments that are made contrary to law. The fact that an investment is in violation of the laws of the host State can be manifest and will therefore allow the tribunal to deny its jurisdiction. Or, the fact that the investment is in violation of the laws of the host State can only appear when dealing with the merits, whether it was not known before that stage or whether the tribunal considered it best to be analyzed as the merits stage, like in the case of Plama.[979]

871. The cases mentioned above demonstrate that tribunals have taken into consideration the legality of an investment or similar doctrines that are manifestations of the "clean hands" doctrine, regardless of whether the underlying treaties have explicit legality requirements or not. Accordingly, the Claimants' claims regarding their investments, if proven to be tainted by illegality or their "unclean hands," would not enjoy the substantive protection under the NAFTA and reduce the amount of damages.

872. As will be shown in the following section, once the Respondent has presented circumstantial evidence proving that there were "red flags" in the Claimants' conduct, the burden of proof shifts to the Claimants to prove that their conduct was not tainted by illegality or "unclean hands."

b. Cases that explicitly applied the "clean hands" doctrine and the applicable burden of proof

873. Investment tribunals have explicitly referred to the "clean hands" doctrine in adjudicating the investors' misconduct and the unethical or illegal practices of investors.

874. One leading case on "clean hands" doctrine is *Al Warraq v. Indonesia*, in which the tribunal equated the "clean hands" doctrine with the legality requirement.

> The Tribunal concludes from the above that the Claimant failed to uphold the Indonesian laws and Regulations. The Tribunal further considers that the Claimant's action, whether criminal or not, caused a liquidity issue to Bank Century, and his actions have been prejudicial to the public interest, in this case the Indonesian financial sector.

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978 Exhibit RL-075, *Phoenix Action, Ltd. v. The Czech Republic*, CIADI Case No. ARB/06/5, "Award," April 15, 2009, ¶ 101, citing *Plama*, ¶¶ 138-139.

979 Id. ¶ 102.

> The Claimant having breached the local laws and put the public interest at risk, he has deprived himself of the protection afforded by the OIC Agreement.
>
> In this regard, the Tribunal is of the view that the doctrine of "clean hands" renders the Claimant's claim inadmissible. As Professor James Crawford observes, the "clean hands" principle has been invoked in the context of the admissibility of claims before international com's and tribunals. Also, the Tribunal refers to the decision of Lord Mansfield in *Holman v Johnson* (1775) which states:
>
> > "No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from /he plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted."[980]

875. Based upon the observation above, the tribunal concluded that the investor was prevented from the treaty's fair and equitable treatment protection because of the investor's "unclean hands."[981]

876. One question that is still under debate is the burden of proof in situations where questions of illegality or "clean hands" were raised. The balance of probabilities or the preponderance of evidence is the traditional standard for the test that applies in such cases. Regarding the burden of proof and its relation with illegality or "unclean hands," the tribunal in *Metal-Tech v. Uzbekistan* pointed out the following: "the International Court of Justice as well as arbitral tribunals constituted under the ICSID Convention and under the NAFTA have characterized this rule as a general principle of law."[982] The *Metal-Tech* tribunal then explained the latitude of a tribunal's discretion when determining the standard of proof in such cases in relation to circumstantial evidence:

> Here, the question is whether for allegations of corruption, the burden should be shifted to the Claimant to establish that there was no corruption. Rules establishing presumptions or shifting the burden of proof under certain circumstances or drawing inferences from a lack of proof are generally deemed to be part of the *lex causae*. In the present case, the *lex causae* is essentially the BIT, which provides no rules for shifting the burden of proof or establishing presumptions. Therefore, the Tribunal has relative freedom in determining the standard necessary to sustain a determination of corruption.[983]

877. The discretion of a tribunal to assess circumstantial evidence on its own accord will be limited once there are indicia by a party showing "unclean hands." In *Metal Tech,* the tribunal found that the circumstantial evidence submitted by the investor contributed to the finding of illegality and "unclean hands":

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980 Exhibit RL-076, *Hesham T. M. Al Warraq v. Republic of Indonesia*, UNCITRAL, "Final Award," December 15, 2014, ¶¶ 645-646.

981 *Id*., ¶¶ 647-648.

982 Exhibit RL-077, *Metal-Tech Ltd. v. Republic of Uzbekistan*, CIADI Case No. ARB/10/3, "Award," October 4, 2013, ¶ 237.

983 *Id.,* ¶ 238.

> A similar situation arose in *World Duty Free v. Kenya*. There, an ICSID arbitral tribunal was called on to decide a claim brought against Kenya for not fulfilling an agreement for the construction, maintenance, and operation of duty-free complexes at Nairobi and Mombasa airports. Kenya argued that the agreement had been procured by paying a bribe to the then President of Kenya, and, therefore, that the agreement was illegal and could not be enforced. The CEO of the Claimant himself admitted that he had handed over the equivalent of USD 2 million in cash to the President and others. The World Duty Free tribunal (as the Tribunal did here) invited the parties to present additional submissions and evidence on the issue of corruption. Faced with these circumstances, the World Duty Free tribunal noted that "this is not a case which turns on legal presumptions, statutory deeming provisions or different standards of proof [...]. Indeed, the decisive evidential materials came from the Claimant itself."
>
> As in *World Duty Free*, the present factual matrix does not require the Tribunal to resort to presumptions or rules of burden of proof where the evidence of the payments came from the Claimant and the Tribunal itself sought further evidence of the nature and purpose of such payments. Instead, the Tribunal will determine on the basis of the evidence before it whether corruption has been established with reasonable certainty. In this context, it notes that corruption is by essence difficult to establish and that it is thus generally admitted that it can be shown through circumstantial evidence.[984]

878. The tribunal in *Glencore International v. Colombia* emphasized the importance of circumstantial evidence as indicia of "unclean hands" in addition to the well-established principle of preponderance of evidence:

> In fact, what Respondent labels as "connecting the dots" is nothing else than the time-honoured methodology followed by tribunals in all jurisdictions to establish truth based on indicia or circumstantial evidence: if a party marshals evidence that proves the existence of certain indicia, and it is possible to infer from these indicia (using experience and reason) that a certain fact has occurred, the tribunal may take such fact as established. The Tribunal has followed this methodology.[985]

879. Since the Respondent has presented circumstantial evidence in this stage –the sworn affidavit of Mr. Taylor– the burden of refuting the allegations of illegality is transferred to the Claimants in the next stage of document production and in their Reply submission.

880. Lastly, the Respondent observes that, although the accusations against B-Mex and some of the claimant parties in these proceeding are related to illicit activities that would have occurred during the operation of the casinos, the case law indicating that an illegality related to the investments precludes access to remedies under the NAFTA would similarly apply, under the same principle, to the operation of the investment. This is even more evident under the circumstances of this case, if we take into account that the casinos operate in a highly regulated sector to protect it from illicit activities, such as fraud and corruption.

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984 *Id*., ¶¶ 242-243.

985 Exhibit RL-078, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, "Award," August 27, 2019, ¶ 670.

IV. Damages

A. Introduction

881. The Claimants claim breach of Articles 1110 (Expropriation and Compensation), 1105 (Minimum Standard of Treatment) and 1102 (National Treatment). As a result of these alleged violations, they affirm to have suffered damages that amount to USD $415.8 million; this figure includes pre-award interest up to of April 21, 2020. The following table, taken from the Claimants' expert report (BRG Report), itemizes the total amount into its various components:

Table 1: Summary of Damages for Claimants' Casinos, the Cabo Project, the Cancun Project, and the Online Gaming Project (USD Million as of Date of Valuation, Except as Noted)[20]

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**

882. The Claimants' experts only quantify damages caused by the alleged expropriation. They do not quantify the damages caused by other alleged NAFTA violations. Therefore, in the event this Arbitral Tribunal determines that there was no expropriation but that other violations did occur, there would be no estimate of the damage caused.

883. On the other hand, Claimants do not identify which damages they are claiming on their own behalf under Article 1116 and which on behalf of an enterprise under Article 1117. This has important implications in the determination of damages because the damages suffered by the company are not necessarily the same as those suffered by its shareholders and, furthermore, all damages arising from a claim filed on behalf of an enterprise must be paid to the enterprise, in accordance with the NAFTA.

884. It is also worth noting that the Claimants have not presented evidence of damages suffered damages as shareholders of the Juegos Companies and/or E-Games (i.e., *flow-through damages*). All damages are calculated on the basis of the Casinos' operations and not on the basis of the value of the Juegos Companies or E-Games. This also has implications in the determination of damages because the Casinos were owned by the Juegos Companies.

885. The Respondent retained RIoN M&A, S.C. to provide an opinion on the valuation performed by the Claimants' experts (Berkeley Research Group or BRG) and to provide an

alternative opinion of the value of the Casinos and the Projects in case they find any problems and deemed it necessary. Their report is attached to this submission as Exhibit RER-3.

886. As explained in the Rion Report, the Claimants' valuation is highly speculative and suffers from fundamental defects which precludes its use as the basis for the determination of damages should the Tribunal determine that the Respondent is liable for one or more violations. The damages claimed are based on the fair market value (FMV) of the Claimants' 5 existing casinos, as well as the value of three projects that, according to them, were in an advanced stage of planning when the Respondent shut down the Casinos on April 24, 2014. In both cases, the FMV is determined through the discounted cash flow method.

887. Regarding the existing casinos, the Respondent's expert (Rion) concludes that BRG considerably overstates the FMV by using incorrect parameters and speculative assumptions, for example: an exaggerated growth rate to derive the future revenues of the casinos; an excessive EBITDA margin that is inconsistent with the margins observed in the market; a discount rate that is much lower than appropriate; and the omission of the workers' participation in profits (PTU), among other defects.

888. The Claimants include in the amount claimed, the FMV of three projects (Projects) that never operated and were not close to becoming operational. In the case of the Cancun and Cabo casinos, not only had the construction of the casinos not begun; the construction of the hotels where the casinos would be located had also not begun. In the case of the online casino, there is no evidence of a detailed business plan or that the investments necessary to begin operations had been made.

889. On the other hand, the evidence presented by the Claimants to support this part of the claim is clearly insufficient to support a claim for more than USD $156 million. There is no evidence of agreements with suppliers in the case of the online casino, or with the owners of the Cabo and Cancun projects, beyond a loan to the hotel developers in Cabo of which there is not even evidence of a transfer of funds and/or the recouped amount. The claim for damages regarding the Projects is mostly based on the statements from Mr. Burr, Mrs. Burr and Mr. Moreno Quijano.

890. An additional problem with the claim for damages related to the Projects is that the investments are being valued using the DCF method, even though none of them had a proven track record of profitable operations, as is traditionally required in international arbitration. BRG extrapolates the revenues of the casinos in Cancun and Cabo from the results of the Cuernavaca casino. This method is not reliable and introduces an unacceptable amount of speculation and uncertainty into the calculation.

891. Lastly, there is evidence that there was a sixth casino operating under E-Games' permit, and also that in 2014, E-Games requested a permit for a seventh casino in Veracruz. This would negate the idea that there were plans to open two additional casinos in Cabo and Cancun, thus circumscribing the damages to those related to the existing casinos.

892. All this and more will be elucidated in the following sections of this damages section. Nothing said here should be construed as an admission of liability or a withdrawal of the arguments made in the fact and legal sections. Moreover, given that the Respondent did not have an opportunity to request documents from the Claimants before preparing this submission, it reserves the right to modify or complement its arguments as additional information becomes available.

B. The Claimants' investments

893. The Claimants are a diverse group of individuals and companies with different interests. The list of protected investments that the Claimants include in the Memorial includes the following:

- an enterprise (presumably the Juegos Companies and E-Games);
- an equity security of an enterprise (presumably the shares in the Juegos Companies and E-Games);
- an undetermined number of loans to an enterprise (not identified);
- interest in an enterprise that entitles the owner to share in income or profits of the entrprise (not identified);
- interest in an enterprise that entitles the owner to share in the assets of an enterprise on dissolution (not identified);
- real estate or other property, tangible and intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes (not identified); and
- interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory (not specified), among other investments.[986]

894. The Respondent does not dispute that the Juegos Companies (owners of the existing Casinos) and E-Games qualify as investments under the NAFTA. They clearly fall into the definition of an "enterprise" in Article 1139 and the Tribunal has already ruled that the Claimants collectively control these enterprises. Therefore, it is not disputed that the Claimants have standing to file a claim on behalf of those enterprises under Article 1117.

895. The Respondent also does not dispute that the Claimants' shares in these companies constitute "an interest in an enterprise that entitles the owner to share in the income or profits of the enterprise". Therefore, it is also not disputed that the Claimants have standing to file a claim on their own behalf under Article 1116, against any damages that they may have suffered as shareholders of the Juegos Companies and E-Games.

896. The other investments have not been identified or proven or are assets that belong to E-Games or the Juegos Companies. For example, the Claimants allege that they invested up to USD $850,000 in loans: USD $250,000 in the Cancun project and USD $600,000 in the Cabo project. They also affirm that they invested USD $250,000 to acquire an "an option to purchase a gaming license from B-Mex II under our permit."[987] No proof has been offered that these loans were ever made or of the option to purchase a license from B-Mex II.

897. Other passages in the Memorial suggest that the Claimants owned certain assets, such as the permit or gaming machines. These assets belonged to the Casinos, not the Claimants, and were necessary for their operation. Therefore, their value would be included in the FMV of the Casinos.

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986 Memorial, ¶¶ 28-30.

987 *Id.*, ¶ 65.

It is clear from the foregoing that the Claimants cannot claim the expropriation of the Casinos and *also* the expropriation of the Casinos' assets because this would lead to double recovery.

898. On the other hand, as explained in the Legal Argument section of this submission, the Respondent objects to the Tribunal's jurisdiction over the claim regarding the Projects because there is no proof of the existence of a protected investments related to these projects. Notwithstanding the foregoing, the Claimants include these Projects into their claim for damages, as if they were established businesses in operation. They do not specify who among them owns these projects and, therefore, it is not clear who should be compensated for damages, in the event that the State is found liable.

899. As long as the Claimants fail to provide proof the existence of an investment related to the Projects, fail to specify who or which persons made this investment, and fail to explain how they could have opened two additional casinos under their permit when they were already operating six and had requested a permit to operate a seventh in Veracruz, the Respondent will oppose the inclusion of damages related to these Projects.

C. The Claimants do not specify which damages they are claiming on their own behalf and which on behalf of the enterprises they control

900. The Claimants do not specify which claims are submitted on their own behalf pursuant to Article 1116 and which are submitted on behalf of the investment pursuant to Article 1117. The Claimants simply point out that their claim is submitted under both Article 1117 and Article 1116.[988] This is important to the issue of damages for a number of reasons, but there are mainly two.

901. *First*, the damages suffered by the shareholders of an enterprise are not equivalent to damages suffered by the company. In the present case, a claim brought on their own behalf under Article 1116 would be limited to the value of the Claimants' shareholding in the Mexican enterprises subject to this arbitration. Also, the value of that shareholding would depend on the flow of dividends that the Claimants would have received in the absence of the alleged violations (flow-through damages), and those flows would, in turn, depend on a number of factors that the Claimants' experts have not taken into account, e.g., the type of shares that they hold may have a different priority in terms of profit distribution.

902. *Second*, Article 1135(2)(b) of the NAFTA provides that when a claim is made under Article 1117, the resulting damages must be paid directly to the enterprise on whose behalf the claim was brought. In this case, the Claimants' experts have adopted a *sui generis* approach: instead of determining the FMV of the Claimants' investments, i.e., E-Games and each of the five Juegos Companies that owned the Casinos, BRG valued the Casino operations. Since the Casinos belong to the Juegos Companies and not to the Claimants, their value cannot be claimed directly by the Claimants as shareholders of the Juegos Companies. A claim such as the one subject to these proceedings would need to be presented on behalf of such companies under Article 1117. As shareholders of the Juegos Companies, the most that the Claimants could claim is the loss of value of their shares due to alleged violations to the Treaty, which have not been quantified.

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988 *Id.*, ¶ 470.

903. It is necessary for the Claimants to explain which damages are being claimed on behalf of the enterprises they control (Article 1117) and which are being claimed on their own behalf, as shareholders of those enterprises or in some other investor capacity (Article 1116). The Respondent reserves the right to modify or expand on its position once the Claimants have clarified their own.

D. Available evidence suggests that E-Games did not plan to open casinos in Cabo or Cancun

904. As explained both in the Memorial and in this submission, E-Games' permit allowed it to open up to 7 casinos. According to SEGOBs' records, E-Games had 6 casinos in operation under this permit: the 5 that the Claimants identify in the Memorial plus a sixth casino located in the Interlomas shopping mall in Huixquilucan, state of Mexico.[989] There also is evidence that, in 2014 E-Games requested authorization for both, the Huixquilucan casino and a seventh casino in the state of Veracruz.[990] In other words, the most likely scenario in the absence of the alleged violation is that the Claimants would have continued operating the Huixquilucan casino and opened another one in Veracruz, and that there would be no casinos in Cabo or Cancun.

905. The Claimants' silence on this material fact in this arbitration speaks for itself.

E. Standard of compensation

1. Standard applicable in cases of expropriation

906. Article 1110(2) of the NAFTA prescribes the standard of compensation applicable in the event of expropriation and provides guidance on the valuation criteria to be used when determining the amount of the compensation. Article 1110(2) specifically provides that "[c]ompensation 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 became known earlier." Regarding the criteria for valuation, it states that they "shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value."

907. The Claimants argue that "the explicit link to the clause discussing a lawful expropriation make clear [sic] that Article 1110(2) applies only to compensation for lawful expropriations", and that "in the absence of *lex specialis*, the relevant standard for the determination of the compensation [...] must be assessed with reference to applicable principles of customary international law, as discussed above."[991] They conclude that " in this case, customary international law applies to the question of damages for unlawful expropriation and other breaches of the NAFTA."[992]

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989 Exhibit C-31, and ¶ 313 *supra*.

990 Exhibit C-33, pp. 11 and ¶ 390.

991 Memorial, ¶¶ 802-803. Emphasized in original text.

992 *Id.* ¶ 804. Emphasized in original text.

908. The Respondent does not fully agree with the Claimants' argument, but believes it is unnecessary to belabor on this point because, despite their misgivings regarding the applicability of the standard in Article 1110(2), the Claimants seem to have reached the conclusion that it should be applied in this case. Indeed, at paragraph 806 of the Memorial, the Claimants take the position that "the proper method to calculate the 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."[993]

909. The other two items of the standard in Article 1110(2) were also observed by the Claimants' experts. BRG determines the FMV of the Casinos immediately before the date of the alleged expropriation (i.e., April 23, 2014) and clearly, the result at which they arrive does not reflect any change in value because the intention to expropriate was known prior to the expropriation date.

910. It should also be noted that, by taking the position that the applicable standard is full compensation, while their experts determine the damages in accordance with the FMV standard, the Claimants are implicitly acknowledging that the standard set out in Article 1110(2) is consistent with the full reparation standard in expropriation cases –a conclusion that several international tribunals have reached in the past.[994]

2. The applicable standard for other breaches

911. The Respondent agrees that the NAFTA does not specify the standard of compensation applicable to other violations of the NAFTA, and that customary international law principles should be applied in such cases. Accordingly, it agrees that the standard of compensation for a violation other than an expropriation is full reparation and, as stated in the *Chórzow Factory* case, the objective is to wipe out the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.

912. However, as stated above, the Claimants are in fact applying the standard of compensation of Article 1110(2), which implies that their claim for damages is circumscribed to the damages arising from the alleged expropriation. The first paragraph of the Claimants' damages expert report explicitly states that BRG received instructions to determine the damages caused by the "expropriation of the Claimants' investment in Mexico," and paragraph 71 reaffirms this idea:

> 1. We have been instructed by Quinn Emanuel Urquhart & Sullivan, LLP, acting as counsel for BMex, LLC and others ("Claimants"), 1 to provide our objective and

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993 Emphasis added. In their report, the Claimants' damage experts add the following: "We have been instructed by Counsel to determine damages related to Claimants' Casinos resulting from the Expropriation of Claimants' investment as of April 23, 2014, in accordance with the fair market value standard [...] " Exhibit CER-4, ¶ 71.

994 Exhibit CL-161, *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Venezuela* II, CIADI Case No. ARB/12/23, Award, December 12, 2016, ¶ 396 and Exhibit CL-108, *CME Czech Republic B.V. v. Czech Republic*, CNUDMI, "Partial Award," September 13, 2001, ¶¶ 615-618. Other international tribunals established under the NAFTA have determined that the applicable standard in the event of expropriation is FMV pursuant to Article 1110(2). See, for example: Exhibit CL-79, *Metalclad Corporation v. Mexico*, CIADI Case No. ARB(AF)/97/1, Award, August 30, 2000, ¶ 118 and Exhibit CL-86, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc* v. *Mexico*, CIADI Case ARB(AF)/04/5, Award, November 21, 2007, ¶ 283.

> independent assessment of the losses suffered by Claimants as a result of the alleged illegal expropriation of Claimants' investment in Mexico (the "Expropriation").
>
> [...]
>
> 71. We have been instructed by Counsel to determine damages related to Claimants' Casinos resulting from the Expropriation of Claimants' investment as of April 23, 2014 in accordance with the fair market value standard [...][995]

913. The damages caused by purported violations to the NAFTA other than expropriation have not been quantified. The following are some examples of claimed measures to which no damages are associated:

- the refusal to issue new permits to E-Games;[996]
- the temporary closure of the Casinos in 2013;[997]
- the alleged interference with the Claimants' efforts to mitigate their losses;[998]
- the alleged discrimination against the Claimants' Casinos.[999]

914. The Claimants must clarify this point because the existence of damages is a requirement to submit a claim to arbitration pursuant to Article 1116 and Article 1117. Therefore, this Tribunal would have to dismiss any claim that does not include a claim for damages.

915. The Claimants had the obligation to put forward their entire case in the Memorial, including the amount of the damages purportedly suffered because of the breach(es). Mexico will strenuously oppose any attempt by the Claimant to supplement their claim for damages at a later stage.

F. Causation

1. Legal principles

916. As a general principle, a State is only responsible for damages caused by an unlawful act under the Treaty. Therefore, a critical aspect of any damages claim is to establish a sufficient causal link between the purported violation and the damages. This burden is on the claimant party.[1000]

917. Article 31 of the *Draft Articles on Responsibility of States for International Wrongful Acts* establishes that a State is obliged to make full reparation for any "injury caused" by the violation

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995 Exhibit CER-4, BRG report, 1, 71. This can also be seen in Exhibit RER-3, Rion report, ¶ 56.

996 Memorial, ¶ 589.

997 *Id.*, ¶ 588.

998 *Id.*, ¶ 564 (iii).

999 *Id.*, ¶¶ 564(ii) and 742.

1000 Exhibit RL-080, Ripinsky & Williams, *Damages in International Investment Law,* BIICL (2008), p. 135.

and defines "injury" as: "any damage, whether material or moral, caused by the internationally wrongful act of a State."[1001]

918. Several international tribunals have emphasized the importance of the causal link between the injury and the violation. In *S.D. Myers v. Canada*, the tribunal determined that compensation can only be made if there is a sufficient causal link between the treaty violation and the damages suffered by the claimant party. It also observed that the injury cannot be "too remote":

> 140. In its First Partial Award the Tribunal determined that damages may only be awarded to the extent that there is a sufficient causal link between the breach of a specific NAFTA provision and the loss sustained by the investor. Other ways of expressing the same concept might be that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the proximate cause of the harm.[1002]

919. The causation requirement is inextricably linked to the standard of compensation identified by the Claimants, as full compensation for the loss suffered as a result of the State's illegal conduct involves putting the investor in the situation that would, in all probability, have existed had but for the breach.[1003] Therefore, as a general principle of law, the concept of causality not only excludes compensation for damages not caused by the breach; it also excludes those derived from an improbable or speculative counter-factual scenario. The principle of causation ensures that the State is not held liable for damages caused by the claimant's or third parties' actions.[1004]

920. Causality has two variants: factual causality and legal causality. Both are relevant for determining causation.[1005] Factual causation alone is not sufficient.

921. Fact or factual causation refers to whether the wrongful conduct played part in bringing about harm caused, and its existence is determined by the question: would the damage have occurred but for the violation? ("but-for" Test.) To determine the existence of legal causation, the question is whether the conduct is a sufficient, proximate, adequate, foreseeable or direct cause of the harm.[1006] This element of the test defines the legally relevant damage, which is necessary to prevent the unlimited State liability and producing an inequitable or unreasonable result.

922. In the words of the tribunal in the *Methanex v. United States*:

> In a legal instrument such as NAFTA, Methanex's interpretation would produce a surprising, if not an absurd, result. The possible consequences of human conduct are infinite, especially when comprising acts of governmental agencies; but common sense does not require that line to run unbroken towards an endless horizon. In a traditional legal context, somewhere the line is broken; and whether as a matter of logic, social policy or other value judgment, a limit is necessarily imposed restricting the

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1001 Exhibit CL-94, Article 31.

1002 Exhibit RL-083, *S.D. Myers v. Government of Canada*, CNUDMI, "Second Partial Award," October 21, 2002, ¶ 140.

1003 Exhibit RL-080, Ripinsky & Williams, *Damages in International Investment Law,* BIICL (2008), p. 87.

1004 *Id.*, pp. 83-84.

1005 *Id.,* p. 135.

1006 *Id.*

> consequences for which that conduct is to be held accountable. For example, in the law of tort, there must be a reasonable connection between the defendant, the complainant, the defendant's conduct and the harm suffered by the complainant; and limits are imposed by legal rules on duty, causation and remoteness of damage well-known in the laws of both the United States and Canada. Likewise, in the law of contract, the contract-breaker is not generally liable for all the consequences of its breach even towards the innocent party, still less to persons not privy to that contract. It is of course possible, by contract or statute, to enlarge towards infinity the legal consequences of human conduct; but against this traditional legal background, it would require clear and explicit language to achieve this result.[1007] [Emphasis added]

923. As will be explained below, neither test of causation (factual or legal) is met with respect to Claimants' Projects in Cabo, Cancun, and the online casino.

2. Application to the facts

924. The Respondent has objected to the Tribunal's jurisdiction over the claim for damages related to the Projects. The following submissions are offered in the alternative, i.e., only in case the Tribunal asserts jurisdiction over said claims.

925. The Claimants only have presented evidence of a loan to the developers of the hotel project in Cabo (Medano Beach Hotel). To support their claims, the Claimants have submitted a signed agreement (Exhibit C-65), however, there is no evidence that the loan was actually granted, or that the debtors defaulted on their payments. But even if this could be proven, the Claimants would have to explain how is it that the measures they complain about prevented or impacted the issuance and/or recovery of that loan. In other words, they would have to prove that there is factual causation between the violation and the damage which, incidentally, has not been quantified.

926. As explained in the objection to jurisdiction, the purpose of the loan was to finance the acquisition of certain plots of land needed to build the hotel in which the Cabo San Lucas casino would subsequently be built. None of the claimed measures prevented the grant and/or recovery of the loan. Indeed, it is difficult to imagine how the revocation of E-Games' permit or the closure of the 5 existing casinos could have affected the loan or its recovery. The same can be said of the alleged delay in granting E-Games' permit, the alleged discrimination against the Claimants, the alleged harassment from tax authorities and the PGR, or any other of the claimed measures. The Claimants have simply forgotten their obligation to establish factual causation between the loss of the alleged loans and the alleged treaty violations.

927. Finally, it should be noted that the Claimants claim that these loans for a total amount of USD $600,000 were not recovered "in full", but they have not specified the amount that was not recovered. Nor have they explained under what theory the debtor's reluctance to repay their loans can be attributed to the Respondent.[1008] The Respondent reiterates that those loans, even if they were granted, do not constitute an investment in a casino and, much less, an investment that would give rise to the USD $77.9 million plus interest in damages that the Claimants seek in connection

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[1007] CL-136, *Methanex v. United States*, CNUDMI, "Final Award on Jurisdiction and Merits," August 3, 2005, ¶ 138.

[1008] Memorial, ¶ 65.

with the Cabo casino project and the USD $42.4 million plus interest that they claim in relation to the Cancun project.

G. Burden of proof and reasonable certainty of the damage

928. It is a well-established principle that the burden of proving a fact lies with the party that alleges it. In the context of a claim for damages, the claimant party is always the one that alleges to have suffered damages and, therefore, the one bearing the burden of proving the fact of the loss, as well as the causal link between the loss and the damage.[1009]

929. Similarly, while it is true that damages do not need to be quantified with absolute precision, international tribunals have on numerous occasions determined that claims that are too uncertain or speculative or that have not been duly proven do not meet the applicable standard and must be rejected, even if State responsibility has been established. There are plenty of examples:

- In *Amoco v. Iran*, the tribunal correctly pointed out that: "[o]ne of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded. This holds true for the existence of the damage and of its effect as well."[1010]
- In the *Gemplus/Talsud v. Mexico* case, the tribunal ruled as follows: "[u]nder international law and the BITs, the Claimants bear the overall burden of proving the loss founding their claims for compensation. If that loss is found to be too uncertain or speculative or otherwise unproven, the Tribunal must reject these claims, even if liability is established against the Respondent."[1011]
- In *BG Group v. Argentina*, the tribunal held that: "damages that are 'too indirect, remote, and uncertain to be appraised' are to be excluded," and further noted that "an award for damages which are speculative would equally run afoul of 'full reparation' under the ILC Draft Articles."[1012]
- In *Asian Agricultural Products v. Sri Lanka,* the tribunal noted that: "according to a well-established rule of international law, the assessment of prospective profits requires proof

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[1009] Exhibit RL-080, Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law, 2008, pp. 161-162. See also, Exhibit CL-30, *S.D. Myers, Inc. v. Government of Canada*, CNUDMI, Partial Award, November 13, 2000, ¶ 316; Exhibit RL-081, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, CIADI Case No. ARB(AF)/04/05, "Decision on the Requests for Correction, Supplementary Decision and Interpretation," July 10, 2008, ¶ 38 and Exhibit CL-213, *Grand River Enterprises Six Nations, Ltd. and others v. States of America*, CNUDMI, "Award," January 12, 2011, ¶ 237.

[1010] Exhibit CL-107, *Amoco v. Iran*, ¶ 238

[1011] Exhibit CL-232, *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, CIADI Case No. ARB(AF)/04/3 and ARB(AF)/04/4, "Award," June 16, 2010, Part XII, ¶ 56.

[1012] Exhibit RL-033; *BG Group Plc. v. Republic of Argentina*, CNUDMI, "Award," December 24, 2007, ¶ 428.

that: 'they were reasonably anticipated; and that the profits anticipated were probable and not merely possible.'" [1013]

- In *S.D. Myers v. Canada*, the tribunal determined that: "[t]he quantification of loss of future profits claims can present special challenges. On the one hand, a claimant who has succeeded on liability must establish the quantum of his claims to the relevant standard of proof; and, to be awarded, the sums in question must be neither speculative nor too remote. [...]"[1014]

930. The foregoing is particularly relevant in this case in view of the Claimants' attempt to include in their claim for damages the FMV of three casinos that were never built. As explained in this submission's objection to jurisdiction, the construction of the casinos in Cabo and Cancun had not even begun. Nor is there any reliable evidence that an investment in the online casino had been made, or that the necessary agreements with suppliers to implement it existed or were about to be executed. The Claimants, notwithstanding, include the value of these three projects in their claim for damages, as if they were going concerns with a proven track record of profitable operations. As will be demonstrated below, the valuation of the Claimants' three casino projects is a speculative exercise and does not meet the principle of reasonable certainty.

H. Contributory fault

1. Legal principle

931. It is incorrect to attribute the totality of the losses to a governmental measure if the losses are due, in part, to negligent, reckless decisions or inaction by the investor. In such circumstances, a deduction must be made from the amount of damages to take account of the contribution of the claimant to the materialization of those damages. [1015]

932. Contributory fault is generally related to an inadequate assessment of risks, and it occurs when the victim is fully aware of the dangers of a certain course of action and voluntarily chooses to follow it.[1016] The claimant party's acts and omissions must be assessed in light of the nature and size of the commercial risks that were identified prior to the investment and that were voluntarily undertaken.

933. Article 39 of the International Law Commissions' Draft Articles on the Responsibility of States for Internationally Wrongful Acts addresses the principle of contributory fault.

> Article 39. Contribution to the injury

[1013] Exhibit CL-251, *Asian Agricultural Products LTD (AAPL) v. Republic of Sri Lanka*, CIADI Case No. ARB/87/3, "Final Award," June 27, 1990, ¶ 104.

[1014] Exhibit RL-083, *S.D. Myers Inc. v. Government of Canada*, CNUDMI, "Second Partial Award," October 21, 2002, ¶ 173.

[1015] Exhibit RL-080, Ripinsky and Williams, at p. 319.

[1016] Exhibit RL-084, David J. Bederman, *Contributory Fault and State Responsibility*, (1990) 30 Va. J. Int'l L. 335, pp. 335-336, see also Exhibit RL-080, Ripinsky & Williams, p. 314-315.

> In the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.[1017]

934. The comment to Article 39 clarifies that the article refers to a situation in which the damage caused by an internationally illegal act is attributable to the State, but the claimant party, who has been an individual victim of the breach, has materially contributed to the damage by some intentional or negligent act or omission. It focuses on situations that domestic legal systems call "*contributory negligence*," "*comparative fault*," "*faute de la victime*," etc. [1018]

935. Article 39 recognizes that the conduct of any individual or entity in relation to whom relief is sought (i.e. the Claimants in this case) must be considered when assessing the form and the extent of the relief. [1019] Relevant actions are those that qualify as malicious or negligent, i.e., involving a lack of care by the victim of the violation.[1020] In accordance with Article 39, where contributory is established, compensation must be reduced in proportion to the damage caused by the claimant.[1021] The purpose of this principle is to guarantee equity.[1022]

936. Several scholars have recognized the need to reduce compensations due to contributory fault of the claimants,[1023] and several tribunals have applied it in international arbitrations. The following section will discuss those awards in detail.

2. Jurisprudence

937. In *MTD v. Chile,* the tribunal concluded that the investor had contributed to its own prejudice by failing to conduct adequate due diligence to investigate whether it was possible to obtain the various licenses and approvals necessary for the investment to proceed before acquiring the land on which the project would be developed. As a result, the court reduced the damages by 50%:

> 242. […] As already noted, the Claimants, at the time of their contract with Mr. Fontaine, had made decisions that increased their risks in the transaction and for which they bear responsibility, regardless of the treatment given by Chile to the Claimants. They accepted to pay a price for the land with the Project without appropriate legal protection. A wise investor would not have paid full price up-front for land valued on

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[1017] Exhibit CL-94. Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), p. 109.

[1018] *Id.*, p. 110.

[1019] *Id*.

[1020] *Id*.

[1021] Exhibit RL-080, Ripinsky and Williams, p. 316.

[1022] Exhibit CL-94, International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries" (2001) 2:2 YBILC 31, at p. 110, ¶ (5). See also Exhibit RL-095, James Crawford, *State Responsibility: The General Part* (Cambridge University Press: 2013), at p. 500.

[1023] Exhibit RL-085, Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law (2nd Edition)* (Oxford University Press, 2017), at pp. 121-125; Anexo RL-080, Ripinsky & Williams, pp. 316-319.

> the assumption of the realization of the Project; he would at least have staged future payments to project progress, including the issuance of the required development permits.
>
> 243. The Tribunal considers therefore that the Claimants should bear part of the damages suffered and the Tribunal estimates that share to be 50% after deduction of the residual value of their investment calculated on the basis of the following considerations.[1024]
>
> [Emphasis added]

938. Afterwards, the *ad hoc* annulment committee confirmed the reduction of the amount of the damages ruled by the tribunal in *MTD*.[1025]

939. In *Azurix v. Argentina,* the tribunal determined that, on the date of the tender, the FMV of the concession in which Azurix negligently invested was but only a fraction (USD $60 million) of the USD $438,555,551 it paid. Azurix made a poorly informed decision and, as a result, the tribunal determined that "no more than a fraction of the [investment] could realistically have been recuperated." Consequently, the tribunal concluded that its role was to try to "determine what an independent and well-informed third party would have been willing to pay for the Concession":

> 426. First of all, in the Tribunal's view, no well-informed investor, in March 2002, would have paid for the Concession the price (and more particularly, the Canon) paid by Azurix in mid-1999, irrespective of the actions taken by the Province and of the economic situation of Argentina at that time. In that regard, the Tribunal refers to some of the concerns expressed by OPIC at the time it denied financing the investment plan of ABA. As already noted, OPIC pointed out the size of the investments needed to achieve the Concession's objectives as compared to the estimated revenues expected from the tariffs in effect, and considered that failure to agree on a modification of the Concession in order to establish a sustainable situation […].
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> 427. More importantly, the Tribunal refers to the conclusions it reached concerning the RPI review process and the impossibility of including the Canon in the recoverable asset base for the purpose of tariff increases. Azurix has argued that the right price for an auctioned item is the price paid by the winning bidder. Argentina, for its part, argues that the fair market value of the Concession should be based on the much lower competing bids. The function of the Tribunal is not to second-guess the values established by the various bidders at the time of the privatization of AGOSBA, but to try and determine what an independent and well-informed third party would have been willing to pay for the Concession in March 2002, in a context where the Province would have honored its obligations. In that regard, being aware that the RPI tariff adjustment was not automatic and that the Canon could only be recoverable over the remaining duration (some 27 years and 9 ½ months) of the Concession and on the basis of the existing tariffs as adjusted periodically through the review process spelled out in the Concession Agreement, such investor would have realized that his only hope of

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[1024] Exhibit CL-149, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, CIADI Case No. ARB/01/7, Award, May 25, 2004, ¶¶ 242-243.

[1025] Exhibit RL-086, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, CIADI Case No. ARB/01/7, "Decision on Annulment," March 21, 2007, ¶ 101.

> recouping the Canon was essentially through expansion of the system and through efficiency improvements between the periodic 5-year tariff reviews. On the other hand, as to the RPI review process, it would have been reasonable for such an investor to 153 conclude that the ORAB would have approved tariff increases from time to time to take into account the Argentine inflation rate, if not the American one.
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> […]
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> 429. Considering those factors and valuing the Canon at present-day value, the Tribunal is of the opinion that no more than a fraction of the Canon could realistically have been recuperated under the existing Concession Agreement. The Tribunal therefore concludes that the value of the Canon on March 12, 2002 should be established at US$60,000,000 (sixty million US dollars).[1026]
>
> [Emphasis added]

940. In *Occidental v. Ecuador,* the claimant transferred its interest in an Ecuadorian oil field without obtaining the prior consent of the relevant government agency. The tribunal deemed this action to be negligent and illegal, and proceeded to deduct 24% of the amount of compensation claimed.

> 670. The Tribunal notes that it is not any contribution by the injured party to the damage which it has suffered which will trigger a finding of contributory negligence. The contribution must be material and significant. In this regard, the Tribunal has a wide margin of discretion in apportioning fault […]
>
> 686. The Tribunal agrees with the ICSID Annulment Committee in the MTD Equity case that "the role of the two parties contributing to the loss [is] […] only with difficulty commensurable and the Tribunal [has] a corresponding margin of estimation." However, the Tribunal must reach a decision and it has.
>
> 687. Having considered and weighed all the arguments which the parties have presented to the Tribunal in respect of this issue, in particular the evidence and the authorities traversed in the present chapter, the Tribunal, in the exercise of its wide discretion, finds that, as a result of their material and significant wrongful act, the Claimants have contributed to the extent of 25% to the prejudice which they suffered when the Respondent issued the Caducidad Decree. The resulting apportionment of responsibility as between the Claimants and the Respondent, to wit **25% and 75%,** is fair and reasonable in the circumstances of the present case.[1027]
>
> [Emphasis added]

[1026] Exhibit CL-126, *Azurix Corp. v. Argentina*, CIADI Case No. ARB/01/12, Final Award, July 14, 2006, ¶¶ 426-430.

[1027] Exhibit RL-087, Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador, CIADI Case No. ARB/06/11, Award, October 5, 2012, ¶¶ 670, 686-687.

941. The Respondent observes that, in her dissent, Professor Brigitte Stern concluded that the claimants' contribution to the damage had been understated by the majority, and that the damages attributable to the claimant should be doubled (50%).[1028]

942. In *Yukos v. Russia*, the tribunal upheld that the claimants "contributed to their injury in a material and significant way" and that "an award of damages may be reduced if the victim of the wrongful act of the respondent State also committed a fault which contributed to the prejudice it suffered." After noting its broad discretion in determining the claimants' contribution to the damages, the tribunal decreased damages by 25%:

> 4. Tribunal's Decision on Contributory Fault
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> 1633. Paraphrasing the words of Article 39 of the ILC Articles on State Responsibility and its commentary, the Tribunal must now determine whether Claimants' and Yukos' tax avoidance arrangements in some of the low-tax regions, including their questionable use of the Cyprus-Russia DTA summarized above, contributed to their injury in a material and significant way, or were these minor contributory factors which, based on subsequent events such as the decision of the Russian authorities to destroy Yukos, cannot be considered, legally, as a link in the causative chain. As the Tribunal noted earlier in this chapter, an award of damages may be reduced if the victim of the wrongful act of the respondent State also committed a fault which contributed to the prejudice it suffered and for which the trier of facts, in the exercise of its discretion, considers the claiming party should bear some responsibility.
>
> 1634. In the view of the Tribunal, Claimants should pay a price for Yukos' abuse of the low-tax regions by some of its trading entities, including its questionable use of the Cyprus-Russia DTA, which contributed in a material way to the prejudice which they subsequently suffered at the hands of the Russian Federation.
>
> [...]
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> 1636. The Tribunal agrees with the ICSID Annulment Committee in the *MTD v. Chile* case that "the role of the two parties contributing to the loss [is] [...] only with difficulty commensurable and the Tribunal [has] a corresponding margin of estimation." However, the Tribunal, as other tribunals have done, must reach a decision and it has done so on the basis of all the evidence which it has reviewed.
>
> 1637. Having considered and weighed all the arguments which the Parties have presented to it in respect of this issue the Tribunal, in the exercise of its wide discretion, finds that, as a result of the material and significant misconduct by Claimants and by Yukos (which they controlled), Claimants have contributed to the extent of 25 percent to the prejudice which they suffered as a result of Respondent's destruction of Yukos. The resulting apportionment of responsibility as between Claimants and Respondent, namely 25 percent and 75 percent, is fair and reasonable in the circumstances of the present case.[1029]

[1028] Exhibit RL-088, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador*, CIADI Case No. ARB/06/11, "Dissenting Opinion (Brigitte Stern)," ¶¶ 7-8.

[1029] Exhibit RL-089, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, CNUDMI, PCA Case No. AA 227, "Final Award," July 18, 2014, ¶¶ 1633-1637.

[Emphasis added]

943. In *Cooper Mesa v. Ecuador,* citing the ILC Articles, *MTD* and *Yukos*, the tribunal ruled that "the damages on the claimant were caused both by the illegal expropriation made by the Respondent and by the Claimants' own negligent actions and omissions and by its 'unclean hands,'" and reduced the compensation by 30% due to the claimants' negligence:

> 6.91. Contributory Fault: As to "contributory fault," the Tribunal refers to Article 39 of the ILC Articles on State Responsibility, entitled "Contribution to the Injury" as being declaratory of international law. It provides: "In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought." In the ILC Commentary (paragraph 1), Article 39 is described as dealing "with the situation where damage has been caused by an intentionally wrongful act of a State, which is accordingly responsible for the damage in accordance with Articles 1 and 28, but where … the individual victim of the breach has materially contributed to the damage by some willful or negligent act or omission. Its focus is on situations which in national law systems are referred to as 'contributory negligence', 'comparative fault', 'faute de la victime' etc."
>
> 6.92. The ILC Commentary also explains what is meant by wilful or negligent action or omission (paragraph 5): "Not every action or omission which contributes to the damage suffered is relevant for this purpose. Rather article 39 allows to be taken into account only those actions or omissions which can be considered as wilful or negligent, i.e., which manifests a lack of due care on the part of the victim of the breach for his or her own property or rights [footnote omitted]. While the notion of a negligent action or omission is not qualified, e.g., by a requirement that the negligence should have reached the level of being 'serious' or 'gross', the relevance of any negligence to reparation will depend upon the degree to which is has contributed to the damage as well as the other circumstances of the case. The phrase 'account shall be taken' indicates that the article deals with factors that are capable of affecting the form or reducing the amount of reparation in an appropriate case." The ILC Commentary cites (inter alia) the decisions in *LaGrand*, *Delagoa Bay Railway* and *The Wimbledon*.
>
> […]
>
> 6.96. As was cited by the Yukos tribunal, the *MTD* committee held that the role of the two parties contributing to the loss was only with difficulty commensurable; and that the tribunal had "a corresponding margin of estimation" (paragraph 101). The *Occidental* tribunal decided likewise that it had "a wide margin of discretion in apportioning fault." (paragraph 670). The Tribunal does not discount the difficulty in estimating a contribution by way of percentage contribution; but it prefers to interpret these references to "margin" and "discretion" as requiring the same exercise for any issue of causation. In the present case, that issue is essentially factual.
>
> 6.97. For present purposes, the Tribunal considers that the general approach taken in all these decisions, whether treated as causation, contributory fault (based on wilful or negligent act or omission) or unclean hands, is materially the same, deriving from a consistent line of international legal materials. The Tribunal decides to apply that general approach in this case. As further explained below, it decides that the Claimant's injury was caused both by the Respondent's unlawful expropriation and also by the Claimant's own contributory negligent acts and omissions and unclean hands. Given

> that the Tribunal draws no distinction between these different concepts for this case, it prefers to refer only to Article 39 of the ILC Articles.
>
> […]
>
> 6.100. In the Tribunal's view, the evidence establishes that several of the Claimant's senior personnel in Quito were guilty of directing violent acts committed on its behalf, in violation of Ecuadorian criminal law. Their resort to subterfuge and mendacity aggravated those acts. The consequences could have led to serious injury and loss of life. The adverse response from members of the local communities, already hostile, was inevitable. That is not to say that the Claimant's senior management in Canada was fully privy to the planning and execution of these acts. On the evidence, the Tribunal prefers to base its decision on the Claimant's negligence, rather than the wilful conduct of its Canadian senior management. […]
>
> […]
>
> 6.102. Taking all these factors into account, including the provocations by certain anti-miners, the Tribunal assesses the Claimant's contribution to its own injury as of November 2008, for the purpose of applying Article 39 of the ILC Articles, at 30 per cent. On the facts of this case, it could not be less.[1030]
>
> [Emphasis added]

944. As can be seen, the case law indicates that a reduction of the award can take place in cases in which the claimant party incurred in illegality or recklessness. As shown below, in this case, the Claimants contributed to their losses when they entered a partnership with E-Mex and, in doing so, took an unnecessary risk that no reasonable investor would have taken in their place.

3. Application to the facts

945. In the present case, the Claimants made a series of poor business decisions that contributed significantly to the damage suffered. The Claimants knowingly walked away from the purchase of Eventos Festivos, which would have allowed them the acquire a permit to open up to 20 casinos. The Claimants had a signed an agreement with Eventos Festivos and had even paid a non-refundable deposit of one million dollars. In turn, Eventos Festivos had requested and obtained authorization from the SEGOB to change the address of their venues, so they could include the locations where the Claimants had their casinos.

946. Instead of concluding this transaction and thereby acquiring their own permit, the Claimants chose to walk away from their deposit and become an operator of E-Mex; a company owned by Mr. Rojas Cardona. To that end, they first entered into a transaction agreement and then into an operating agreement, and did so with full knowledge of the following facts:

- Mr. José Rojas Cardona had pushed out Mr. Young from the business. According to Mr. Burr, it was Mr. Young who introduced him to the casino business in Mexico. It must be

[1030] Exhibit RL-090, *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, "Award (Redacted)," March 15, 2016, ¶¶ 6.91-92, 6.96-97, 6.100, 6.102.

recalled that Mr. Rojas and Mr. Young owned JVE Monterrey and that it was under the Monterrey Resolution that the Claimants initially opened their casinos.[1031]

- The Claimants (or at least Mr. Burr) were aware of certain illicit activities in which Mr. Rojas had partaken. It is not clear what those illegal activities were, but if the Claimants' statement is taken as true, it would imply that they knowingly did business with a criminal.[1032]
- As part of their due diligence, the Claimants hired an internationally recognized firm (Prescience) to look into Mr. Cardona's background.[1033] The Respondent has not had access to Prescience's report, but according to the Claimants themselves, the firm recommended them to separate their business from that of Mr. Rojas Cardona. Despite the recommendation of the firm that they themselves retained; the Claimants entered into a partnership with Mr. Rojas Cardona.[1034]
- The Claimants knew that E-Mex owed Blue Crest USD $75 million and, also, that "*E-Mex was in default and not able to pay this debt to BlueCrest.*"[1035] This implies that they were aware that, if the agreement between BlueCrest/Advent and E-Mex did not materialize, E-Mex was under risk of being declared bankrupt and, if that happened, E-Mex would lose the permit under which the Claimants planned to operate their casinos.[1036]

947. The reckless decision to do business with Mr. Rojas Cardona's E-Mex proved over time to be the source of all the Claimants' problems in Mexico. The deal between BlueCrest/Advent and E-Mex did not close; E-Mex was unable to pay its debt to BlueCrest; BlueCrest sued to try to recover its money and, as a consequence, E-Mex was declared in bankruptcy; E-Mex lost its permit and, in Mr. Burr's words: "as a result of the bankruptcy proceedings, our relationship with E-Mex rapidly deteriorated."[1037]

948. What followed was a dispute between E-Mex and E-Games regarding the payment of royalties, which resulted in an arbitration in which E-Games was ordered to pay a considerable sum of money.[1038] Also, when E-Mex finally learned that E-Games was still operating under its permit, it presented an amendment to Amparo 1668/2011 to challenge the 2009-BIS Oficio which, according to E-Games, allowed it to operate E-Mex's permit without its consent. In the end, the above-mentioned *oficio* was declared unconstitutional by an amparo judge and in compliance with

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1031 Memorial, ¶¶ 18-19, 32-33. See also third witness statement of Mr. Burr, ¶¶ 38, 46.

1032 *Id.*, ¶ 87. See also Exhibit CW-50, Third witness statement of Mr. Burr, ¶¶ 49-51.

1033 Exhibit CW-50, third witness statement by Mr. Burr, ¶ 38.

1034 *Id.*

1035 Memorial, ¶ 81.

1036 *Id.*, ¶ 87.

1037 Exhibit CW-50, third witness statement by Mr. Burr, ¶ 50. The original text in English reads as follows: "as a result of the bankruptcy proceedings, our relationship with EMex rapidly deteriorated."

1038 Section II.H *supra*.

the ruling, Oficio 1009-Bis was revoked, together with all the acts deriving from it, including E-Games' permit.

949. Had it not been for the decision to walk away from the transaction with Eventos Festivos and do business with Mr. Rojas, despite all the risks that this entailed, E-Games would have today a permit to operate up to 20 casinos in Mexico and would be able to operate them without having to submit themselves to the will or whims of Mr. Rojas or any other person.[1039] With their imprudent decisions, the Claimants greatly contributed to the injury they suffered and now are trying to blame the Respondent for the materialization of the risks that they knowingly assumed at the time. On the basis of the above, the Tribunal is requested to decrease the damages by at least 50%, if it determines that there was responsibility on the part of the State.

I. Use of the discounted cash flow (DCF) methodology in international arbitration

950. It is generally recognized that the DCF method is based on cash flow projections and an estimate of the risk associated to such cash flows. Thus, its suitability as a method to assess damages in investor-state arbitration depends on the existence and availability of sufficient information to determine the future cash flows and their risks with a reasonable level of certainty. This is why most international tribunals insist on the existence of a proven track record of profitable operations (at least three years) as a condition for using the DCF method.

951. In the NAFTA context, several tribunals have referred to the need for this proven track record of profitable operations. In *Metalclad v. Mexico*, a case that involved hazardous waste containment that never became operational due to lack of a local permit, the tribunal noted that:

> 119. Normally, the fair market value of a going concern which has a history of profitable operation may be based on an estimate of future profits subject to a discounted cash flow analysis. B*envenuti and Bonfant Srl v. The Government of the People's Republic of Congo*, 1 ICSID Reports 330; 21 I.L.M. 758; *AGIP SPA v. The Government of the People's Republic of Congo,* 1 ICSID Reports 306; 21 I.L.M. 737.
>
> 120. However, where the enterprise has not operated for a sufficiently long time to establish a performance record or where it has failed to make a profit, future profits cannot be used to determine going concern or fair market value. In *Sola Tiles, Inc. v. Iran* (1987) (14 Iran-U.S.C.T.R. 224, 240-42; 83 I.L.R. 460, 480-81), the Iran-U.S. Claims Tribunal pointed to the importance in relation to a company's value of "its business reputation and the relationship it has established with its suppliers and customers". Similarly, in *Asian Agricultural Products v. Sri Lanka* (4 ICSID Reports 246 (1990) at 292), another ICSID Tribunal observed, in dealing with the comparable problem of the assessment of the value of good will, that its ascertainment "requires the prior presence on the market for at least two or three years, which is the minimum period needed in order to establish continuing business connections."[1040]

[1039] The Claimants' propensity to associate themselves with persons of dubious reputation is also established by their experience with Mr. Chow and Mr. Pelchat.

[1040] Exhibit CL-79, *Metalclad Corporation v. United Mexican States,* CIADI Case No. ARB(AF)/97/1, Award, August 30, 2000.

[Emphasis added]

952. In *Merill & Ring*, the tribunal noted that future estimates are "unavoidably extracted" from historic risks and, lacking "items for an educated estimate," the results would always be speculative and could not give grounds to base an award on damages:

> 264. Of course, there is always some item of uncertainty involved in future scenarios, and even in often used valuation methods, such as the discounted cash flow, future estimates are based on assumptions. But these are inevitably drawn from specific information provided by a historical record of profitability, or other items that allow for an educated estimate. In the instant case, such an educated estimate is not possible because the record of profitability on the Investor's British Columbia operations has been inextricably and permanently related to the existence and application of the regulatory regime. There is thus no measure of profitability relating to the period before the measures were adopted. However, in these circumstances, the future scenario will be characterized more by speculation than by educated estimates, an approach which has not been favored by arbitration tribunals, and upon which this Tribunal would not be prepared to base an award of damages.[1041]
>
> [Emphasis added]

953. Other non-NAFTA tribunals have also expressed concern over the use of the DCF method in absence of sufficient information.

954. In *Gemplus v. Mexico,* the dispute arose from the cancellation of a concession to operate the National Vehicle Register of Mexico (RENAVE). The tribunal rejected the DCF method even though the RENAVE was a running business that had operated for some months:

> DCF Method: The Tribunal does not consider the DCF method to be an appropriate methodology to apply on the facts of the present case; and it rejects the Claimants' case on the use of the DCF method. The Tribunal accepts the Respondent's submissions to the effect that the status of the Concessionaire as a business, during the period from August/September 2000 up to the relevant valuation date of 24 June 2001, was far too uncertain and incomplete to provide any sufficient factual basis for the DCF method. Moreover, the Claimants' use of the DCF method, with its expert (LECG), produces figures for the Concessionaire's future lost profits which are manifestly too high on the facts found by the Tribunal. [1042]
>
> [Emphasis added]

955. Similarly, the tribunal in *Siag v. Egypt* rejected the use of DFC due to the project's short operation history. Also relevant to the present case is the exchange between the tribunal and one of the damages experts (Mr. Abdala from the LECG firm) on the differences between the valuation of a business with a sufficient track record and a business opportunity still under development:

[1041] Exhibit CL-124, Merrill & Ring Forestry L. P. v. Government of Canada, CIADI Case UNCT/07/1, ICSID Administrated, Award, March 31, 2010, ¶ 264, footnote 179, citing LG&E Energy Corp. et al. v. Argentine Republic, Award and PSEG Global Inc et al. v. Republic of Turkey, Award, ¶¶ 312-313.

[1042] Exhibit CL-232, *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, CIADI Case No. ARB(AF)/04/3 and ARB(AF)/04/4, Award, June 16, 2010, Part XIII, ¶ 72.

> 567. At the end of his evidence, Mr Abdala of LECG was asked by the Tribunal a question concerning the differences in valuing the future profits of a business which has been operating for several years, as compared to a "business opportunity" which is still in the development phase. Mr Abdala very candidly acknowledged that there is one particular difference and this is that "… in the [case] that you have a track record of profitability you could say that you have a higher degree of certainty as to what to expect of the performance of the business in the future."[750] He further offered that " … in both cases, whether you're valuing new business or [existing] business, you will still have a certain degree of uncertainty as to projecting revenues moving forward, and profits moving forward."
>
> 568. This point is perhaps obvious, but it is nonetheless significant. Of equal importance are the numerous "moving parts" which contribute to a DCF analysis, whether at the front end in terms of building up the model of revenue and operating costs and capital expenditure, or in terms of the Weighted Average Cost of Capital ("WACC") used to discount future cash flows back to a present value. On the question of capital expenditure, the Tribunal notes that in accounting for construction costs, LECG relied on information provided to it by Mr Fleetwood-Bird of CBRE, which information Mr Fleetwood-Bird explained he had obtained from a discussion with an architect in Cairo. 752 569.
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> [...]
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> 570. Points such as those just mentioned tend to reinforce the wisdom in the established reluctance of tribunals such as this one to utilise DCF analyses for "young" businesses lacking a long track record of established trading. In all probability that reluctance ought to be even more pronounced in cases such as the present where the business is still in its relatively early development phase and has no trading history at all. The Tribunal accepts Egypt's submission. [1043]
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> [Emphasis added]

956. More recently, in *Rusoro v. Venezuela*, the tribunal established the general circumstances in which the DCF methodology is appropriate in investor-State arbitration:

> 758. Valuations based on the DCF method have become usual in investment arbitrations, whenever the fair market value of an enterprise must be established. The Tribunal agrees that, where the circumstances for its use are appropriate, forward looking DCF has advantages over other, more backwards looking valuation methods.
>
> 759. DCF, however, cannot be applied to all types of circumstances, and while in certain enterprises it returns meaningful valuations, in other cases it is inappropriate. DCF works properly if all, or at least a significant part, of the following criteria are met:
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> - The enterprise has an established historical record of financial performance;
>
> - There are reliable projections of its future cash flow, ideally in the form of a detailed business plan adopted in *tempore insuspecto*, prepared by the company's officers, and verified by an impartial expert;

[1043] Exhibit RL-065, *Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, CIADI Case No. ARB/05/15, "Award," June 1, 2009, ¶¶ 567-568 and 570.

> - The price at which the enterprise will be able to sell its products or services can be determined with reasonable certainty;
>
> - The business plan can be financed with self-generated cash, or, if additional cash is required, there must be no uncertainty regarding the availability of financing;
>
> - It is possible to calculate a meaningful WACC, including a reasonable country risk premium, which fairly represents the political risk in the host country;
>
> - The enterprise is active in a sector with low regulatory pressure, or, if the regulatory pressure is high, its scope and effects must be predictable: it should be possible to establish the impact of regulation on future cash flows with a minimum of certainty.
>
> 760. DCF is not a friars' balm which cures all ailments. It is simply a financial technique, in which an expert is able to estimate with reasonable certainty a number of future parameters (income, expenses, investments), and then discount the net income at an appropriate rate. If the estimation of those parameters is incorrect, the results will not represent the actual fair market value of the enterprise. Small adjustments in the estimation can yield significant divergences in the results. For this reason, valuations made through a DCF analysis must in any case be subjected to a "sanity check" against other valuation methodologies.[1044]
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> [Emphasis added]

957. These conclusions were subsequently reiterated in another recent case, *Cengiz Insaat Sanayi ve Ticaret A.S. v. Libya,* in which the investment consisted of contracts to plan, design and build housing infrastructure in Libya. The project was in the design and construction phase when the claimant abandoned it due to safety concerns caused by the Arab Spring in 2011. After several subsequent attempts to continue with the project, the claimant failed and sued the State for 302.6 million dollars.

958. The tribunal rejected DFC as a valuation method after finding that the claimant had not proven that the earnings could be reasonably anticipated and were probable, not merely possible.[1045] The tribunal's conclusion was based (*inter alia*) on the fact that the scope of the construction project was still under discussion and, consequently, there was much uncertainty about the projects and the feasibility of continuing the work based on the original budget.[1046] The tribunal concluded its analysis in the following terms:

> 616. Summing up, the Tribunal concludes that Cengiz' loss of profit claim is highly speculative. The evidence proves that it is unlikely that Cengiz would have been able to successfully conclude the Projects as foreseen in the Contracts, and extremely unlikely that Cengiz would be able to clinch a 30.5% rate of profit from the Contracts.

[1044] Exhibit CL-125, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, CIADI Case No. ARB (ARB/12/5, "Award," August 22, 2016, ¶¶ 758-760.

[1045] Exhibit RL-091, *Cengiz Insaat Sanayi ve Ticaret A.S. v. Libya*, ICC Case No. 21537/ZF/AYZ, "Award," November 7, 2018, ¶¶ 602-603

[1046] *Id.*, ¶¶ 604 and 610.

959. The tribunal accepted the valuation submitted by the claimant's expert, based on the net book value of the machinery and the equipment, which amounted to 49.2 million dollars.[1047] The tribunal justified it as follows:

> Valuations based on the DCF method have become usual in investment arbitrations, whenever the fair market value of an enterprise must be established. The Tribunal agrees that, where the circumstances for its use are appropriate, forward looking DCF has advantages over other, more backwards looking valuation methods.
>
> DCF however, cannot be applied to all types of circumstances, and while in certain enterprises it returns meaningful valuations, in other cases its inappropriate. The tribunal in Rusoro has provided a list of criteria which a company must meet for its DCF valuation to be relevant: […].[1048]

960. The Respondent acknowledges that there are isolated cases in which tribunals have departed from this practice and allowed DCF analysis to determine the fair market value of investments without a proven track record of profitable operations. However, the vast majority have voiced reservations about its use in such circumstances and, even in those cases where it has been used, the tribunals have set out strict requirements, such as the need for the claimants to prove that: (i), in the absence of the violating measure, the project would have become operational and profitable; and (ii) that cash flows may be established with reasonable certainty based on the evidence presented. This occurred in the case of *Tehtyan v. Pakistan:*

> 330. In the Tribunal's view, a review of recent case law, including but not limited to the cases set out in more detail above, confirms that the question whether a DCF method (or a similar income-based valuation methodology) can be applied to value a project which has not yet become operational depends strongly on the circumstances of the individual case. The first key question is whether, based on the evidence before it, the Tribunal is convinced that in the absence of Respondent's breaches, the project would have become operational and would also have become profitable. The second key question is whether the Tribunal is convinced that it can, with reasonable confidence, determine the amount of these profits based on the inputs provided by the Parties' experts for this calculation. If the Tribunal reaches the conclusion that there are "fundamental uncertainties" due to which it is not convinced that the project would have reached the operational stage and would have been able to generate profits, it cannot apply the DCF method. If it reaches the conclusion that no such "fundamental uncertainties" preclude reliance on the DCF method but is not convinced by the inputs provided by the Parties' experts, it may conclude that it cannot apply the DCF method or it may conclude that certain deductions have to be made to account for additional risks or uncertainties faced by the project.[1049]
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> [Emphasis added]

961. As can be seen from the quotation above, a proven track record of profitable operations is usually a requirement for the use of the DCF method, and has only been allowed in cases involving

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[1047] *Id.*, ¶¶ 618-619.

[1048] *Id.*, ¶¶ 620-621.

[1049] Exhibit RL-092, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, CIADI Case No. ARB/12/1, "Award," July 12, 2019, ¶ 330.

new businesses when there is sufficient evidence to dispel any uncertainty about the project's future and its results, in order to comply with the compensation standard. To paraphrase *Asian Agricultural Products v. Sri Lanka,* the prospective gains (on which a DCF is invariably based) must be reasonably anticipated and probable, not just merely possible.

962. It should also be noted that the World Bank Guidelines on the Treatment of Foreign Direct Investment (hereinafter "the World Bank Guidelines") and the ILC's Draft Articles on Responsibility of States are consistent with these conclusions.

963. The World Bank Guidelines only recommend the use of DCF to value "a going concern with a proven track record of profitability" that is "an enterprise consisting of income-producing assets which has been in operation for a sufficient period of time to generate the data required for the calculations of future income and which could have been expected with reasonable certainty."[1050]

964. The commentary to Article 36 (compensation/indemnification) of the Draft Articles on Responsibility of States, with comments, notes that the international tribunals have shown caution with respect to the methodology, in view of the "wide range of inherently speculative items" that it uses, which further underscores the need for a history of profitable operations as a condition for using the DCF approach:

> (26) Since 1945, valuation techniques have been developed to factor in different items of risk and probability.[557] The discounted cash flow (DCF) method has gained some favour, especially in the context of calculations involving income over a limited duration, as in the case of wasting assets. Although developed as a tool for assessing commercial value, it can also be useful in the context of calculating value for compensation purposes.[558] But difficulties can arise in the application of the DCF method to establish capital value in the compensation context. The method analyses a wide range of inherently speculative items, some of which have a significant impact upon the outcome (e.g., discount rates, currency fluctuations, inflation figures, commodity prices, interest rates and other commercial risks). This has led tribunals to adopt a cautious approach to the use of the method. Hence, although income-based methods have been accepted in principle, there has been a decided preference for asset-based methods.[559] A particular concern is the risk of double-counting which arises from the relationship between the capital value of an enterprise and its contractually based profits.[560]
>
> [Emphasis added]

965. As will be explained in the next section, even in the unlikely event that this Tribunal determines that the Cabo, Cancun, and online casino projects should be included in the claim for damages, none of them would meet the necessary conditions to be valued using the DCF method. The uncertainty is not only related to the possible future results of those casinos, but with such fundamental issues as the probability that the projects being carried out and, if so, the possible date of start of operations.

1. Application to the facts

[1050] Exhibit RL-093, World Bank Guidelines on the Treatment of Foreign Direct Investment, "Chapter IV," ¶ 6.

966. The Respondent does not dispute that the DCF methodology can be used to value the existing Casinos, but it does question several of the assumptions used by BRG that result in a considerable overestimation of the damages. However, it cannot accept the application of said methodology to determine the FMV of the Projects because none of them were even in the construction stage at the time of the closure and, for obvious reasons, they were never close to becoming operational.

967. In fact, as will be explained below, the available evidence raises serious doubts about the possibility of those projects coming to fruition and about the profitability that the Claimants impute to them. It is noted that, out of the 8 casinos included in the claim for damages, those in Cabo and Cancun, as well as the online casino, would be almost as valuable as the 5 existing casinos, representing almost 49% of the claimed damages.

968. In any case, the available evidence clearly shows that none of those projects were in advanced stages of development, as the Claimants contend. There is no support for the premise that, but for the actions of the Respondent, the hotels and the casinos would have been built (causation) and no basis for assuming that they would be as profitable as the Claimants' experts claim (breach of the principle of reasonable certainty of the damages).

J. Claimants' quantification of damages

969. In what follows, the Respondent will address some general aspects of the Claimants' claim for damages and will also summarize the main observations of its damages experts (Rión) on the estimate prepared by BRG and their conclusion on the value [of Claimants' investment]. Please note that this summary is not intended to be exhaustive, but rather a synthesis of the main points. For a more detailed and complete explanation, please refer to the report presented in this submission as Exhibit RER-3, Expert report by Rión M&A.

1. Date of expropriation

970. The Claimants' experts determine the FMV of the operating casinos and of the Projects as of April 23, 2014, that is, one day before the closure of the Casinos.

971. The Respondent does not dispute [the validity of] this date for the purposes of determining the FMV of the existing casinos, however, it does dispute its applicability to the valuation of the Projects, in the event that the Tribunal determines that they can in fact be valued as going concerns, even though they never were. To be clear, the Respondent's position on this point is that there is no protected investment associated with these three projects and, alternatively, that the damages associated with them were uncertain because they were in the very early planning stages. Therefore, they cannot be valued as if they were going concerns, as BRG does.

972. Should this Tribunal determine that it is appropriate to quantify the damage associated to the Projects as if they were going concerns (which is not accepted), the date of valuation/expropriation should be the day before the annulment of the permit, simply because they could not have become legally operational without a permit. The date of the closure of the casinos that were in operation had no impact on the Projects.

2. Damages period

973. Valuations based on the DCF methodology normally proceed under the assumption that the enterprise which value is being determined will continue indefinitely. However, in cases where there is a clear limit to the duration of the project, this restriction should be taken in account in the analysis. Because the casinos in this case required a permit, and that permit had a fixed term and the possibility of extending its duration for periods of 15 years, these restrictions must be taken into account when projecting future cash flows.

974. The Claimants' valuation of damages introduces this restriction, but in a manner calculated to increase the amount of damages. Their DCF analysis is based on the premise that E-Games was granted a 25-year permit on November 16, 2012, and that, upon expiry of the original term, the permit would be extended for an additional 15-year period, thereby extending the period of damages until November 16, 2052. The Respondent disagrees with this approach for the following reasons:

975. *First*, E-Games received its permit on August 15, 2012 -not on November 16- when the SEGOB granted it E-Mex's permit through Oficio DGAJS/SCEV/0827/2012 (Permitholder Oficio). This can be clearly seen in the excerpt reproduced below, which refers to permit "DGAJS/SCEVF/P-06/2005, dated May 25, 2005," which is E-Mex's permit:

> FIRST: Ownership of the acquired rights is determined and recognized, on the use and exploitation of the permit Number DGAJS/SCEVF/P-06/2005, dated on May 25, 2005, and its amendments, in favor of "Exciting Games S. de R.L. de C.V."[1051]
>
> [Emphasis added]

976. Because E-Mex's permit provided that it would expire on May 24, 2030, it naturally follows that the rights that were acquired by E-Games under that permit, should they exist, would expire on the same date, not 25 years after the *oficio* was issued. It is also worth noting that the *oficio* specifically states that the rights acquired by E-Games' were "naturally limited to the terms and conditions [of E-Mex's permit],"[1052] and those terms and conditions set a specific expiry date and not a term in years:

> **TERMS**
>
> **A) VALIDITY**
>
> From May 25, 2005 to May 24, 2030
>
> The validity of this permit begins on the date of its issuance.[1053]
>
> [Emphasis added]

977. *Second*, on November 16, 2012, at the request of E-Games, the SEGOB issued a second oficio -i.e. Oficio DGJS/SCEV/1426/2012 defined as Permitholder BIS Oficio- confirming that E-Games was a permitholder. This second *oficio* clarifies that the terms of E-Games' permit were

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[1051] Exhibit C-254, p. 6.

[1052] *Id*.

[1053] Exhibit C-235, p. 1.

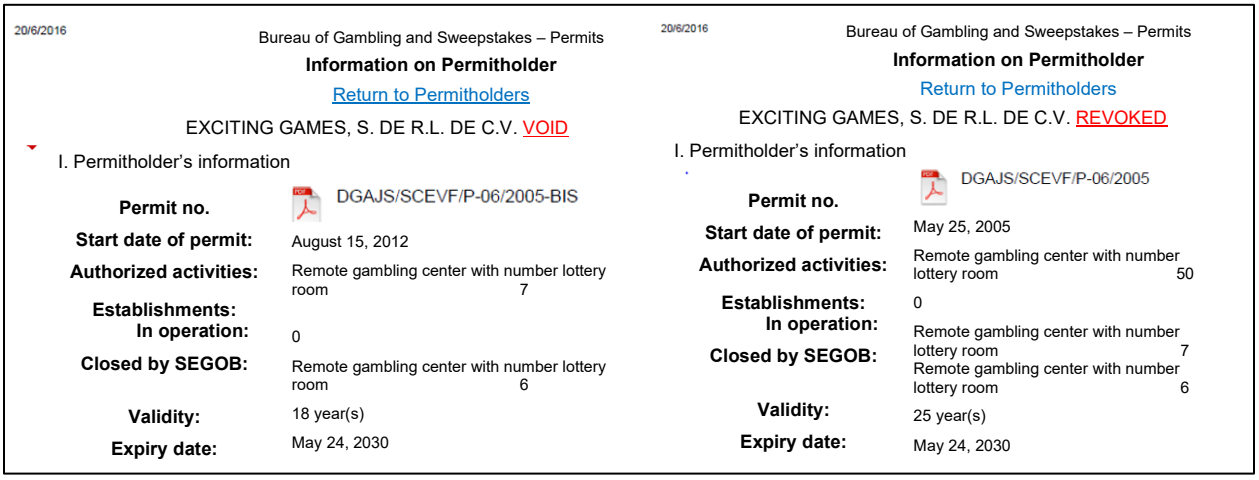
the same as E-Mex's permit and reiterates that E-Games' rights and obligations under the permit were "naturally limited to the same terms and conditions as [E-Mex's permit]:"

> FIRST. The ownership ol an independent permit is determined and recognized, granting the rights and obligations in the same terms as permit number DGAJSISCEVF/P-0612005, dated May 25, 2005 and its amendments under the numbering DGAJS/SCEVFIP-0612005-Bis, regarding (7) seven Remote Gambling Centers and (7) Seven Lottery Number Rooms […]
>
> Noting that the recognized rights are naturally limited to the same terms and conditions as the permit DGAJSISCEVFIP-0612005, dated May 25, 2005, and any amendments thereto or extensions, which are constituted as the origin and limit of rights and obligations for "Exciting Games, S. de R.L. de C. V."" [1054]
>
> [Emphasis added]

978. It is important to emphasize that nowhere does the Permitholder-BIS Oficio indicate that the permit will be valid for 25 years.

979. *Third*, the Respondent's position that the permit would expire in 2030 is confirmed by the postings in SEGOB's website (screenshots taken in June 2016), shortly after the Claimants submitted their Notice of Arbitration. Regarding E-Games, the website indicates that the permit was issued on August 15, 2012 and was valid for 18 years. The E-Mex's permit, on the other hand, was valid for 25 years. The permits of E-Games and E-Mex would expire on May 24, 2030.

980.



20/6/2016 Bureau of Gambling and Sweepstakes – Permits

Information on Permitholder

Return to Permitholders

EXCITING GAMES, S. DE R.L. DE C.V. VOID

I. Permitholder's information

Permit no.	DGAJS/SCEVF/P-06/2005-BIS
Start date of permit:	August 15, 2012
Authorized activities:	Remote gambling center with number lottery room 7
Establishments: In operation:	0
Closed by SEGOB:	Remote gambling center with number lottery room 6
Validity:	18 year(s)
Expiry date:	May 24, 2030

20/6/2016 Bureau of Gambling and Sweepstakes – Permits

Information on Permitholder

Return to Permitholders

EXCITING GAMES, S. DE R.L. DE C.V. REVOKED

I. Permitholder's information

Permit no.	DGAJS/SCEVF/P-06/2005
Start date of permit:	May 25, 2005
Authorized activities:	Remote gambling center with number lottery room 50
Establishments: In operation:	0
Closed by SEGOB:	Remote gambling center with number lottery room 7 Remote gambling center with number lottery room 6
Validity:	25 year(s)
Expiry date:	May 24, 2030

981. *Fourth*, the Respondent's position in this submission is consistent with the arguments made by the Claimants themselves in this arbitration. In their Notice of Arbitration, the Claimants made clear that they understood that E-Games' permit would expire in 2030:

> 46. 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. E-Games' independent permit was subject to the same conditions and obligations as E-Mex's permit, meaning that, while it-and Claimants' ability to operate their Casinos-was no longer tied legally to E-Mex' permit, Claimants'

[1054] Exhibit C-16, p. 13.

> new permit encompassed the same rights and obligations as E-Mex's permit, including, among other things, that the permit would remain **valid until 2030** and that Claimants would have the right to operate up to fourteen gaming establishments (7 remote gambling centers and 7 lottery number rooms), or up to 7 dual-function gaming establishments.[1055]
>
> [Emphasis added]

982. It is clear that the intention behind this change of position was to add 7 years of cash flow to the DCF analysis to increase their claim for damages.

3. Projected income

983. Rion has identified two major problems in the revenue projection for the counter-factual scenario of the existing Casinos. The first is the adjustments made by BRG to the historical revenues of the Mexico City casino (2011 to 2013) to compensate for the "interference" of the Government of Mexico during the period that, they say, had an impact on their results.[1056] Particularly, BRG makes two adjustments which are explained in paragraph 91 of the BRG report. None of these adjustments are justified.

984. In the first case, BRG explains that it adjusted the results for 2011 by extrapolating the revenues of the last four months starting after the first eight months.[1057] BRG does not specifically identify the interference to which it attributes the impact on revenue from the last four months of 2011. However, this coincides with the attack made in August 2011 on Casino Royale -which is not attributable to the Respondent- and the actions taken by the government in response to that incident, which are fully justified. To eliminate the effects of these events would be equivalent to reducing, artificially and without justification, the risks to which casinos are exposed in Mexico.

985. The second adjustment is made to compensate for a 16-day partial closure of the Mexico City Casino in 2012, and a partial closure and temporary seizure of machines in the Mexico City Casino in 2012 and 2013. In order to eliminate the effects of this alleged interference, BRG assumes that the revenue from the Mexico City casino would have grown in line with the sector's GDP. Even if this adjustment were justified -and the Respondent's position is that it is not- it would be wrong to apply it as BRG does because the GDP growth rate is applied, not to the historical results of 2011, but to the adjusted results as per the paragraph above.

986. The logic behind the requirement of a proven track record of profitable operations for using the DCF methodology is precisely to have a sufficient base of verified or verifiable information for projecting results. The corollary would be that, when such history is available, it must be used. The Respondent holds that it would be inappropriate to ignore or adjust the historical information of companies that are being valued according to the subjective judgments of the experts of a party to a controversy. It should be noted in this context that the alleged interference that occurred in 2011 and 2012 is outside of the 3-year time limit established by Articles 1116(2) and 1117(2) to

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[1055] Notice of Arbitration, ¶ 46.

[1056] Exhibit RER-3, expert report by Rión M&A, ¶ 124.

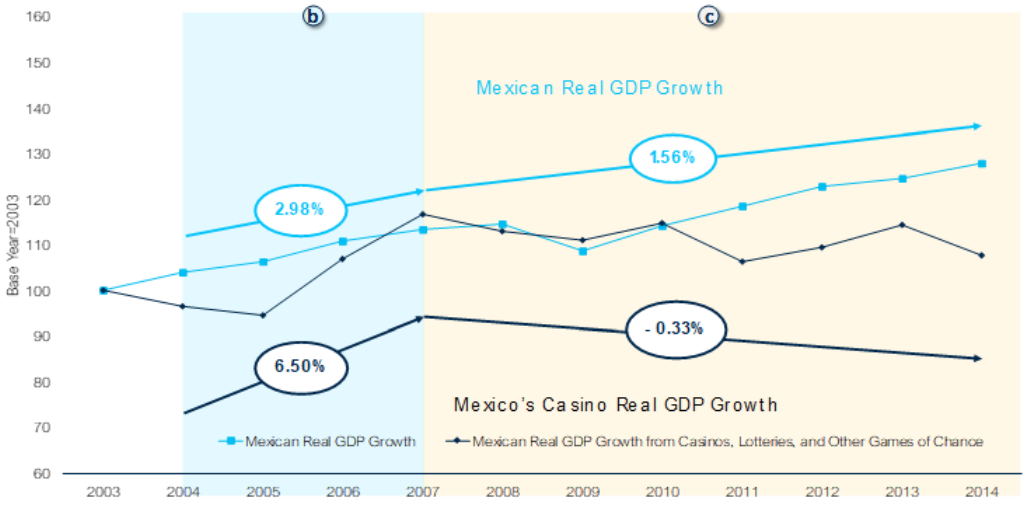
[1057] Exhibit CER-4, BRG report ¶91.

file an arbitration claim, and that the Claimants are not claiming damages caused by any of the actions identified as unjustified and discriminatory interference in their casinos.[1058]

987. The second problem with the projection of revenues is the growth rate used by BRG to project revenue. To model Casino revenues, BRG relies on the "adjusted" historic results to which it applies the estimated growth rate for national GDP. By doing so, it implicitly assumes a perfect correlation between the development of the casino and gaming sector and the overall economy.[1059] The Rión Report explains that this assumption is not reasonable, because there is no significant correlation between the sectoral and overall GDP. BRG distorts the analysis by arbitrarily selecting the period of analysis to justify its conclusions.[1060]

988. Rión explains that, between 2004 and 2007 there was a period of rapid growth following the publication of the RLFJS in 2004 and the granting of the first permits. However, the growth in the sector stagnated and in fact contracted slightly (-0.33%) between 2007 and 2013, even though the GDP grew 1.56% over the same period. This lack of correlation between sectoral GDP and the GDP of the economy as a whole can be seen clearly in the following graph included in the Rión Report.[1061]

Illustration 7. Comparison of growth rates of the total Mexican real GDP and the casino, lottery and games of chance industry GDP in periods with growth and stability



[1058] It is also worthy of mention that the Claimants base the alleged discrimination solely on the sayings of Mr. and Mrs. Burr. This is not sufficient proof of discrimination. There is no direct evidence that other operators incurred in the same faults and, unlike the Claimants, were allowed to continue their operations without interruption.

[1059] Exhibit RER-3, expert report by Rión M&A, ¶ 127.

[1060] *Id.*, ¶¶ 128-133.

[1061] *Id.*, ¶ 132.

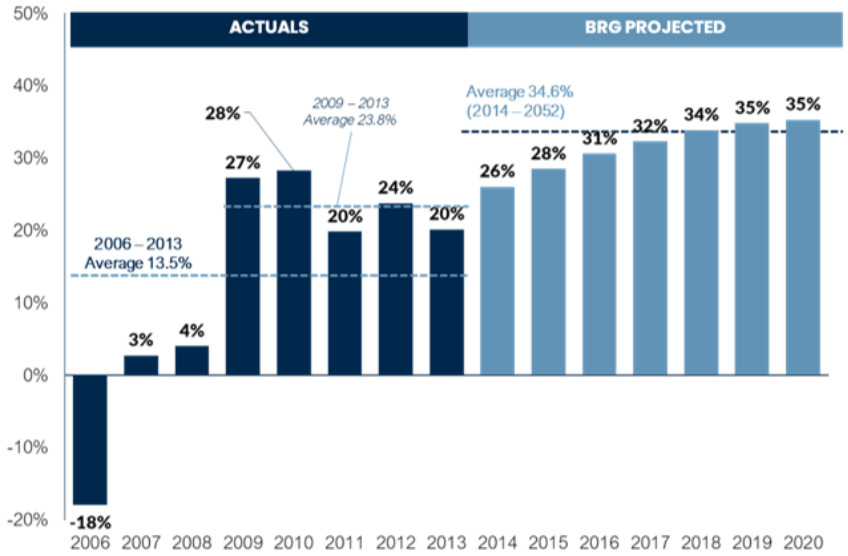
989. Based on the above, the Respondent's experts conclude that it is not correct to use the expectation of GDP growth to project the Casinos' revenues for the period 2014-2019 and that a more moderate rate should be used.[1062]

4. Operational expenditure

990. To estimate operational expenditure (Opex), BRG bases it on the relationship with revenues in the period 2012-2013 period. BRG separates revenue-related expenditure (variable) from those that are independent (fixed). Additionally, it adjusts downwards the base of expenditure between 2014 and 2015 to reflect a purported savings plan that substantially but artificially improves the profits of the Casinos.[1063]

991. The following table prepared using data from the BRG report, shows both the historic EBITDA margin[1064] and the projected margin for the first years:

Illustration 8. Actual and projected EBITDA margins (in %)



992. As can be seen, the Claimants' business presented an average historical margin of 13.5%, which is substantially improved in BRG's projections with an average margin of 34.6%. Even if the average from the years immediately before the projection period (2009-2013) were used, the average would be 23.8%, which is substantially lower than the 34.6% anticipated by BRG. The Rión report points out that they have found no evidence in the BRG report that supports or justifies this radical improvement of the EBITDA margin.[1065]

[1062] *Id.*, ¶¶ 135-136.

[1063] *Id.*, ¶ 137.

[1064] The EBITDA is obtained by dividing profits by sales, before taxes, depreciation and amortization (i.e. the English acronym EBITDA).

[1065] Exhibit RER-3, BRG report, 138-139.

993. The projected EBITDA margin is not only very superior to the Casinos' historical margin, but also well above the margins obtained by the sector, both at international and national levels. For example, the Rión report cites an analysis made by S&P Capital IQ which compares the EBITDA margin of casinos globally, in the United States, in mature and emerging markets. The global average for the EBITDA margin is at about 17.5%, i.e., about half of that projected by BRG.[1066] The Respondents' experts also examined the available data from the domestic market and found that the casinos of the Claimants' major competitors exhibit stabilized margins between 20 and 25%; this is well below the 34.6% projected by BRG.[1067]

994. This is partly because BRG considers certain expenses as fixed when they actually exhibit a variable behavior. The most relevant are payroll (33.3%), leasing of venues (15.5%), as well as security (5.5%) and electricity (3.2%). Rión notes that, although the increase in these expenses is likely not directly proportional to sales, it is unreasonable to assume that the Casinos could continue to operate with the same staff (to name an example), regardless of the magnitude of sales.[1068] All of this is relevant because BRG projects those fixed expenses into the future based on inflation and, as the Rión report explains, many of these expenses grew far above the inflation.

995. As an alternative valuation, Rión considers an EBITDA margin of between 20 and 25% during the valuation period, even though it considers this scenario as "highly optimistic" because it would place the Claimants' casinos as the best in the Mexican industry.[1069]

5. Capital investments (CAPEX) and depreciation

996. BRG divides the CAPEX into two main categories: (i) investments necessary for periodical renovations of the Casinos, and (ii) other investments that Rión interprets as investments in maintenance of existing assets, machinery, equipment, furniture, computers, and transportation.[1070]

997. BRG estimates investments in casino renovations based on the cost per square meter of the renovations made in the Naucalpan Casino in 2010 and 2012. It then adjusts this cost for inflation and multiplies the result by the square meters of all the other casinos. BRG also assumes that renovations would have to be carried out every 7 years. The other CAPEX category is taken directly from historical results adjusted for inflation.[1071]

998. Overall, Rión agrees with BRG's estimates. However, they note that the assets are completely amortized by 2052, which is inconsistent with the assumption of a going concern. This overstates the cash flow in the last year of the projection which, in turn, serves as the basis for the calculation of the terminal value.[1072]

[1066] *Id.*, ¶ 143.

[1067] *Id.*, ¶ 144.

[1068] *Id.*, ¶¶ 140-141.

[1069] *Id.*, ¶ 148.

[1070] *Id.*, ¶ 149.

[1071] *Id.*, ¶¶ 149-150.

[1072] *Id.*, ¶ 152.

999. The Respondent's experts also point out that the assumed renovation every 7 years might well underestimate the investment needed to keep the Casinos up to date. For example, they observe that the Puebla casino was renovated only three years after opening its doors and the Claimants do not provide any statistics or analysis of the renovation cycle that their experts assume –i.e., every seven years– and do not justify that the amount proposed for each renovation will be sufficient to sustain an attractive services offering.[1073] Evidently, a greater frequency in renovations (e.g. every 5 years) or a higher investment than estimated by BRG would imply a considerable reduction of damages.

6. Taxes

1000. Regarding taxes, the Rión report points out that the main problem is that BRG omits from its calculations the participation of workers in profits (Spanish acronym PTU), which, by law, all companies must pay. The PTU is calculated as 10% of the taxable income used to calculate income tax and, although it is not properly a tax, it becomes a *de facto* additional tax for companies.[1074] This omission causes artificially increase cash flows and thus, the estimation of damages.

7. Terminal value

1001. BRG estimates the terminal value under the assumption that the Claimants' business will carry on forever. As Rión explains in the report, there are different options to estimate terminal value: zero value, the sale of assets and the net present value of perpetual cash flows (the approach used by BRG).

1002. Rión favors a zero value because of the uncertainty regarding the renewal of permits beyond the expiry date of E-Games' permit and the low value that the Casino assets would have on that date, given the quick obsolescence, depreciation and wear-and-tear of equipment and facilities (three-year depreciation rate).[1075] However, it estimated the terminal value component separately, in case the Tribunal decides that it should be applied.

8. Discount rate

1003. Rión also generally agrees with the methodology used by BRG to estimate the discount rate, though it differs on some of the assumptions used for the calculation, such as the risk-free rate, cost of debt, equity risk premium and re-levered beta. Once the corresponding adjustments have been made, Rión obtained a discount rate (WACC) of 11.61%, instead of the 8.12% used by BRG. The adjustments that were made, together with their justification, can be found in detail in Exhibit 1 of the Rión report.[1076]

9. Alternate valuation

[1073] *Id.*, ¶ 153.

[1074] *Id.*, ¶ 157.

[1075] *Id.*, ¶¶ 161-162.

[1076] *Id.*, Exhibit 1, ¶¶ 210-250.

1004. Rión performed an alternate valuation of the Claimants' casinos. Their approach and the main assumptions used in its analysis is described below.

a. Existing casinos

1005. Rión recalculates the FMV of the existing Casinos using the same data, methodology and date of valuation used by BRG, but with some adjustments that it deemed relevant. These adjustments involve:

- Inclusion of the PTU that BRG left out. This adjustment reduces the total value of the operating Casinos by USD $27.2 million.
- Valuation period which considers the expiry date of the E-Games permit to be May 24, 2030, with a 15-year renewal. This adjustment reduces the FMV by USD $5.6 million. (Rión calculated the terminal value as of the end of that period, on the basis of perpetual cash flows, but this figure was not included in their final valuation.)
- It increases the discount rate from the 8.12% used by BRG to 11.61%. This adjustment reduces the FMV of the Casinos by USD $65.6 million.
- It uses the historical revenues of the Mexico City Casino as grounds for that casino's projections, which impacts the valuation by USD $17.30 million.
- Sets the expected short-term growth rate at 2.0% per annum and levels EBITDA margins at 24.1%. This adjustment reduces the FMV by USD $48.25 million.
- Finally, a conservative discount of 20% was applied to the rest of the DCF valuation because it was a non-liquid investment in a private company. Consideration of this discount has a negative impact on the FMV of USD $7.17 million.[1077]

1006. The following table, taken from the Rión report, presents a breakdown of its valuation per casino, and per time component, considering the adjustments mentioned above:

[1077] *Id.*, ¶ 165.

Adjusted Damages Summary: Casinos in operation					
USD Million	April 2014 - May. 2030	May. 2030 - May. 2045	Terminal Value[1]	Total Damages	Damages MXNmm
Naucalpan Casino	$7.54	$1.48	$0.25	$9.02	$118.07
Villahermosa Casino	$5.35	$1.14	$0.35	$6.49	$84.93
Puebla Casino	$4.74	$1.05	$0.32	$5.79	$75.74
Cuernavaca Casino	$7.21	$1.58	$0.48	$8.79	$115.08
DF Casino	$4.76	$1.02	$0.22	$5.78	$75.60
Subtotal USDmm	**$29.59**	**$6.27**	$1.63	**$35.86**	**$469.42**
Private Company Discount			*20%*		
Total	**$23.67**	**$5.01**	$1.30	**$28.69**	**$375.53**

1) Terminal Value included for information purposes, but not included in Total Damages

b. Cabo and Cancun Projects

1007. Rións' main criticism regarding the valuation of the Cabo and Cancun projects is that BRG values them as if they were going concerns, when in fact they were far from that. Indeed, BRG used the same DCF method that it uses for existing casinos, though it does not apply to businesses lacking a proven history of profitable investments. Also, BRG applied the same discount rate, which implies the assumption that flows associated with those new projects had the same level of risk as the flows from the operating casinos. This is not a reasonable assumption from any point of view.[1078] In addition to the above, Rión did not find convincing evidence that the projects were close to commencing operations, which implies a high risk that they would not be carried out at all ("completion risk").[1079]

1008. BRG fills the information gap created by the lack of observed results by extrapolating the Cuernavaca Casino results to potential results for Cabo and Cancun. In its report, Rión points out that there are no theoretical grounds for this method and that it yields unrealistic and highly speculative results.[1080]

1009. To demonstrate the shortcomings of this method, Rión used the same methodology to estimate the revenue of the existing casinos in Mexico City based on the Cuernavaca casino. Once the estimation was done, it compared it with the observed data to evaluate the accuracy of the estimates. Figure 13 in the Rión report summarizes the results and, as illustrates, that the method used by BRG leads to significant errors:

> 180 For example, the revenue suggested by the BRG Methodology would underestimate the revenue from the Naucalpan Casino by a factor of 3. Furthermore, the same methodology would underestimate the revenue from the Villahermosa

[1078] *Id.*, ¶ 175.

[1079] *Id.*, ¶ 177.

[1080] *Id.*, ¶¶ 175-179.

> (Tabasco) casino by almost a factor of 2 (1.8x). Other methodologies present similar margins of error. One important figure, for example, is that, if the revenue from the Cancun Project is estimated using the PIB from casinos instead of the PIB from the hotel industry, the estimated revenue would have been nine times less than those estimates by BRG.[1081]

1010. In Rións' opinion, this clearly shows the inadequacy of this methodology and the high uncertainty that it introduces into the estimation of damages.[1082]

1011. To estimate the value of these projects, Rión considers that it would be more appropriate use the liquidation value method proposed in the World Bank Guidelines. However, it also acknowledges that there is no evidence of invested amounts and/or the amount recovered from the loans that the Claimants affirm they granted.[1083] For this reason, it concludes that the value range of these projects would be between zero and 3.35 million, which is the value of the investments that were mentioned, assuming that they all have a liquidation value equal to their historic value and were duly proven by the Claimants.[1084] Of course, this has not been done.

1012. Finally, Rion observes that, given the wide availability of "licenses" under permits granted to other operators, the Claimants could well have made an arrangement similar to the one they had with E-Mex to launch the Cabo and Cancun projects and the project for the online casino. In such a scenario, the damages would decrease to the present value of the royalties or the amount paid to the permitholder. However, they warn that there is not enough information to estimate damages in this scenario.[1085]

1013. The Respondent submits that any value that this Tribunal may assign to the Projects must consider the evidence presented by the Claimants. In this case, there is simply no evidence of any investments or that the project would have been launched if not for the alleged violations. Under these conditions they should be assigned a value of zero.

c. Online Casino

1014. The criticism regarding the use of the DCF also applies to the online casino, since, like the Cabo and Cancun casinos, the online casino never operated.[1086] In fact, Rión considers that this business was at least one year away from becoming operational.[1087] Similarly, as in the case of the Cabo and Cancun projects, the Claimants affirm without any proof that they invested USD $2.5 million in licenses, infrastructure, and marketing expenses.

[1081] *Id.* ¶ 180.

[1082] *Id.*, ¶¶ 179-181.

[1083] *Id.*, ¶¶ 182-183.

[1084] *Id.*, ¶ 185.

[1085] *Id.*, ¶¶ 189-190.

[1086] *Id.*, ¶ 199.

[1087] *Id.*, ¶¶ 194-196.

1015. Rión is of the opinion that this project cannot be valued using the DCF method and, therefore, there are only two possible options: to assign it a value of zero or to consider the replacement value of the investment made, insofar it is proven. Rión favors the first option due to the lack of evidence of the alleged investment.[1088]

d. Pre-Award interest

1016. Article 1110(4) of the NAFTA sets out that "if payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency..." It also establishes that: "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."

1017. Applying these principles, the Respondents' experts conclude that it would not be correct to apply the interest rate used by BRG when calculating the pre-award interests. Since the Claimants' business was located in Mexico, they consider that reparation should be determined in Mexican pesos (MXN) and only then would the 6.15% rate that applies to 10-year bonds issued by the Government of Mexico could be used.[1089] If payment is made in US dollars, Rión proposes the use of the "United States Prime Rate," considered by experts as the reasonable commercial rate for such currency.[1090]

e. Summary of Rion's alternative valuation

1018. The following table summarizes the opinion of the Respondents' experts on the damages in this case:

[1088] *Id.*, ¶¶ 199-200.

[1089] *Id.*, ¶ 118.

[1090] *Id.*, ¶¶ 118-119.

Table 4. Summary of fair market value estimate

Adjusted Damages Summary					
USD Million	April 2014 - May. 2030	May. 2030 - May. 2045	Terminal Value[1]	Total Damages	Damages MXNmm
Naucalpan Casino	$7.54	$1.48	$0.25	$9.02	$118.07
Villahermosa Casino	$5.35	$1.14	$0.35	$6.49	$84.93
Puebla Casino	$4.74	$1.05	$0.32	$5.79	$75.74
Cuernavaca Casino	$7.21	$1.58	$0.48	$8.79	$115.08
DF Casino	$4.76	$1.02	$0.22	$5.78	$75.60
Going concern	**$29.59**	**$6.27**	**$1.63**	**$35.86**	**$469.42**
Cabo Project, or Cancun Project				$2.39 [(2)]	$31.29
Online Gaming Project				$0.00	$0.00
Planned projects				**$2.39**	**$31.29**
Subtotal	**$29.59**	**$6.27**	**$1.63**	**$38.25**	**$500.70**
Private Company Discount			*20%*		
Total	**$23.67**	**$5.01**	**$1.30**	**$30.60**	**$400.56**
Pre-Award Interest				$6.47	$172.48
Total with Pre-Award Interest				**$37.07**	**$573.05**

1) Terminal Value included for information purposes, but not included in Total Damages
2) Average of estimated range of USD $0mm (full recovery or no proof of investments, zero realizable cost for one additional permitted location), and USD $4.78mm (no recovery of any investments, and full realizeable value of one additional permitted location)

V. Request for relief

1019. For the reasons stated above, the Respondent respectfully requests that this Tribunal:

- Dismiss the Claimants' claims in their entirety because the claims are without merit;
- Dismiss the Claimants' claims regarding the Cabo, Cancun, and online casino projects in their entirety, either because this Tribunal lacks jurisdiction to consider the Claimants' claims or, if it determines that it has jurisdiction to decide one or more of the Claimants' claims, because those claims lack merit;
- If the Tribunal determines that the Respondent expropriated the Claimants' casinos, that it determine the damages based on the Rión M&A valuation and reduce the amount payable in the percentage that this Tribunal deems appropriate in view of the Claimants' contributory fault;
- Dismiss the claim for breach of Articles 1102, 1103 and 1105 because the Claimants have not quantified the damages associated with these breaches;
- Order the Claimants to indemnify the Respondent for the costs and expenses incurred in this arbitration, including legal cost and those incurred by its legal team, witnesses and experts; and
- Award the Respondent any other relief that this Tribunal deems appropriate.

The General Director

The Spanish version is the original and shall prevail over this courtesy translation in case of discrepancy.

[signature]

Orlando Perez Garate