BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

ADDITIONAL FACILITY

BETWEEN:

Gordon G. Burr; Erin J. Burr; John Conley; Neil Ayervais; Deana Anthone; Douglas Black; Howard Burns; Mark Burr; David Figueiredo; Louis Fohn; Deborah Lombardi; P. Scott Lowery; Thomas Malley; Ralph Pittman; Daniel Rudden; Marjorie "Peg" Rudden; Robert E. Sawdon; 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

QEU&S Claimants

and

United Mexican States

Respondent

REPLY ON THE MERITS

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6 December 2021

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I. INTRODUCTION

1. Mexico unfortunately is a country where corruption is endemic in the culture, increases yearly and remains rampant. In 2013, Mexico ranked as the 106th most corrupt country out of 177 countries ranked by Transparency International.[1] In 2020, the country ranked 124th out of 180.[2] It is thus no surprise that political cronyism and corruption are to blame for Mexico's actions and breaches of its responsibilities under international law in this case. This is a paradigmatic case of politically motivated expropriation, unfair and discriminatory treatment, failure to provide full protection and security, and denial of justice carried out by the United Mexican States ("**Mexico**" or "**Respondent**")[3] against Claimants—investors in five Mexican enterprises (the "**Juegos Companies**") and Exciting Games, S. de R.L. de C.V. ("**E-Games**") (collectively, the "**Mexican Enterprises**"). Claimants owned and operated five thriving Casinos in various Mexican cities, which they had operated legally and very successfully for nine years, and were advanced in developing gaming and hotel facilities in two more cities as well as an online gaming project, when Mexico, just two months after having granted Claimants a 25-year autonomous gaming permit (extendable indefinitely by successive 15-year periods), precipitously canceled their gaming permit, illegally closed their Casinos in military-style raids on April 24, 2014, and otherwise curtailed their rights and harassed and retaliated against them, ultimately completely destroying their substantial investment in Mexico in violation of the North American Free Trade Agreement (the "**NAFTA**" or the "**Treaty**").

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[1] Transparency International, Corruption Perceptions Index, Mexico https://www.transparency.org/en/cpi/2013/index/mex, **C-377**.

[2] *Id*.

[3] Unless otherwise specified, all defined terms have the same meaning as in Claimants' Memorial.

2. What changed? The new administration of President Enrique Peña Nieto and the Institutional Revolutionary Party ("**PRI**") took power after years of successive rule by the National Action Party ("**PAN**"), and his administration had political favors to return to powerful local interests within the gaming sector, vendettas against the supports of the PAN administration (including against Claimants' recent former business partner), and a desire to ensure it would "control" all of the important players in the gaming industry so as to secure important "contributions" from their material revenues. These factors, in particular, motivated the new Peña Nieto administration to set their sights on Claimants and their investments from the word "go" so as to ensure their demise, and remove them from the gaming sector. And Mexico accomplished just that a year and half into Peña Nieto's tenure, wiping out nine plus years of very hard and successful work by Claimants and decades of planned, continued success, expansion and profits on which Claimants had been counting.

3. At all times since Claimants made their initial investments in Mexico in 2005, they operated their casino businesses in accordance with Mexican law and pursuant to valid authorizations and/or permits issued by the Government through its *Secretaría de Gobernación* ("**SEGOB**"), the Ministry of the Interior of the Government of Mexico, and its *Juegos y Sorteos* ("**Games and Raffles**") Division. Following the 2012 electoral defeat of the PAN by the PRI, Mexico engaged in a systematic, politically motivated campaign against Claimants and their investments, which culminated in the final taking and destruction of the highly profitable casino businesses they had worked over nine years to build. It did so to favor local interests who had significant investments in the casino industry and were being remunerated for supporting then President Enrique Peña Nieto, because Claimants has been associated with a business partner who was a known and avid supporter of the PAN, and because they were perceived, rightly, as foreign

investors who could not be "controlled" and by the new, highly corrupt Peña Nieto administration who was looking to profit from all of the important business sectors in the country.

4. From the very beginning of the new PRI administration, Mexico made it clear that it *would not* allow Claimants' thriving business and newly obtained independent gaming permit ("**the E-Games Independent Permit**") to survive. Claimants obtained the status of independent gaming permitholder, obtained on November 16, 2012, after waiting over a year and half for SEGOB to finally assess and grant their permit. Mexico pursued that agenda through attacks against Claimants and their permit and businesses in the media and through politically motivated, as well as arbitrary and unlawful measures, designed, in part, to favor local, powerful gaming companies. The President Peña Nieto administration also targeted Claimants because it incorrectly perceived them as being associated with the ousted PAN given their business partner's widely-known support for that party, and because it wanted to reward the loyalty of the politically connected Hank Rhon family, owners of Claimants' competitor Grupo Caliente. Mexico also targeted Claimants because they could not be "controlled" and were perceived (again rightly) as ones who would not pay bribes to the Peña Nieto administration. With these illegal motivations, Mexico destroyed Claimants' successful gaming business and deprived them of the fruits of nine years of hard work under a lawful permit, their substantial investments in Mexico, and what would have been a fruitful and extremely profitable 25-year gaming license that would have been renewed for at least one additional 15-year term.

5. Mexico's discriminatory, arbitrary, and unlawful measures taken against Claimants in excess of its legal discretion included, without limitation:

i. The politically motivated January 2013 statement of Marcela González Salas ("**Ms. Salas**") to the media, at the beginning of her tenure as head of SEGOB's

Games and Raffles Division under President Peña Nieto, that the E-Games Independent Permit, a 25-year Casino permit that had been legally granted to E-Games in SEGOB's November 16, 2012 Resolution, was "illegal;"

ii. SEGOB's arbitrary and discriminatory invalidation of the E-Games Independent Permit on as-yet unspecified grounds of "irregularity" without providing Claimants any notice about the reasons for the cancelation and without affording them any due process, either before or after the illegal cancelation;

iii. SEGOB's arbitrarily exceeding its compliance with a judicial order in the *Amparo* 1668/2011 proceeding by revoking the November 16, 2012 Resolution within 24 hours of receiving notice of the judge's order on arbitrary grounds and then refusing to comply with the amparo judge's admonition that SEGOB had exceeded its authority and compliance with his order;

iv. Mexico's cancellation of the E-Games Independent Permit and closure of Claimants' Casinos for underlying illegitimate and illegal reasons, including political paybacks to the Hank family and vendettas against PAN supporters;

v. Mexico's violation of the principle of legal certainty and E-Games' legitimate expectations to operate its Casinos under the E-Games Independent Permit;

vi. Mexico's arbitrary and discriminatory administrative and judicial proceedings that were plagued not only with gross legal and procedural irregularities but also with political influence (including their premature conclusion under direct pressure from the President's personal attorney) and corruption, which proceedings attempted to legitimize SEGOB's invalidation of the E-Games Independent Permit and closure of Claimants' Casinos;

vii. Mexico's illegal closure of the Mexico City Casino on June 19, 2013 for 34 days;

viii. Mexico's unlawful, aggressive, and permanent closure of all of Claimants' Casinos in coordinated military-style raids on April 24, 2014 without providing Claimants any due process or transparency, and in violation of Mexican law, including a judicial injunction prohibiting the closures;

ix. Mexico's illegal and arbitrary handling of the Closure Administrative Review Proceedings, which were plagued by violations of Claimants' due process rights and applicable Mexican law, including limitations periods, and by numerous other irregularities,

x. SEGOB's application of different standards to different permit holders in like circumstances to E-Games, including Petolof, S.A. de C.V. ("**Petolof**") and Producciones Móviles, S.A. de C.V. ("**Producciones Móviles**");

xi. Mexico's deployment of discriminatory and retaliatory tax measures designed to harass Claimants and illegally extract profits to which Claimants are entitled;

xii. Mexico's retaliatory criminal investigation against E-Games and its representatives in response to Claimants asserting their rights in this NAFTA Arbitration;

xiii. SEGOB's discriminatory, arbitrary, and non-transparent denial based on nonexistent legal requirements of E-Games' requests for a new, independent gaming permit in 2014 , and its informal and nontransparent policy not to increase the number of gaming permits which, itself, was arbitrarily and discriminatorily applied, despite granting them to Mexican companies in like circumstances;

xiv. Mexico's illegal intervention into Claimants' efforts to sell and/or transfer certain of their Casino assets to third parties; and,

xv. SEGOB's unsealing of the Casinos and transference of the premises and the assets therein to third parties without notice to Claimants, resulting in the pilfering of Claimants' remaining assets.

6. In order to vindicate their rights, Claimants initiated this NAFTA Arbitration by filing their Notice of Arbitration on May 23, 2014. In response, Mexico retaliated against and increased its harassment of Claimants, including by filing the baseless criminal and tax investigations described above; continuing to deny them due process, justice, and fair treatment in administrative and judicial proceedings; and abusing its unlawful custody of their Casinos, among other measures. Mexico's continued breaches of the NAFTA during this time and afterward resulted in the total destruction of Claimants' investment in Mexico.

7. Nevertheless, Claimants pursued their rights in this NAFTA Arbitration and filed their Request for Arbitration on June 15, 2016. The Parties agreed, and the Tribunal ordered, that this NAFTA Arbitration be bifurcated into a jurisdictional phase and a merits and damages phase. In the jurisdictional phase, the Tribunal ultimately rejected Mexico's objections to jurisdiction and admissibility and determined that Claimants' case may proceed.

8. On April 21, 2020, Claimants filed their Memorial on the Merits ("**Memorial**") setting forth Mexico's breaches of the NAFTA that destroyed their investment in Mexico. On December 4, 2020, Mexico filed its Counter-Memorial on the Merits ("**Counter-Memorial**").

9. Rather than face Claimants' claims and the evidence supporting them, Mexico largely devotes its Counter-Memorial to disregarding the plentiful evidence of political and discriminatory animus against Claimants that motivated the actions of SEGOB and its Games and Raffles Division, the Peña Nieto administration, and the judiciary, among other state organs, irresponsibly blaming Claimants for Mexico's destruction of their thriving business. It also ignores and attempts

to divine new Mexican law at will to serve its narrative and attempts to rewrite the NAFTA to serve its unsupported legal arguments, creating artificially high and non-existent legal standards that it hopes Claimants cannot meet. Mexico then denies the true impact of its harm with fanciful damages arguments and raises untimely and unfounded jurisdictional objections that nonetheless fall under their own weight.

10. As an initial matter, in this arbitration, the Parties agreed to bifurcate the proceedings into (i) a jurisdiction phase established for addressing any and all possible objections by Mexico to the Tribunal's jurisdiction or the admissibility of Claimants' claims, and (ii) a merits and damages phase. Then, after extensive briefing, document production, and a hearing, the Tribunal in its Partial Award determined that it had jurisdiction over all of the Claimants and their claims; and that all those claims are admissible.[4] It is therefore not open to Mexico to now reargue these jurisdictional issues, but it still improperly attempts to do so on two patently meritless grounds. Mexico first claims that the Tribunal lacks the jurisdiction to decide on the claims relating to Claimants' expansion projects in Cabo, Cancun and online gaming. As further explained below, Mexico's argument turns a blind eye to the irrefutable facts of this case, which are that Claimants have made protected investments in these expansion projects. In any event, Mexico should not be allowed to raise, during this merits phase, this belated jurisdictional objection, which Mexico could certainly have raised during the bifurcated proceedings on jurisdiction, but voluntarily chose not to do so.

11. Mexico also *suggests* that the doctrine of "unclean hands" *might* apply in this case and that this *might* deprive the Tribunal of the jurisdiction "to grant the Claimants' investment protection

[4] Partial Award, ¶ 273(e).

under the NAFTA" or *might* "otherwise make the Claims inadmissible."[5] Mexico's suggestion of "unclean hands" rests on one document, Exhibit R-75—an affidavit filed in unrelated proceedings by Claimant Randall Taylor ("**Mr. Taylor**") which purportedly alleges that several Claimants mismanaged corporate entities and the Casinos. Mexico candidly admits that it could not "assess the veracity of these allegations,"[6] wholly ignoring the fundamental principle of international law that it bears the burden of proving all facts underlying its defense. The argument is based on fraudulent documents and unreliable evidence that is easily disproven. If Mexico had any reason to believe that Claimants engaged in any illegal or improper activity while running their Casinos in Mexico, Mexico could have argued so during the jurisdictional phase of this arbitration, but it did not. The reality is that Claimants at all times developed, constructed, operated, and managed the Casinos in accordance with all applicable laws and with SEGOB's continued seal of approval. Claimants' witnesses uniformly confirm, the purported allegations of "unclean hands" are entirely untrue, and Mexico cannot meet its burden of proof based on mere speculations, presumptions, and innuendoes spawned by baseless and fraudulent information that Claimants' adversaries fabricated and disseminated to sabotage this NAFTA Arbitration.

12. Mexico's denial of liability equally fails to withstand scrutiny. As explained, this case arises from a politically motivated and discriminatory campaign carried out by the Peña Nieto administration against Claimants. Mexico aggressively deployed the full powers of the State to this end, and did so in a rushed, haphazard, and illegal manner that further highlights the political and discriminatory motivations behind its campaign against Claimants and the E-Games Independent Permit. Claimants have proved their claims with ample evidence. In response, one

[5] Respondent's Counter-Memorial on the Merits ("Counter-Memorial"), ¶ 864.

[6] Counter-Memorial, ¶ 861.

would expect Mexico to have produced with its Counter-Memorial a panoply of documents purporting to demonstrate the basis and propriety of its impugned measures described above. Mexico did no such thing, however. Claimants requested from Mexico various documents relating to the government's views and/or analysis of the E-Games Independent Permit and the closure of their Casinos, among other topics for which Mexico—and only Mexico—would possess documents. Rather than objecting to Claimants' Requests, for 34 out of 77 (44%) of Claimants' Requests, Mexico simply stated that "it has not identified any documents that would be responsive to this request."[7] For example, Mexico *astonishingly* did not produce any documents, communications, or memoranda relevant to: (i) government resolutions granted in favor of Claimants (including the May 27, 2009, August 15, 2012, and November 16, 2012 Resolutions); (ii) analysis of SEGOB's granting of the E-Games Independent Permit; (iii) analysis of the duration of the E-Games Independent Permit; (iv) the Mexican Government's views or instructions regarding E-Games' permit; (v) the basis for Ms. Salas, head of SEGOB's Games and Raffles Division under President Peña Nieto, to refer to E-Games' permit as "illegal" immediately upon taking office; (vi) documents related to its (including SEGOB's) analysis of any of the judicial proceedings at issue in this case, including analyses of decisions, or communications within the executive branch regarding the same; (vii) Mexico's decision to close the Casinos, without affording Claimants any due process, and in violation of an existing injunction; (viii) Mexico's decision to allow the similarly situated Producciones Móviles' casinos to remain open; and, (ix) Mexico's retaliatory tax measures against E-Games. Mexico's assertion that it does not have any documents relevant to these and other topics is as implausible as it is disingenuous, as the undisputed facts and Mexico's own arguments show it to be untrue. Claimants explicitly request

[7] Procedural Order No. 10 (Mar. 26, 2021), Annex I.

throughout this Reply that the Tribunal draw specific adverse inferences arising from Mexico's gross failure to produce documents as ordered.[8] *The simple fact is that Mexico has not produced the requested documents because they are prejudicial to its case*. Mexico's systematic refusal to produce relevant and responsive documents further proves that Mexico's revocation of the E-Games Independent Permit and closure of its Casinos was unreasonable, arbitrary, and unlawful.

13. Claimants note for the purpose of clarity that although Quinn Emanuel Urquhart & Sullivan ("**QEU&S**") previously represented the entire Claimant group in this NAFTA Arbitration, Claimant Mr. Taylor now represents himself and is no longer represented by QEU&S. While the Claimants represented by QEU&S are referred to elsewhere in this proceeding as the "QEU&S Claimants," this group of Claimants is referred to simply as "Claimants" in this Reply. Claimants understand that Mr. Taylor is filing his own Reply Memorial in this proceeding and confirm that the arguments submitted in this Reply are not submitted on his behalf. Moreover, there are portions of this Reply that directly address Mr. Taylor, his history of relationships with the other Claimants, and his credibility in this NAFTA Arbitration. These portions of the Reply are submitted by Reed Smith, conflicts counsel to the QEU&S Claimants ("**Conflicts Counsel**") and not by QEU&S—this was done out of an abundance of caution to ensure compliance with QEU&S' ethical responsibilities. The portions of the Reply that were prepared by Conflicts Counsel are specifically denoted throughout the submission.

A. Structure of this Submission

14. This Reply is structured as follows. Section I provides an introduction and Executive Summary. Section II describes the relevant facts of the dispute, including the interrelated and politically motivated actions taken by Mexico and its State organs to deprive Claimants of and

[8] A complete list of the adverse inferences Claimants is requesting can be found in **Appendix A**.

ultimately expropriate and destroy their investments. Section III sets out the law applicable to this dispute, including a response to Mexico's jurisdictional objections. Sections IV refutes Mexico's arguments concerning its substantive breaches of the NAFTA and further explains how Mexico's actions breached its obligations to Claimants under the Treaty and international law. Section V sets out Claimants' request for relief.

15. Accompanying this Reply are: (i) the Fourth Witness Statement of Gordon Burr, numbered **CWS-59**; (ii) the Fourth Witness Statement of Erin Burr, numbered **CWS-60**; (iii) the Second Witness Statement of Neil Ayervais, numbered **CWS-61**; (iv) the Fifth Witness Statement of Julio Gutiérrez, numbered **CWS-62**; (v) the Third Witness Statement of José Ramón Moreno, numbered **CWS-63**; (vi) the Second Witness Statement of Black Cube (Avi Yanus), numbered **CWS-64**; (vii) the Second Witness Statement of Daniel Rudden, numbered **CWS-65**; (viii) the Second Witness Statement of Patricio Chavez, numbered **CWS-66**; (ix) the Second Witness Statement of Hector Ruiz, numbered **CWS-67**; (x) the Second Witness Statement of Alfredo Galván, numbered **CWS-68**; (xi) the First Witness Statement of Miguel Romero, numbered **CWS-69**; (xii) the Second Witness Statement of John Conley, numbered **CWS-70**; (xiii) the First Witness Statement of Andrea Martínez Porras, numbered **CWS-71**; (xiv) the Second Expert Report of Omar Guerrero, an expert on Mexican *Amparo* law, numbered **CER-5**; (xv) the Second Expert Report of Ezequiel González, an expert on Mexican administrative law, numbered **CER-6**; (xvii) the Second Expert Report of Berkeley Research Group, an expert on damages, numbered **CER-7**; (xviii) the First Expert Report of Michael Soll, an expert on gaming, numbered **CER-8**; and (xix) the First Expert Report of Claudio Jiménez de León, an expert on Mexican labor and employment law, numbered **CER-9**. Claimants also submit with this Reply factual exhibits numbered consecutively from

Exhibit **C-377 to** Exhibit **C-588** and legal authorities numbered consecutively from **CL-257** to **CL-332**.

II. FACTS

A. Claimants' Operations Under Monterrey's Resolution were Legal and Successful, and Sanctioned by SEGOB

16. Claimants' operations in Mexico formally began in 2005, following the incorporation of the B-Mex Companies and the Juegos Companies and the execution of the first joint venture agreement between the Juegos Companies and Juegos de Entretenimiento y Video de Monterrey, S.A. de C.V. (the company will be referred to as "**JEV Monterrey**" and the resolution will be referred to as "**Monterrey's Resolution**") in June 2005.[9] As explained in Claimants' previous submissions, Mr. Burr's first exploratory trips to Mexico started in late 2004, when he met Lee Young ("**Mr. Young**"), the CEO and owner of JEV Monterrey, who was operating skill machines throughout Mexico.[10] Mr. Young had started operating his machines in 2004, with the understanding that JEV Monterrey did not need a permit, which was later confirmed unequivocally by SEGOB in March 2005, when it issued Resolution No. UG/211/095/2005, a valid and enforceable administrative act ("**Monterrey's Resolution**").[11]

1. Aside from the Specific Guarantees Provided by SEGOB, Claimants also Knew their Investments were on Solid Legal Ground Due to Mexico's Efforts to Provide an Expanded and Transparent Legal and Regulatory Framework for Gaming

17. In 2004, Mexico made a dedicated effort—in connection with its comprehensive reform and modernization of its gaming laws—to attract foreign and domestic investors in the gaming

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[9] Claimants' Counter-Memorial on Jurisdiction ("Counter Memorial on Jurisdiction"), ¶ 45; Claimants' Memorial on the Merits ("Memorial"), ¶¶ 34-35; Third Witness Statement of Gordon Burr ("Third Gordon Burr Statement"), **CWS-50**, ¶¶ 34-35.

[10] Memorial, ¶ 18; Third Gordon Burr Statement, **CWS-50**, ¶¶ 3-5.

[11] SEGOB Resolution No. UG/211/0295/2005 ("Monterrey's Resolution") (Mar. 10, 2005), **C-94**.

industry by providing guarantees of a modern and more expanded legal and regulatory framework. In September 2004 Mexico enacted "an all-encompassing regulation of the [Federal] Gaming Law, which was meant to provide more transparency and uniformity in the regulation of gaming as well as to expand the permissible scope of gaming activities in Mexico."[12] Mexico knew that this reform was essential due to the history of the gaming monopoly established in favor of allies to the PRI, including, importantly, the Hank family.[13] Mexico's prior gaming law was more than 50 years old and prohibited most gaming activities.[14] As Claimants' Mexican gaming law expert Ezequiel González ("**Mr. González**") explains in his second report, the Regulation of the Games and Raffles Federal Law (the "2004 Gaming Regulation") opened up Mexico's industry to more investors, including foreign investors, and other forms of gaming that previously were not legal.[15]

18. Specifically, Mr. González concludes that:

> The entry into force of the Gaming Regulations constituted a great legal advance, because the 1947 Law prohibited most activities. Additionally, the spirit of the Gaming Regulation promoted competition within the industry, trying to encourage foreign investment in Mexico in this sector. Since its entry into force, it has undergone two modifications. (English translation of Spanish original).[16]

19. In light of the evolution of Mexico's gaming legal framework, Mr. González explains that this new Gaming Regulation was the legal and regulatory framework containing the rules applicable to the different legal statuses pursuant to which the Claimants operated their Casinos,

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[12] Claimants' Request for Arbitration ("Request for Arbitration"), ¶ 14; Memorial, ¶ 21.

[13] Request for Arbitration, ¶ 14.

[14] Memorial, ¶ 21.

[15] Second Expert Report of Ezequiel González Matus ("Second Ezequiel González Matus Report"), **CER-6**, ¶ 13.

[16] Second Ezequiel González Matus Report, **CER-6**, ¶ 13 ("*La entrada en vigencia del Reglamento de Juegos constituyó un gran avance desde lo jurídico, pues incorporó reglas concretas a la Ley de Juegos, que se regía bajo un principio prohibitivo en la mayoría de las actividades. Adicionalmente, el espíritu del Reglamento de Juegos promovió la competencia dentro de la industria y propició nuevas inversiones nacionales y extranjeras en este sector. Desde su entrada en vigor, el Reglamento de Juegos ha tenido dos modificaciones […]*.").

which were obtained as a result of a series of administrative acts issued by SEGOB,[17] including those obtained under Monterrey's Resolution. Claimants relied on the guarantees provided by the newly enacted 2004 Gaming Regulation in making their investment in Mexico as well as on SEGOB's inspections and continual sanctioning of their operations.

2. Claimants' Decision to Start their Operations Under Monterrey's Resolution was Legally Sound, Prudent, and Conservative

20. Mexico presents a severely distorted account of the facts in its Counter Memorial, attempting to infer that Claimants' operations were illegal from their inception. This is not only a litigation-created, self-serving argument; it is untrue. Mexico contends, moreover, that Mr. Burr's statements regarding Claimants' decision to invest in Mexico and his first discussions with Mr. Young are untrue for two reasons: (i) because Monterrey's Resolution was issued on March 5, 2005 and the initial discussions between Messrs. Burr and Young took place in 2004; and (ii) because, in Mexico's view, it was simply not possible that Mr. Young could be *legally* operating a "profitable business" in 2004 given that Monterrey's Resolution was issued in March 2005.[18] First, while Mr. Young's operations in Mexico initially inspired Mr. Burr to assemble a group of investors to invest in Mexico, the legality of Mr. Young's operations in 2004 or 2005 are not relevant in this case. Claimants conducted extensive due diligence in order to independently determine that Claimants' operations were legal and they determined that they were. Before this litigation began, Mexico, through SEGOB, agreed. Mexico's allegations in this regard are thus entirely deceptive and wrong.

21. A simple review of Mr. Burr's four witness statements reveals that Claimants' narrative and sequence of events regarding their investments and operations in Mexico have been truthful

[17] Second Ezequiel González Matus Report, **CER-6**, ¶ 14.

[18] Counter-Memorial, ¶¶ 62-64.

and consistent. As early as his first witness statement, Mr. Burr confirmed that: (i) he met Mr. Young for the first time in Monterrey in August of 2004, and conducted several exploratory visits to Mexico afterwards;[19] (ii) the B-Mex Companies, E-Games, and the Juegos Companies were all incorporated between May 2005 and the beginning of 2006 (after Monterrey's Resolution formally took effect);[20] and (iii) Claimants' initial operations in Mexico were carried out under the Joint Venture Agreements between each of the Juegos Companies and JEV Monterrey, which were executed after Monterrey's Resolution came into force and reviewed and sanctioned by SEGOB.[21]

22. Aside from the specific guarantees provided by SEGOB that Claimants were legally operating their Casinos under the Monterrey Resolution, Claimants also drew additional comfort for their investment from the due diligence conducted by several reputable law firms in Mexico.[22] This due diligence confirmed that Monterrey's Resolution was a valid authorization for Claimants to operate their facilities under Mexican law.[23]

23. Mexico also fails to take into account that in 2005, when Claimants formally began operations in Mexico, the Gaming Regulation was still under review before Mexico's Supreme Court. Supreme Court review of the Gaming Regulation was specifically contemplated in Claimants' due diligence efforts, and, as explained in Claimants' prior submissions, this is why Claimants opted for the most legally sound, prudent, and conservative approach: operating through

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[19] First Witness Statement of Gordon Burr ("First Gordon Burr Statement"), **CWS-1**, ¶¶ 6-7.

[20] First Gordon Burr Statement, **CWS-1**, ¶ 13; Third Gordon Burr Statement, **CWS-50**, ¶¶ 9-11; Third Witness Statement of Erin Burr ("Third Erin Burr Statement"), **CWS-51**, ¶¶ 3, 9-10; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 4.

[21] First Gordon Burr Statement, **CWS-1**, ¶ 20; Joint Venture Agreements between JEV Monterrey and the Juegos Companies, **C-95-C-99**.

[22] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 13; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 12; Second Ezequiel González Matus Report, **CER-6**, ¶¶ 20-24; Fourth Witness Statement of Gordon Burr ("Fourth Gordon Burr Statement"), **CWS-59**, ¶ 5; Fourth Witness Statement of Erin Burr ("Fourth Erin Burr Statement"), **CWS-60**, ¶ 5; Memorial, ¶ 22; Roberto Ignacio Ortuño Burgoa Opinion (May 25, 2005), **C-378**.

[23] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 103; Second Ezequiel González Matus Report, **CER-6**, ¶ 20.

a joint venture agreement with JEV Monterrey in locations containing only the permissible games of skill under Monterrey's Resolution.[24]

24. Mexico radically distorts Mr. Burr's declarations on the issue of the scope of Monterrey's Resolution. Mexico claims that Mr. Burr suggests that Monterrey's Resolution was a permit.[25] However, Mr. Burr has never said or even implied that Monterrey's Resolution was a permit, but rather a resolution issued by SEGOB confirming the *criteria* regarding the scope of SEGOB's regulatory oversight over certain "skill" slot machines that allowed JEV Monterrey—and therefore, Claimants' Mexican companies—to operate their skill machines legally in Mexico.[26]

25. First, there is nothing incongruent with Claimants' prior contentions. On the contrary, Mr. Burr has been consistent: (i) that he met Mr. Young in August 2004;[27] (ii) that Mr. Young was operating his facilities "pursuant to a **validly-issued Resolution** issued by [SEGOB]";[28] (iii) that Mr. Young's machines were considered skill-based according to Monterrey's Resolution;[29] and (iv) that after meeting Mr. Young, he conducted several exploratory/due diligence visits to Mexico, confirming Mr. Young's statement regarding the legality of the skill-based gaming

[24] First Gordon Burr Statement, **CWS-1**, ¶ 20 ("About the joint venture agreements, Mr. Burr states that they "allowed the Juegos Companies to operate certain slot machines that qualif[ied] as games of 'skill', rather than games of chance, and that SEGOB, through the Monterrey Resolution, had declared were outside the scope of its regulatory oversight. [Claimants] operated legally under this structure from 2005 until April 2008, including paying [their] taxes directly to the tax authorities rather than through JEV Monterrey, and with the knowledge of SEGOB until there was a change in the country's gaming law through which SEGOB **would start issuing gaming permits to companies** that met the criteria for the issuance of the permits as outlined in the new gaming law.").

[25] Counter-Memorial, ¶¶ 72-73.

[26] First Gordon Burr Statement, **CWS-1**, ¶¶ 20-22; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 15.

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

[28] Third Gordon Burr Statement, **CWS-50**, ¶ 3 (emphasis added).

[29] First Gordon Burr Statement, **CWS-1**, ¶ 20; First Witness Statement of Julio Gutiérrez ("First Julio Gutiérrez Statement"), **CWS-52**, ¶ 8.

machines business operations in Mexico.[30] Mexico's efforts to distort and sow doubt as to these assertions are unavailing.

26. Second, a simple reading of Monterrey's Resolution also confirms Mr. Burr's statements. Recital (*Considerando*) 2, for example, states that in order to set the criteria to issue the resolution,[31] SEGOB inspected the documentation provided by JEV Monterrey as well as the machines operating in JEV Monterrey's casinos, and confirmed that its machines were outside the scope of the Federal Law on Games and Raffles ("**Federal Gaming Law**") and the 2004 Gaming Regulation.[32] Moreover, Mr. Burr also confirms that between 2005-2008, which is the entire time that Claimants were operating under Monterrey's Resolution, SEGOB frequently examined their machines, including before their facilities opened and thereafter and never determined that the machines were somehow impermissible and/or beyond the scope of Monterrey's Resolution.[33] SEGOB even confirmed that Claimants' machines were compliant with Monterrey's Resolution shortly after the Naucalpan facility opened.[34] This confirms that Mexico's argument about Claimants' operations under the resolution are nothing more than a litigation contrived argument that fails based on its own pre-litigation conduct.

27. This is also clear from the very structure and language of the Monterrey's Resolution provisions, which specifically sets:

> "Criteria determining that [JEV MONTERREY] does not require a permit issued by [SEGOB] for the sale, use and operation in its Entertainment Centers for "Aristocrat mkv series 1 y 2" and "Ainsworth series cristal" machines.

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[30] First Gordon Burr Statement, **CWS-1**, ¶ 7; First Julio Gutiérrez Statement, **CWS-52**, ¶ 13-15.

[31] Monterrey's Resolution (Mar. 10, 2005), p. 3, **C-94** ("*[p]ara efecto de* ***fijar criterio y emitir la resolución*** *que corresponde*.").

[32] Monterrey's Resolution (Mar. 10, 2005), p. 4, **C-94** ("*las máquinas que comercializa y explota [JEV Monterrey] se encuentran fuera del ámbito de aplicación de la Ley Federal de Juegos y Sorteos*.").

[33] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 4, 6; Fourth Erin Burr Statement, **CWS-60**, ¶ 4.

[34] Naucalpan Verification (Dec. 8, 2005), **C-346**; Fourth Gordon Burr Statement, **CWS-59**, ¶ 6.

> Gaming machines of skill and ability, or similar to, those that were the subject of the present revision, and provided that said gaming mechanisms operate with a chip, because the use or commercial exploitation of such gaming machines essentially operate by skill and ability, do not require a permit issued by the [SEGOB]."[35] (English translation of Spanish original).

28. The plain language of Monterrey's Resolution demonstrates that there was nothing irregular or illegal about Claimants' operations under the JEV Monterrey Joint Venture Agreements.[36] Rather, Mexico's arguments are all litigation-driven and contradicted by SEGOB's actions. JEV Monterrey's filings and records with SEGOB relating to its operations go back to at least July 2004, when JEV Monterrey filed its first request for the issuance of a criteria (*criterio*) before SEGOB; that is, prior to Mr. Burr's first meetings with Mr. Young in August 2004. As Monterrey's Resolution itself shows, SEGOB specifically refers to JEV Monterrey's 2004 requests for the issuance of ***criteria*** regarding its legal authority over JEV Monterrey's commercial activity.[37] In this regard, Monterrey's Resolution explicitly highlights JEV Monterrey's July 23, 2004 and September 8, 2004 requests regarding the legality of its commercial activities and the scope of the Gaming Regulation. Specifically, Monterrey's Resolution says:

> "First.- On **September 8 (eight), 2004 (two thousand and four)** (…) [JEV Monterrey] appears before this Government Agency, in accordance with its **request of July 23 (twenty-three) of the same year**, in order to request a criteria regarding the legal authority of this agency of the Federal Government with respect to [its] commercial activity (…), and to that effect substantially states that, (…) the corporate purpose and the commercial activity of [JEV Monterrey] is not regulated under the administrative federal scope since the Federal Law on Games and Raffles is not applicable to its activity.

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[35] Monterrey's Resolution (Mar. 10, 2005), pp. 5-6, **C-94** ("*fija criterio en el que determina que [JEV Monterrey] no requiere permiso expedido por la [SEGOB], para la venta, uso y explotación en sus Centros de Entretenimiento de las máquinas del tipo "Aristocrat mkv series 1 y 2" y Ainsworth series cristal (…) Máquinas de Juegos de habilidad y destreza como las que fueron objeto de la presente revisión o similares a estas, y siempre que los citados mecanismos de juego operen con tarjetas de chip; lo anterior por razón de que el uso o explotación comercial de las referidas máquinas de juego operan esencialmente por habilidad y destreza, y por tanto no requieren permiso expedido por la [SEGOB].*"). (emphasis added).

[36] Monterrey's Resolution (Mar. 10, 2005), **C-94**.

[37] Monterrey's Resolution (Mar. 10, 2005), p. 1, **C-94**.

(…)

> Moreover, the petitioner [JEV Monterrey] appropriately points out in the petitions and evidence that serve as the basis for this resolution, that [SEGOB], through its Government Unit, and based on the Federal Law on Games and Raffles and its Regulations in force, is responsible for authorizing and regulating throughout the entire national territory the establishments and activities related to games of chance and games with cross betting; however, although such activities are exclusive of the federal jurisdiction, the power of regulation, inspection and control is limited to the content of the Federal Law on Games and Raffles and its Regulation and, therefore, it is applicable only to games of chance or games with cross betting; Therefore, **all gaming activities for entertainment that do not involve chance or betting are permitted by exclusion and are outside the framework of the Federal regulation to inspect them since they do not require permission from the Ministry of the Interior for its exploitation; this criteria is in effect sustained and shared by this Authority**."[38] (English translation of Spanish Original).

29. Third, Claimants' and Mr. Burr's accounts are also confirmed by Mr. Gutiérrez's testimony. In his fourth witness statement, Mr. Gutiérrez describes a May 2005 meeting that took place in the Mexico City offices of JEV Monterrey between Messrs. Burr, Young, and other executives of JEV Monterrey.[39] Mr. Gutiérrez recalls that later that same day, he and Mr. Burr met with Mr. Rojas Cardona who was working for Mr. Young at the time, and had the chance to review Monterrey's Resolution along with its Technical Folder (*Carpeta Técnica*).[40]

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[38] Monterrey's Resolution (Mar. 10, 2005), pp. 1-2, **C-94** *("Primero.- Por escrito de fecha 8 de septiembre de 2004 dos mil cuatro (. . .) la empresa denominada [JEV Monterrey] (. . .) comparece ante esta Unidad de Gobierno,* ***de manera concordante*** *con la petición hecha por escrito de fecha 23 veintitrés de julio del mismo año, a efecto de solicitar Se emita criterio sobre la facultad legal de esta dependencia del ejecutivo federal respecto de la actividad comercial (. . .), y al efecto sustancialmente señala que, (. . .) se desprende específicamente el objeto social y la propia actividad comercial de la empresa [JEV Monterrey] no se encuentra regulada en el ámbito administrativo de la esfera federal por no ser susceptible de aplicación a su actividad la Ley Federal de Juegos y Sorteos (…)*").

Así mismo, señala adecuadamente la peticionaria [JEV Monterrey] en las promociones y pruebas que sirven de base para la presente resolución, que la [SEGOB] por conducto de esta Unidad de Gobierno y con base en la Ley Federal de Juegos y Sorteos y su Reglamento en vigor, es la encargada de autorizar y regular en todo el territorio nacional los establecimientos y actividades relacionadas con juegos de azar y juegos con cruce de apuesta(…) Por lo que toda actividad de entretenimiento que no implique el azar o apuesta, se encuentran por exclusión permitidos y fuera del ámbito de regulación federal para inspeccionarlos, por no requerir permiso de [SEGOB] para la explotación, criterio que en efecto, sostiene y comparte esta Autoridad que resuelve."). (emphasis added); *See also* Second Ezequiel González Matus Report, **CER-6**, ¶¶ 21-23.

[39] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶¶ 5-6.

[40] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 6.

Mr. Gutiérrez explains that his firm conducted extensive due diligence on the validity of operating under Monterrey's Resolution.[41] Moreover, Claimants also sought an additional opinion on the legality of their operations under Monterrey's Resolution from another renowned Mexican law firm, the law firm of Dr. Ignacio Burgoa Orihuela ("**Dr. Burgoa**").[42] As Mr. Gutiérrez recalls, after reviewing JEV Monterrey's files along with Monterrey's Resolution, his firm as well as Dr. Burgoa's firm, both confirmed that:

> "the way in which JEV Monterrey was operating was legal and the 2005 SEGOB Resolution was a valid administrative act, whereby SEGOB, in use of its powers and prior *on-onsite* verification, determined that certain skills and ability machines, thus classified due to their manner of operation, did not require a special permit from the SEGOB and could be used at the JEV Monterrey facilities."[43] (English translation of Spanish original).

30. Mr. Gutiérrez's testimony is consistent with Mr. Burr's statements and Claimants' narrative. Moreover, the first Joint Venture Agreement between JEV Monterrey and the B-Mex Companies was executed on June 13, 2005 ("**First Joint Venture Agreement**"), approximately three months after SEGOB issued Monterrey's Resolution, and about a month after the May 2005 meeting in JEV Monterrey's Mexico City office.

31. Mexico seeks to portray Claimants' initial operations as unlawful because Monterrey's Resolution was only issued in March 2005. Mexico ignores the important fact, however, that according to SEGOB, Mr. Young and JEV Monterrey did not need a permit from SEGOB to

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[41] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 7.

[42] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 7; Fourth Gordon Burr Statement, **CWS-59**, ¶ 5; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 12; Roberto Ignacio Ortuño Burgoa Opinion (May 25, 2005), **C-378**.

[43] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 8 ("*la forma en que se encontraba operando la sociedad JEV Monterrey era legal y que la Resolución de SEGOB 2005* ***era un acto administrativo válido, por el cual la SEGOB, en uso de sus facultades y previa verificación in sito, determinó que ciertas máquinas de habilidad y destreza, clasificadas así por su forma de operación, no requerían de permiso especial de la SEGOB y podían ser utilizadas en los establecimientos de JEV Monterrey***."). (emphasis added).

operate the type of machines owned or run by JEV Monterrey.[44] It also ignores that Claimants did not initiate their operations until *after* the Monterrey Resolution was issued.[45] One need look no further than the text of the first Joint Venture Agreement between JEV Monterrey and Claimants' Mexican Companies, which memorializes SEGOB's issuance of Monterrey's Resolution, which was part of the understanding between Claimants and JEV Monterrey when Claimants initiated their gaming operations:

> "C) The commercial activity of the company, mainly the Entertainment Centers with Video-Games Machines, has been authorized for installation in all of the national territory, pursuant to the articles of incorporation and the diverse authorizations and resolutions granted to the company.
>
> D) The installation and operation of its Entertainment Centers in the national territory, **"THE ASSOCIATING PARTNER"** in particular regarding the game machines it commercializes and exploits, only requires the authorizations for video gaming and those similar provided by the Federal Entities and Municipalities where they are installed, pursuant to the criteria issued by [SEGOB] through its Government Unit, which through an administrative procedure in connection thereto, issued a final resolution in the administrative procedure dated March 10, 2005, which determined (…) : That the Petitioner [JEV Monterrey] requires no permit issued [SEGOB] for the installation and operation of machines of the type "Aristocrat mvk series 1 y 2" and 'Ainsworth series cristal". (English translation of Spanish original).[46]

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[44] Monterrey's Resolution (Mar. 10, 2005), p. 5, **C-94**.

[45] Fourth Gordon Burr Statement, **CWS-59**, ¶ 5.

[46] Joint Venture Agreement between Juegos de Entretenimiento y Video de Monterrey S.A. de C.V. and Juegos de Video y Entretenimiento del Mexico., S de R.L. de C.V. (June 13, 2005), **C-96** ("*C) Que la operación comercial del objeto social de [JEV Monterrey], que son fundamentalmente los Centros de entretenimiento con Máquinas de Video-Juego, se encuentra autorizado para ser instalado en todo el territorio nacional, de conformidad con la propia acta constitutiva y las diversas resoluciones que tiene la empresa a su favor D) Que para la instalación y operación de sus Centros de Entretenimiento en el territorio nacional, "**El Asociante**" en lo particular, respecto de las máquinas de juego que comercializa y explota, solo requiere las autorizaciones que sobre máquinas de video-juego y similares prevén las Entidades Federativas y Municipios en los que estos se instalen, ello de conformidad con el criterio emitido a su favor por la Secretaria de Gobernación a través de la Unidad de Gobierno, que mediante procedimiento administrativo sustanciado para el efecto, dicta resolución definitiva en la vía administrativa de fecha 10 de marzo de 2005, misma que determine, en lo conducente, respecto de los centros de entretenimiento que instala y comercializa la asociante: Que se fija criterio en el que se determina que la empresa promovente [JEV Monterrey] no requiere permiso expedido por la Secretaria de Gobernación para instalar y operar las maquinas del tipo 'Aristocrat mvk series 1 y 2' y 'Ainsworth series cristal' en las diferentes presentaciones que fueron objeto de la revisión o esencialmente similares a estas; quedando reguladas en su establecimiento y explotación, solo por las disposiciones que sobre máquinas de video juegos y similares, prevén las Entidades Federativas y Municipios, en los que se instalen los referidos Centros de Entretenimiento que la promovente opere al amparo de la referida resolución*."). (emphasis added).

32. Mexico's argument is simply wrong and is contradicted by the contemporaneous record evidence.

3. Under Mexican Law, Monterrey's Resolution was a Valid Enforceable Administrative Act that Confirmed that JEV Monterrey Did Not Need a Permit to Operate its Gaming Machines

33. Mexico does not contest that Claimants' operations in Mexico began after the issuance of Monterrey's Resolution, nor does it dispute the nature of Monterrey's Resolution as a valid resolution or administrative act issued by SEGOB. Moreover, Mexico does not argue that Monterrey's Resolution was issued contravening administrative law principles or Mexican law. In Mexico's own words, Monterrey's Resolution is a valid administrative act:

> 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. **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.** [47] (English translation of Spanish original).

34. This is also consistent with Claimants' gaming expert, Mr. González's opinion: the criteria recognized by SEGOB in Monterrey's Resolution was an administrative act that produced legal effects.[48] As Mr. González explains, Monterrey's Resolution is a valid administrative act by SEGOB explicitly confirming that JEV Monterrey did not need a permit from SEGOB in order to operate.[49] Moreover, Mexico's own expert, Alfredo German Lazcano ("**Mr. Lazcano**") confirms

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[47] Counter-Memorial, ¶ 68 ("*Se trata de un **oficio** emitido por la SEGOB el 10 de marzo de 2005 a la empresa JEV Monterrey que señala que las máquinas que operaba dicha empresa no se encontraban dentro del ámbito de aplicación de la LFJS porque: a) el resultado del juego dependía de la habilidad del jugador y, por lo tanto, no eran juegos de azar, y; b) no eran juegos con apuesta. **En pocas palabras, la Resolución Monterrey indicaba que las máquinas que operaba JEV Monterrey no eran juegos prohibidos por la LFJS y, por lo tanto, no requerían de un permiso especial de la SEGOB para su funcionamiento***."). (emphasis added).

[48] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 24-30.

[49] Second Ezequiel González Matus Report, **CER-6**, ¶ 29 ("*Un acto administrativo válido emitido por la SEGOB en uso de sus facultades, mediante el cual emitió su criterio sobre la actividad comercial de la empresa JEV Monterrey*

that an administrative decision is "any unilateral and concrete statement of will, issued by a public administrative body, in the exercise of its administrative competence, whose legal effects are direct and immediate."[50] This is exactly what Monterrey's Resolution was: a unilateral declaration issued by a Mexican public administrative body (*i.e.,* SEGOB) acting in accordance with Mexican law. Thus, the discussion as to the validity or lawfulness of Monterrey's Resolution is moot.

35. As such, Claimants' operations under Monterrey's Resolution were proper and lawful in accordance with Mexican law.

B. The Proposed Transaction with BlueCrest and Advent Was Reasonable and Had Tremendous Potential

1. There Were Various Benefits to the Claimants Obtaining Their Own Permit

36. Mexico argues in its Counter-Memorial that the Claimants have not effectively explained the benefits and advantages to becoming an independent permit holder.[51] Claimants don't quite understand the relevance of this argument to the case, but nonetheless dispel it. Mr. Burr's vision from the inception of the Claimants' investments in Mexico was always to obtain an independent permit in order to grow their business within Mexico.[52] Put simply, there were numerous strategic advantages to the Claimants becoming a permit holder, rather than continuing to operate under another permit holder's authorization.

37. Once the Claimants had proven the viability and success of their model, they sought to obtain an independent permit so that they would have complete control over their growth and

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de Monterrey, S.A. de C.V., ("JEV Monterrey"), confirmando expresamente que ésta no necesitaba un permiso de la SEGOB para operar.").

[50] Expert Report of Mr. Lazcano ("Mr. Lazcano Report"), **RER-2**, ¶ 32 ("*Un acto administrativo es "toda declaración de voluntad unilateral y concreta, dictada por un órgano de la administración pública, en ejercicio de su competencia administrativa, cuyos efectos jurídicos son directos e inmediatos."*).

[51] Counter-Memorial, ¶ 78.

[52] Fourth Erin Burr Statement, **CWS-60**, ¶ 8; Fourth Gordon Burr Statement, **CWS-59**, ¶ 8.

expansion.[53] Based upon conversations with participants in the market, with legal advisors, and others, Mr. Burr understood that obtaining their own permit would provide the companies with greater autonomy, greater flexibility, and put their operations on the most solid footing.[54] From an economic perspective, obtaining a permit would reduce royalty payments to third parties and would keep all generated revenue in house.[55] Moreover, as Mr. and Ms. Burr explain in their witness statements, obtaining an independent permit would have facilitated the eventual sale of the Mexican Enterprises to a third party, facilitating a major liquidity event for all Claimants.[56] Having an independent permit would eliminate any complications of the Claimants being beholden to an outside group for their operating authority, would allow them to report more income, and yield rapid growth.[57] For all of these reasons, the Claimants were focused on obtaining an independent permit and understood that, according to Mexican law, permits could not be transferred from one entity to another, so they sought to acquire one of their own: initially through the acquisition of a company that owned a permit and later through a direct application for one from SEGOB.

(a) The Proposed Transaction with Eventos Festivos Was Less Favorable Than the Proposed Transaction with BlueCrest and Advent

38. In its Counter-Memorial, Mexico mischaracterizes the nature of the negotiations with Eventos Festivos as well as the proposed transaction with BlueCrest and Advent. To put the facts in the appropriate context, by early 2008, the Mexican gaming market was growing, the regulatory

[53] Fourth Erin Burr Statement, **CWS-60**, ¶ 8; Fourth Gordon Burr Statement, **CWS-59**, ¶ 8.

[54] Fourth Erin Burr Statement, **CWS-60**, ¶ 8; Fourth Gordon Burr Statement, **CWS-59**, ¶ 9.

[55] Fourth Erin Burr Statement, **CWS-60**, ¶ 8; Fourth Gordon Burr Statement, **CWS-59**, ¶ 8.

[56] Fourth Erin Burr Statement, **CWS-60**, ¶ 8; Fourth Gordon Burr Statement, **CWS-59**, ¶ 9.

[57] Fourth Erin Burr Statement, **CWS-60**, ¶ 9; Fourth Gordon Burr Statement, **CWS-59**, ¶ 9.

landscape was changing with the new Gaming Law, and Claimants sought to expand their operations beyond Monterrey's Resolution.[58] In furtherance of this effort, Claimants explored a number of potential opportunities. One opportunity was to negotiate with Eventos Festivos, which was a company that was an existing permit holder, to purchase the company and take over its permit.[59] As Mr. González explains in his report, the Claimants planned to purchase the company that owned the Eventos Festivos permit, and thereby also control the permit, which is permissible under Mexican law.[60] This transaction would have allowed the Claimants to expand their operations from seven dual-function locations to twenty, as Eventos Festivos was authorized for twenty dual function locations.[61] In 2008, Claimants' legal team conducted due diligence on the Eventos Festivos permit to ensure its legal viability.[62] It was essential that the permit and the company's operations were on solid footing.[63] As explained by the Claimants' witnesses, they engaged in extensive negotiations with Eventos Festivos to purchase the company in 2008.[64]

39. Mexico's arguments regarding the lack of rationality of the Claimants' decision not to proceed with the Eventos Festivos permit are speculative and without merit. Mexico fails to understand the relevant context and circumstances, as well as the potential of the transaction with

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[58] Third Erin Burr Statement, **CWS-51**, ¶ 40; Fourth Erin Burr Statement, **CWS-60**, ¶ 8; Third Gordon Burr Statement, **CWS-50**, ¶ 35; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 7-9; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 13-15; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 17-18.

[59] Memorial, ¶ 78; Second Ezequiel González Matus, **CER-6**, ¶ 59.

[60] Second Ezequiel González Matus, **CER-6**, ¶¶ 54-59.

[61] Eventos Festivos Permit No. DGAJS/SCEVF/P-02/2005 (May 6, 2005), **C-249**; Third Erin Burr Statement, **CWS-51**, ¶ 40; Fourth Erin Burr Statement, **CWS-60**, ¶ 8; Third Gordon Burr Statement, **CWS-50**, ¶ 35; Fourth Gordon Burr Statement, **CWS-59**, ¶ 7.

[62] Fourth Erin Burr Statement, **CWS-60**, ¶ 30; Fourth Gordon Burr Statement, **CWS-59**, ¶ 12; Fourth Julio Gutiérrez Statement"), **CWS-52**, ¶ 14.

[63] Third Erin Burr Statement, **CWS-51**, ¶ 40; Fourth Erin Burr Statement, **CWS-60**, ¶ 15; Third Gordon Burr Statement, **CWS-50**, ¶ 35; Fourth Gordon Burr Statement, **CWS-59**, ¶ 12.

[64] Third Erin Burr Statement, **CWS-51**, ¶ 40; Fourth Erin Burr Statement, **CWS-60**, ¶ 8; Third Gordon Burr Statement, **CWS-50**, ¶ 35; Fourth Gordon Burr Statement, **CWS-59**, ¶ 7.

Advent and BlueCrest. As the Claimants considered all options, they understood that the Eventos Festivos permit was limited in terms of the locations that it authorized whereas the E-Mex permit allowed for two and half times as many locations.[65] While the Claimants had negotiated with Eventos Festivos to obtain approval to operate the five existing locations plus two additional locations in Cabo and Cancun, under the terms of the Eventos Festivos permit, they needed to expressly request and obtain approval from SEGOB for any location changes.[66] This provided the Claimants with less flexibility and additional uncertainty, as they would have needed to request approval for SEGOB for any additional locations they built as well as any locations that may need to be relocated in the future.[67] The E-Mex permit, on the other hand, did not have any location restrictions and allowed for the operation of 100 casino facilities (50 remote gambling centers and 50 lottery rooms) for a period of 25 years, or until 2030 without the need for seeking preapproval from SEGOB.[68] The E-Mex permit provided greater commercial certainty, allowed the Claimants greater potential for growth as well as greater flexibility in terms of the types of games that could be utilized in the Casinos.[69] E-Mex's permit was considered one of the broadest gaming permits in Mexico at the time.[70]

40. In order to acquire Eventos Festivos and its permit, Claimants would have had to raise outside capital to purchase the company.[71] Claimants estimated that they needed to raise US$ 55 million to acquire the company, build out the locations according to the timeline required under

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65 Fourth Erin Burr Statement, **CWS-60**, ¶ 17; Fourth Gordon Burr Statement, **CWS-59**, ¶ 11.

66 Screenshot of change of establishment authorizations granted to Eventos Festivos, **R-036**; Fourth Erin Burr Statement, **CWS-60**, ¶ 17; Fourth Gordon Burr Statement, **CWS-59**, ¶ 11.

67 Fourth Erin Burr Statement, **CWS-60**, ¶ 17; Fourth Gordon Burr Statement, **CWS-59**, ¶ 11.

68 E-Mex Permit No. DGAJS/SCEVF/P-06/2005 (May 25, 2005), **C-235**.

69 E-Mex Permit No. DGAJS/SCEVF/P-06/2005 (May 25, 2005), **C-235**.

70 Fourth Erin Burr Statement, **CWS-60**, ¶ 19; Fourth Gordon Burr Statement, **CWS-59**, ¶ 20.

71 Fourth Erin Burr Statement, **CWS-60**, ¶ 22; Fourth Gordon Burr Statement, **CWS-59**, ¶ 13.

the permit, make capital improvements to the Eventos Festivos facilities they were acquiring, and relocate one of the Eventos Festivos facilities that was in Cuernavaca because of redundancy with Claimants' existing facility in Cuernavaca.[72] Moreover, the Claimants also would have had to replace all of their machines, as Eventos Festivos' permit only permitted the operation of machines that were characterized as Class II machines, while the Claimants, pursuant to Monterrey's Resolution, had machines in their locations that were classified as Class III machines.[73] Given that machines cost around US$ 11,000 to US$ 15,000 each at that time, replacing their machines would have been a significant capital expenditure for the Claimants as they had already invested between US$ 10 million – US$ 15 million in machines they owned by the end of 2007.[74]

41. Mexico also misunderstands the timeline of Claimants' negotiations with Eventos Festivos. In order to keep all of their options available while they investigated the possibilities, the Claimants continued to work with Eventos Festivos to make modifications to the permit for the first half of 2008.[75] The Claimants paid the US$ 1 million down payment to Eventos Festivos in February 2008 to lock in that opportunity and keep it viable while they also continued to negotiate with Advent and BlueCrest.[76] While the transaction with Eventos Festivos was initially scheduled to close by no later than April 2, 2008, the Claimants negotiated various extensions with Eventos Festivos to preserve the exclusive option to acquire this permit, as they continued negotiating with BlueCrest and Advent.[77] It was important to the Claimants to fully and carefully investigate all of

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[72] Fourth Erin Burr Statement, **CWS-60**, ¶ 22; Fourth Gordon Burr Statement, **CWS-59**, ¶ 14.

[73] Fourth Erin Burr Statement, **CWS-60**, ¶ 18; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 13, 20.

[74] Fourth Erin Burr Statement, **CWS-60**, ¶ 18; Fourth Gordon Burr Statement, **CWS-59**, ¶ 13.

[75] Fourth Erin Burr Statement, **CWS-60**, ¶ 31; Fourth Gordon Burr Statement, **CWS-59**, ¶ 15.

[76] Fourth Erin Burr Statement, **CWS-60**, ¶ 31; Fourth Gordon Burr Statement, **CWS-59**, ¶ 15.

[77] Letter from Eventos Festivos de México, S.A. de C.V. Extending Period of Proposed Transaction to May 2008 (May 20, 2008), **C-379**.

their options. Thus, they extended their exclusive option to acquire Eventos Festivos through at least June 2008.[78] After June 2008, Claimants did not maintain the exclusive option to acquire Eventos Festivos, but continued discussions, as BlueCrest and Advent even considered bringing Eventos Festivos into their transaction.[79]

(b) Under the Proposed Transaction with BlueCrest and Advent, Claimants Would Have Acquired E-Mex and Mr. Rojas Cardona Would Not Have Been Involved in the New, Combined Company

42. In its Reply, Mexico also questions the rationality as well as the potential risk associated with the proposed transaction with Advent and BlueCrest. Once again, these arguments have no merit. The testimony and contemporaneous documents show that the proposed transaction with Advent and BlueCrest was of an entirely different scale and caliber than the transaction with Eventos Festivos.[80] BlueCrest and Advent were, in the words of Mr. Burr, major "business builders" and would have provided the Claimants with unprecedented access to capital to grow their business.[81] Contrary to Mexico's speculative and incorrect assertion that this proposed transaction was somehow shortsighted or risky, partnering with Advent and BlueCrest was actually the most advantageous move for the Claimants in order to grow their business.[82]

43. In order to fully appreciate the benefits of the proposed transaction with Advent and BlueCrest, it is important to explain the proposed structure. Importantly, although the transaction structure was not entirely finalized, under the proposed transaction, BlueCrest and Advent would also have acquired the Juegos Companies.[83] Mr. Rojas Cardona would have received cash in

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78 Eventos Festivos de México, S.A. de C.V. Non-Compliance Letter (June 5, 2008), **C-380**.

79 Fourth Erin Burr Statement, **CWS-60**, ¶ 31; Fourth Gordon Burr Statement, **CWS-59**, ¶ 15.

80 Fourth Erin Burr Statement, **CWS-60**, ¶ 20; Fourth Gordon Burr Statement, **CWS-59**, ¶ 21.

81 Fourth Erin Burr Statement, **CWS-60**, ¶ 20; Fourth Gordon Burr Statement, **CWS-59**, ¶ 42.

82 Fourth Erin Burr Statement, **CWS-60**, ¶ 23; Fourth Gordon Burr Statement, **CWS-59**, ¶ 21.

83 Fourth Erin Burr Statement, **CWS-60**, ¶ 25; Fourth Gordon Burr Statement, **CWS-59**, ¶ 16.

exchange for the value of E-Mex's license and several of his locations and would have had no further role in the new, combined company.[84] Advent would have provided capital to develop a certain number of the new casino locations, and the remaining locations would be funded out of cash flow.[85] In contrast to the proposed transaction with Eventos Festivos, Advent and BlueCrest would have provided all of the capital needed to develop the locations under the E-Mex permit.[86] If additional capital was needed, they had distinguished financial contacts they could approach.[87] The monetary risk to Claimants' investors for capital was effectively eliminated under the transaction with BlueCrest and Advent.[88] As a result, the Claimants would have been able to devote their complete focus to the construction of new locations and operations.[89]

44. The Claimants would have maintained a significant ownership stake in the new company and Mr. and Ms. Burr would have run the new company's operations.[90] The new company would have used the E-Mex permit to operate casinos throughout Mexico without any involvement from

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[84] Initial Agreement between E-Mex and B-Mex Companies (July 7, 2008), **C-381** ("The Mr. Rojas Cardona Group hereby agrees to sell all of its direct and indirect rights, title and interest in and to Integradora, E-Mex, the Permit, and all of the Mr. Rojas Cardona Operations, for the Mr. Rojas Cardona Purchase Price, free of any Liens, encumbrances or any other claims of any nature against any of the assets, profits, or rights of such entities and operations."); Fourth Erin Burr Statement, **CWS-60**, ¶ 21; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 16, 19.

[85] Fourth Erin Burr Statement, **CWS-60**, ¶ 21; Fourth Gordon Burr Statement, **CWS-59**, ¶ 16.

[86] Fourth Erin Burr Statement, **CWS-60**, ¶ 21; Fourth Gordon Burr Statement, **CWS-59**, ¶ 17.

[87] Fourth Erin Burr Statement, **CWS-60**, ¶ 21; Fourth Gordon Burr Statement, **CWS-59**, ¶ 17.

[88] Fourth Erin Burr Statement, **CWS-60**, ¶ 21; Fourth Gordon Burr Statement, **CWS-59**, ¶ 17.

[89] Fourth Erin Burr Statement, **CWS-60**, ¶ 22; Fourth Gordon Burr Statement, **CWS-59**, ¶ 17.

[90] Advent International Letter of Intent (July 7, 2008), **C-382** ("The Investor's interest in the Proposed Transaction is based on the following key assumptions: […] on the Closing Date the Shareholders and their affiliates would cease to have any direct or indirect interest (of any nature) in Integradora, its business or assets." Shareholders are defined as Messrs. Juan José Mr. Rojas Cardona, Arturo Mr. Rojas Cardona and Jesús Hector Gutiérrez Cortes.) ("The Investor's interest in the Proposed Transaction is based on the following key assumptions: […] B-Mex Management would manage the day-to-day operations of Integradora."); *see also* Initial Agreement between E-Mex and B-Mex Companies (July 7, 2008), **C-381**, which refers to the managers and officers of the B-Mex Group Mexican operating entities as the "B-Mex Management Group"; Fourth Erin Burr Statement, **CWS-60**, ¶ 25; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 17-19.

Mr. Rojas Cardona.[91] The parties to the proposed transaction retained various advisors to ensure that the transaction progressed smoothly. Specifically, the Claimants worked with legal advisors in the U.S. and Mexico, tax advisors in the U.S. and Mexico, as well as some investors who had experience with these types of transactions.[92] Claimants also retained a financial advisor, Crowell Weedon, in February 2008, initially to help them put together a business plan and raise money to acquire the Eventos Festivos permit, but they later also provided guidance on the proposed transaction with BlueCrest and Advent.[93] Crowell Weedon prepared financials for the proposed transaction in which it assumed, as the transaction documents did, that through the transaction, Mr. Rojas Cardona would be cashed out and that he would not have any ownership/equity in the new company going forward.[94] The Claimants also retained Hein and Associates LLP, an accounting and wealth management firm, to provide guidance on the transaction, and particularly its tax implications.[95] The parties also retained respected Mexican counsel to help facilitate and advance the transaction.[96] Creel, García-Cuéllar, Aiza y Enríquez, S.C. ("**Creel**") was counsel for Advent in the proposed transaction and Cervantes, Aguilar-Álvarez y Sainz, S.C. was counsel for BlueCrest.[97] Importantly, all of the parties to the proposed transaction conducted extensive due

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91 Advent International Letter of Intent (July 7, 2008), **C-382**; Fourth Gordon Burr Statement, **CWS-59**, ¶ 19.

92 Fourth Erin Burr Statement, **CWS-60**, ¶ 37; Fourth Gordon Burr Statement, **CWS-59**, ¶ 22.

93 Engagement Letter with Crowell Weedon (Feb. 20, 2008), **C-383**. Specifically, the Engagement Letter with Crowell Weedon states: "the BlueCrest Group has proposed a separate transaction combining the Company [defined as B-Mex, LLC, B-Mex II, LLC Palmas South, LLC and their Mexican subsidiaries] and certain other associated entities under common management with an entity controlled by them."

94 Fourth Erin Burr Statement, **CWS-60**, ¶ 38; Fourth Gordon Burr Statement, **CWS-59**, ¶ 19; Proposed BlueCrest-Tangent Deal Structure Proposal (Aug. 18, 2008), **C-384**.

95 Fourth Erin Burr Statement, **CWS-60**, ¶ 38; Fourth Gordon Burr Statement, **CWS-59**, ¶ 22.

96 Fourth Erin Burr Statement, **CWS-60**, ¶ 39; Fourth Gordon Burr Statement, **CWS-59**, ¶ 24.

97 Fourth Erin Burr Statement, **CWS-60**, ¶ 39; Fourth Gordon Burr Statement, **CWS-59**, ¶ 24; Second Witness Statement of Neil Ayervais ("Second Neil Ayervais Statement"), **CWS-61**, ¶ 6.

diligence on the entities that were being acquired, including E-Mex.[98] The Juegos Companies and the B-Mex Companies provided voluminous information to BlueCrest and Advent for purposes of facilitating the transaction.[99] PricewaterhouseCoopers conducted the financial due diligence on E-Mex and determined that the E-Mex permit itself was not associated with any illegality, and did not identify any issues with the company's financials.[100] This gave BlueCrest and Advent, as well as the Claimants, additional comfort that the permit itself, as well as the company, were on strong legal footing.

45. In April 2008, in furtherance of the proposed transaction with Advent and BlueCrest, and importantly, at BlueCrest and Advent's urging, E-Games moved its operations under E-Mex's permit as an operator. In order to keep the Claimants engaged in their project, Advent specifically negotiated with E-Mex to allow for E-Games to be able to use the seven dual-function licenses under the E-Mex permit while the transaction was being negotiated.[101] After April 2008, the Claimants continued negotiating with BlueCrest and Advent, and also simultaneously continued negotiating with Eventos Festivos.[102] The Claimants were carefully considering the various options that were available to them. As spring 2008 progressed, the BlueCrest and Advent transaction began advancing further with the parties exchanging draft transaction documents a clear expectation developed that the deal would materialize.[103] As explained, after June 2008, the Claimants ultimately decided to abandon their exclusive right to purchase Eventos Festivos for all

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98 Fourth Erin Burr Statement, **CWS-60**, ¶ 39; Fourth Gordon Burr Statement, **CWS-59**, ¶ 24.

99 Fourth Erin Burr Statement, **CWS-60**, ¶ 100; Fourth Gordon Burr Statement, **CWS-59**, ¶ 24.

100 Fourth Erin Burr Statement, **CWS-60**, ¶ 39; Fourth Gordon Burr Statement, **CWS-59**, ¶ 24; Second Neil Ayervais Statement, **CWS-61**, ¶ 11.

101 *See* Transaction Agreement (Apr. 1, 2008), **C-6**; Fourth Erin Burr Statement, **CWS-60**, ¶ 31; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 23, 27.

102 Fourth Erin Burr Statement, **CWS-60**, ¶ 31; Fourth Gordon Burr Statement, **CWS-59**, ¶ 23.

103 Initial Agreement between E-Mex and B-Mex Companies (July 7, 2008), **C-381**.

the reasons explained above, and instead focused their efforts on the transaction with BlueCrest and Advent.

46. The proposed transaction documents with BlueCrest and Advent reflect important understandings as between the parties that made the transaction more attractive to the Claimants. First, through the transaction, Mr. Rojas Cardona would receive cash in exchange for the value of the E-Mex permit and some of E-Mex's casino locations and he would have no ownership stake in the new company and/or any continued role in managing the E-Mex permit going forward.[104] Specifically, the Letter of Intent between the parties states: "The Investor's interest in the Proposed Transaction is based on the following key assumptions: […] on the Closing Date the Shareholders and their affiliates would cease to have any direct or indirect interest (of any nature) in Integradora, its business or assets."[105] Shareholders are defined as Messrs. Juan José Rojas Cardona, Arturo Rojas Cardona and Jesús Hector Gutiérrez Cortes.[106] Instead, the parties agreed that Mr. and Ms. Burr would manage the E-Mex permit going forward.[107] Specifically, the Letter of Intent between the parties states that "B-Mex Management [defined as the managers and officers of the B-Mex Group Mexican operating entities] would manage the day-to-day operations of Integradora."[108] In an email from Bob Rice at Tangent Capital Partners, LLC ("**Tangent**") to Ms. Burr and others on

[104] Advent International Letter of Intent (July 7, 2008), **C-382**; Fourth Erin Burr Statement, **CWS-60**, ¶ 31; Fourth Gordon Burr Statement, **CWS-59**, ¶ 22.

[105] Advent International Letter of Intent (July 7, 2008), **C-382**.

[106] Advent International Letter of Intent (July 7, 2008), **C-382**.

[107] Advent International Letter of Intent (July 7, 2008), **C-382**; Fourth Erin Burr Statement, **CWS-60**, ¶ 31; Fourth Gordon Burr Statement, **CWS-59**, ¶ 21.

[108] Advent International Letter of Intent (July 7, 2008), **C-382**; Initial Agreement between E-Mex and B-Mex Companies (July 7, 2008), **C-381**.

May 4, 2008, Mr. Rice made clear that the investors "do not wish to bid on the Emex (sic) assets without a management team as part of the deal: they want to be buying a complete solution."[109]

47. The parties ultimately agreed on the terms of a proposed transaction on July 14, 2008.[110] Importantly, the draft transaction documents contain key assumptions, including that E-Mex would retain no ownership interest in the company after the transaction was consummated, and that B-Mex would manage the day-to day operations of the new company.[111] The Letter of Intent, reflecting this understanding, was signed by Mr. Rojas Cardona, B-Mex, BlueCrest, and Tangent.[112] In September 2008, Ms. Burr participated in a multi-day planning meeting with Advent and its key representatives and counsel in which they discussed all of the pending aspects of the transaction.[113]

48. On November 1, 2008, while the Claimants continued to negotiate with BlueCrest and Advent, they entered into an Operating Agreement with E-Mex, whereby E-Games acquired the rights and obligations to operate seven dual function casino facilities under E-Mex's permit, as provided for and in accordance with the Gaming Regulation and other applicable Mexican laws.[114] The Operating Agreement with E-Mex was another good faith step to facilitating the proposed transaction with BlueCrest and Advent. The Claimants expected that the transaction would close.

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[109] Email from B. Rice to E. Burr re: proposed transaction structure (May 4, 2008), **C-385**.

[110] Email from A. Sainz to G. Burr, E. Burr, and others attaching Letter of Intent and Initial Agreement (July 14, 2008), **C-386**.

[111] Initial Agreement between E-Mex and B-Mex Companies (July 7, 2008), **C-381**; Advent International Letter of Intent (July 7, 2008), **C-382**.

[112] Initial Agreement between E-Mex and B-Mex Companies (July 7, 2008), **C-381**; Advent International Letter of Intent (July 7, 2008), **C-382**; Proposed BlueCrest-Tangent Structure Power Point (Aug. 5, 2008), **C-387**.

[113] Advent International and B-Mex Companies Meeting Agenda (Sept. 17-19, 2008), **C-388**.

Operating Agreement (Nov. 1, 2008), **C-7**.

49. In 2009, negotiations continued. As previously noted, the BlueCrest and Advent deal did not materialize in the end. It fell apart in the fall of 2009 ultimately because after lengthy due diligence and negotiations E-Mex would not agree to various terms.[115] The proposed transaction with BlueCrest and Advent was a strategic growth opportunity for the Claimants. BlueCrest and Advent wanted Mr. and Ms. Burr to manage the casinos through the proposed transaction and to build a prominent casino enterprise throughout Mexico, utilizing the E-Mex permit and the Claimants' management team (namely, Mr. and Ms. Burr) and eventually sought expansion with the Burrs throughout Latin America.[116] They agreed that they would only proceed with the transaction if the Claimants, led by Mr. and Ms. Burr, were responsible for developing and operating the casinos.[117] This requirement was important and as explained, was built into the transactional documents.

50. The documents reveal the potential as well as the scale of this proposed transaction with BlueCrest and Advent. Working with BlueCrest and Advent, two major business builders, was a tremendous opportunity.[118] It would have provided the Claimants with access to capital to massively grow their business and the opportunity to partner with major private equity firms.[119] Any savvy businessperson seeking to grow their business would have advocated to proceed with this proposed transaction.[120]

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[115] Fourth Erin Burr Statement, **CWS-60**, ¶ 33; Fourth Gordon Burr Statement, **CWS-59**, ¶ 26.

[116] Fourth Erin Burr Statement, **CWS-60**, ¶ 25; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 17-19.

[117] Advent International Letter of Intent (July 7, 2008), **C-382** ("The Investor's interest in the Proposed Transaction is based on the following key assumptions: […] B-Mex Management would manage the day-to-day operations of Integradora."); *see also* Initial Agreement between E-Mex and B-Mex Companies (July 7, 2008), **C-381**, which refers to the managers and officers of the B-Mex Group Mexican operating entities as the "B-Mex Management Group."

[118] Fourth Erin Burr Statement, **CWS-60**, ¶ 20; Fourth Gordon Burr Statement, **CWS-59**, ¶ 21.

[119] Fourth Erin Burr Statement, **CWS-60**, ¶ 20; Fourth Gordon Burr Statement, **CWS-59**, ¶ 21.

[120] Fourth Gordon Burr Statement, **CWS-59**, ¶ 21.

(c) It Is Unreasonable for Mexico To Argue that There Should Be Any Contributory Fault for the Claimants Choosing to Pursue an Advantageous Transaction with Advent and BlueCrest

51. Based upon the foregoing, Mexico's argument that there should be contributory fault arising from the Claimants' efforts to partner with BlueCrest and Advent, as well as the ultimate decision to move under Mr. Rojas Cardona's permit, is implausible "Monday afternoon quarterbacking." The above description of the deal shows that Claimants' decision to proceed with it, not only because of the stellar opportunity it provided but also because it was clear that Mr. Rojas Cardona would be out, was a more than reasonable and responsible decision.[121]

52. However, in the event that the transaction did not come to fruition, the Claimants had carefully coordinated with their counsel in Mexico as well as in the U.S. to discuss alternative plans, which included how they could function as an operator under E-Mex's permit and eventually separate themselves from E-Mex, in reliance on the Petolof precedent.[122] This contingency planning resulted from careful and reasoned discussions among Claimants and their counsel as they considered the best course of action. Mexico's discussion of potential contributory fault should be disregarded in its entirety, as it is but another misguided, litigation-crafted argument that misunderstands and wrongly second guesses the key elements that the Claimants considered.

(d) Due Diligence into Mr. Rojas Cardona

53. At some point in late 2007, before the negotiations for the BlueCrest/Advent transaction intensified, Mr. and Ms. Burr decided that that they should perform their own due diligence on Mr. Rojas Cardona.[123] The Claimants hired Prescience chiefly in order to conduct due diligence

[121] Fourth Erin Burr Statement, **CWS-60**, ¶ 25; Fourth Gordon Burr Statement, **CWS-59**, ¶ 16.

[122] Fourth Erin Burr Statement, **CWS-60**, ¶ 26; Fourth Gordon Burr Statement, **CWS-59**, ¶ 27.

[123] Fourth Erin Burr Statement, **CWS-60**, ¶ 35; Fourth Gordon Burr Statement, **CWS-59**, ¶ 29.

so that they better understood who Mr. Rojas Cardona was.[124] Given that they had heard some rumors about Mr. Rojas Cardona, they thought that it was important for them to also investigate Mr. Rojas Cardona. Mr. Burr retained Prescience in November 2007. Prescience's 2008 report examined Mr. Rojas Cardona's businesses' financial situation, and involvement in any criminal cases.[125] Most of the report's findings related to charges against Mr. Rojas Cardona in the United States dating back many years.[126] While Prescience's initial recommendation was that the Claimants separate from Mr. Rojas Cardona in a businesslike manner,[127] Prescience did not advise against the transaction with BlueCrest and Advent.[128] In fact, in an email to Mr. Burr, Mike Baker, the CEO of Prescience, noted that he was pleased that the Claimants sought to partner with BlueCrest and Advent.[129] It is important again to emphasize that the Claimants only sought to work with E-Mex through the proposed transaction with BlueCrest and Advent and understood that E-Mex would have been acquired by the private equity companies and that neither Mr. Rojas Cardona nor any of the other shareholders in E-Mex would have had any ownership in the new company.[130] Moreover, the Claimants understood that if the proposed transaction with BlueCrest and Advent did not come to fruition, they would have a viable legal avenue to separate themselves from Mr. Rojas Cardona and E-Mex.

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[124] Third Gordon Burr Statement, **CWS-50**, ¶ 38.

[125] Email from M. Baker to G. Burr attaching the Prescience Report (July 11, 2008), **C-389**.

[126] Email from M. Baker to G. Burr attaching the Prescience Report (July 11, 2008), **C-389**.

[127] Third Gordon Burr Statement, **CWS-50**, ¶ 38; Fourth Gordon Burr Statement, **CWS-59**, ¶ 29

[128] Fourth Erin Burr Statement, **CWS-60**, ¶ 36; Fourth Gordon Burr Statement, **CWS-59**, ¶ 29.

[129] Email from M. Baker to G. Burr attaching the Prescience Report (July 11, 2008), **C-389**.

[130] Fourth Erin Burr Statement, **CWS-60**, ¶ 25; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 19, 21.

(e) Claimant's Reliance on the Petolof Precedent Was Proper

54. Mexico also criticizes the Claimants' reliance on the Petolof precedent.[131] This critique is unfounded. In considering their options to become a permit holder, the Claimants examined various possibilities in conjunction with advisors and counsel.[132] At some point in 2007, as the Claimants carefully investigated the different avenues through which they could obtain their own permit, the Claimants sought guidance from Mr. Gutiérrez, their Mexican counsel. In considering their various options, one of the items Mr. Gutiérrez advised them on was the Petolof precedent as well as its application to their circumstances.[133] While Mexico notes that the Petolof Resolution was not issued until October 28, 2008, after the Claimants had already moved under the E-Mex permit, Mr. Gutiérrez had been closely following the Petolof case, which had been ongoing in the Mexican courts for a number of years.[134] Although the administrative resolution that recognized Petolof's acquired rights was not issued until October 28, 2008 (the "**October 28, 2008 Resolution**" or the "**Petolof Resolution**"), this Resolution was issued in compliance with an *amparo* proceeding that was decided in 2005 due to the revocation of the permit from Espectáculos Deportivos del Norte SA de C.V. ("**EDN**").[135] Mr. Gutiérrez understood and explained the relevance of this precedent to the Claimants, and also explained that E-Games should benefit from the precedent, and the court's likely ruling in favor of Petolof.[136] Claimants were especially focused on the implications of the Petolof case in the event that the transaction with BlueCrest and

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131 Counter-Memorial, ¶¶ 103-106.

132 Fourth Erin Burr Statement, **CWS-60**, ¶ 26; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 12, 20.

133 Fourth Erin Burr Statement, **CWS-60**, ¶ 26; Fourth Gordon Burr Statement, **CWS-59**, ¶ 28; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 81-82.

134 Fourth Erin Burr Statement, **CWS-60**, ¶ 27; Fourth Gordon Burr Statement, **CWS-59**, ¶ 28; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 81-82.

135 Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 80, 83.

136 Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 81-83.

Advent fell through and the Claimants had to more permanently move their operations under E-Mex's permit. When the Claimants initially moved their operations under the E-Mex permit, they discussed the various scenarios, including the possibility (although it seemed unlikely at the time) that the proposed transaction with BlueCrest and Advent could fall through. In that unlikely scenario at the time, the Claimants understood that the Petolof precedent was favorable and that it provided them with an avenue to separate from E-Mex and Mr. Rojas Cardona should he remain as the owner of E-Mex permit.[137]

55. In response to Mexico's timing argument on this issue, as Mr. Gutiérrez explains, although the Petolof Resolution was not issued until October 28, 2008, the lifting of the closure seals of the establishments that Petolof operated under the EDN permit and the orders of compliance that Petolof obtained occurred in December 2007, which was before E-Games decided to move under E-Mex's permit.[138] Mr. Gutiérrez was closely following the development of the Petolof case and reported to the Claimants regarding these relevant case updates.[139]

56. Additionally, the Petolof precedent was directly applicable to E-Games' situation, contrary to what Mexico argues. The case was relevant to E-Games because the case involved a situation where the permit of a permit holder (EDN) had been revoked, but its operator (Petolof) was litigating its right to continue its ongoing gaming operations based on the rationale that SEGOB had approved them as an operator and Petolof thus had acquired rights in order to defend their investment and continue operating.[140] Like Petolof, the Claimants, as of 2008, did not have their own permit and were considering whether to become operators under E-Mex's permit, which they

[137] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 85.

[138] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 85.

[139] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 81-82, 85.

[140] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 81-83.

ultimately did in 2008 and were concerned as to what would happen if Mr. Rojas Cardona remained the owner of E-Mex and did something that endangered their ability to continue operaring, including losing his permit. It was extremely relevant for them to understand whether the Mexican courts would protect the rights of an operator who did not have its own permit should the permit holder for any reasons endanger their ongoing operations.[141] As Mr. González explains, the main similarity between the Petolof case and the case of E-Games is the concept of acquired rights (*derechos adquiridos*) which emanate from the contractual agreement between a permit holder and a third party, and these rights are independent from the rights of the permit holder that have been previously recognized by SEGOB.[142]

57. Mexico argues that Claimants should not have relied on the Petolof precedent. Specifically, Mexico argues that (i) although the Petolof Resolution and the May 27, 2009 Resolution both speak of acquired rights, the criteria are not the same; (ii) E-Games and Petolof were not in similar circumstances because the permit SEGOB granted to Petolof was granted in compliance with a judicial order and not in a discretionary manner; and (iii) SEGOB could not apply the Gaming Regulation to Petolof without incurring a retroactive application.[143] As Mr. González explains, Mexico's arguments regarding Claimants' reliance on the Petolof precedent are unfounded under the Gaming Regulation or Mexican law and practice.[144]

58. Under Mexican law, acquired rights, which is a legal concept in itself, implies that a right was generated some time ago and the right has been endorsed by the relevant Mexican government

[141] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 84.

[142] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 99, 106.

[143] Counter-Memorial, ¶¶ 426, 446.

[144] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 99-119.

agency.[145] Mr. González explains that the cases of E-Games and Petolof emanated from the same legal concept: the existence of acquired rights that were recognized by SEGOB.[146] Mr. González confirms that it is irrelevant whether that right was generated during the validity of the Gaming Regulation or not, because acquired rights is a legal concept that does not depend upon the validity of the Gaming Regulation.[147] Moreover, as Mr. González explains, Mexico's argument affirming that the gaming regulations were inapplicable to Petolof in order to protect its acquired rights implied that the acquired rights had been generated and that Mexican authorities should respect them.[148] Contrary to what Mexico and its expert, Mr. Lazcano, argue in this case, SEGOB's position as to E-Games and Petolof was the same: SEGOB had granted both of them acquired rights in their favor based on its earlier approval and endorsement of their gaming operations.[149] Furthermore, Mexico argues that the underlying contracts that E-Games and Petolof had were different as a basis to state that the companies were not similarly situated. Mr. González explains that the concept of acquired rights is not conditioned upon a certain type of legal relationship.[150] In other words, it did not matter whether the contractual relationship was an operating agreement (in the case of E-Games) or a joint venture agreement (in the case of Petolof).[151] SEGOB recognized acquired rights in both cases arising from contractual relationships that SEGOB had endorsed; an endorsement upon which both Petolof and E-Games had relied. Ultimately, the companies received different treatment by Mexico, which was improper, as Mexico must apply

[145] Second Ezequiel González Matus Report, **CER-6**, ¶ 100.

[146] Second Ezequiel González Matus Report, **CER-6**, ¶ 99.

[147] Second Ezequiel González Matus Report, **CER-6**, ¶ 102.

[148] Second Ezequiel González Matus Report, **CER-6**, ¶ 104.

[149] Second Ezequiel González Matus Report, **CER-6**, ¶ 106.

[150] Second Ezequiel González Matus Report, **CER-6**, ¶ 108.

[151] Second Ezequiel González Matus Report, **CER-6**, ¶ 109.

the same criteria in similar cases in accordance with the principle of legal certainty and non-discrimination.[152]

(f) E-Games Settled the Dispute with E-Mex So It Could Continue Operating its Casinos

59. Mexico also distorts the dispute between E-Games and E-Mex as well as the settlement agreement between the parties. As Mr. Gutiérrez explains, the purpose behind the settlement agreement, and the basis for E-Games agreeing to the settlement agreement, was to try and stop E-Mex from continuing its attacks against the E-Games Independent Permit, especially with respect to *Amparo* 1151/2012 and the numerous irregularities in the *Amparo* 1668/2011 proceeding.[153] As the Tribunal will recall, and as Claimants explained in their Memorial, Mr. Rojas Cardona's lawyer threatened E-Games and stated that "they controlled" the *Amparo* judge as well as SEGOB.[154] They threatened Mr. Burr and stated that unless E-Games settled their claims at issue in the underlying arbitration between the parties, E-Mex would instruct the *Amparo* judge to issue an order requiring SEGOB to rescind all other administrative resolutions issued in favor of E-Games, even though these resolutions were not at issue in or challenged during the *Amparo* 1668/2011 proceeding.[155]

60. On August 26, 2013, the *amparo* judge issued a judgment ordering SEGOB to rescind all resolutions based on or derived from the May 27, 2009 Resolution without specifying which resolutions were to be rescinded.[156] Only two days after the *Amparo* judge's August 26, 2013

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[152] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 111-114.

[153] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 60.

[154] Memorial, ¶ 305. Note that there are various articles in the press documenting this relationship between Mr. Rojas Cardona and the government and judiciary. *See* Silvia Otero, *Zar tejió red de apoyo judicial*, El Universal, https://archivo.eluniversal.com.mx/primera-plana/2014/impreso/recluto-zar-a-ex-juez-para-apoyar-red-legal-45280.html (May 8, 2014), **C-390**.

[155] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 56; Third Gordon Burr Statement, **CWS-50**, ¶ 118.

[156] Third Gordon Burr Statement, **CWS-50**, ¶ 118.

order and less than 24 hours after SEGOB was notified of the decision, SEGOB issued a lengthy 12-page memorandum rescinding each and every resolution that it had issued in favor of E-Games following the May 27, 2009 Resolution when some, including the November 26, 2012 Resolution granting the E-Games Independent Permit was not at all associated with the May 27, 2009 Resolution as it dealt with a totally different request and issue.[157]

61. The issuance of this decision by SEGOB is a seminal event in this case. It is quite frankly implausible, if not impossible, for a Mexican governmental agency like SEGOB to have conducted a legal analysis of all of the resolutions it issued after the May 27, 2009 Resolution to determine whether they were derived from and legally intertwined with the May 27, 2009 Resolution and then to write a lengthy memorandum justifying the recission of all subsequent resolutions, importantly including the November 16, 2012 Resolution granting the E-Games Independent Permit. It is clear that there is something amiss here and that this memorandum issued by SEGOB less than 24 hours after it was notified of the *amparo* judge's August 26, 2013 order is riddled with irregularities. The reasoning within the SEGOB memorandum, the timing of its issuance, and the very fact that the Mexican gaming agency is going against its own administrative acts calls into serious question the legality of what occurred.

62. In doing so, SEGOB surprisingly concluded that all subsequent resolutions issued in favor of E-Games, including the November 16, 2012 Resolution that granted the E-Games Independent Permit, were derived from the May 27, 2009 Resolution.[158] On October 11, 2013, seeing that the Claimants had no other options but to settle the claims with E-Mex following its extortionist threats regarding its use of the Mexican judiciary and SEGOB to try and destroy Claimants' investment

[157] Third Gordon Burr Statement, **CWS-50**, ¶ 119.

[158] Third Gordon Burr Statement, **CWS-50**, ¶ 119.

in Mexico, Claimants reluctantly, and under coercion, entered into an agreement with E-Mex to settle all outstanding disputes and other claims by E-Mex, including any outstanding litigation between them and an arbitration award which was pending appeal.[159]

63. On October 14, 2013, the *amparo* judge issued an order determining that SEGOB had exceeded its authority through the August 28, 2013 Resolution when it attempted to nullify all subsequent resolutions issued after the May 27, 2009 Resolution that had been issued in relation to E-Games, including the November 16, 2012 Resolution that granted the E-Games Independent Permit.[160] This was significant, because the judge was instructing SEGOB that it had failed to comply with his order and that SEGOB had gone too far by nullifying all of the subsequent resolutions issued in favor of E-Games. In particular, the judge instructed SEGOB that it had erred and exceeded the judge's mandate when it nullified the November 16, 2012 Resolution that granted the E-Games Independent Permit. One would think that SEGOB would immediately comply with the judge's directive. But it did not, and that is another seminal event in this case. Rather than complying with the judge's order, and issue a *mea culpa* reinstating the November 16, 2012 Resolution, SEGOB instead doubled-down and continued to insist that the judge's ruling required it to overturn the November 16, 2012 Resolution even though the judge made clear that it did not and that doing so was an excess in SEGOB's authority. These facts demonstrate that SEGOB seized on the judge's August 26, 2013 decision to illegally invalidate the E-Games Independent Permit for the illegal and politically motivated reasons we have outlined in this Reply. This watershed event along with numerous other procedural and substantive irregularities in the *amparo* proceedings will be discussed in more detail in Section II. L. below.

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[159] Third Gordon Burr Statement, **CWS-50**, ¶ 120.

[160] Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), **C-24**.

64. Mexico's statement of the damages amount in the settlement with E-Mex is incorrect—Claimants paid over US$ 5 million to settle the claims with E-Mex so that E-Mex would not continue its legal actions against E-Games and its permit.[161] As Mr. Gutiérrez explains in his witness statement, the Claimants discussed the relative risk of continuing to litigate against Mr. Rojas Cardona in the Mexican courts and concluded that continued litigation was much riskier than reaching an agreement with Mr. Rojas Cardona.[162] Moreover, the Claimants realized that a settlement would likely result in a smaller payment, particularly given Mr. Rojas Cardona's claims that he "controlled" the judge.[163] Mr. Burr explained that he made the authorities aware of the settlement with E-Mex as well as the US$ 5 million payment so that there could be no suggestion or implication that the Claimants were involved in any way in attempting to exert improper influence over the *amparo* judge.[164] As Mr. Gutiérrez explains, the Claimants just sought to continue to operate their Casinos in peace, and never thought that through the ongoing judicial proceedings, SEGOB would attack the E-Games Independent Permit.[165]

C. E-Games Becomes an Operator and Then Independent Operator Under E-Mex's Permit

1. Claimants Obtain the Status of Independent Operator

65. In its Memorial, Claimants explain in detail how they became an operator, and ultimately, an independent operator under E-Mex's permit.[166] In its Counter-Memorial, Mexico denies that Claimants obtained independent operator status ("**Independent Operator**") through the May 27,

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[161] Third Gordon Burr Statement, **CWS-50**, ¶ 120; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 60; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 47.

[162] Fourth Julio Gutiérrez Statement, **CWS-62**, ¶ 60.

[163] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 47; Third Gordon Burr Statement, **CWS-50**, ¶ 118.

[164] Third Gordon Burr Statement, **CWS-50**, ¶ 118.

[165] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 60.

[166] Memorial, ¶¶ 88-92.

2009 Resolution and attempts to mitigate the importance of the May 27, 2009 Resolution.[167] Mexico also argues that the figure of Independent Operator does not exist under Mexican law.[168] From a legal standpoint, Mr. González effectively refutes Mexico's arguments and states that SEGOB may interpret the Mexican gaming law and regulations including with respect to activities that are not expressly contemplated in the Federal Gaming Law or the Gaming Regulation.[169] In other words, SEGOB has the power to provide administrative interpretation of the Gaming Regulation, including with respect to activities not expressly contemplated in the Gaming Regulation (in this case, the independent operation of a gaming permit). In this instance, SEGOB exercised this power in accordance with the powers granted to it in Article 2 of the Gaming Regulation and made a valid administrative act with respect to Exciting Games.[170] Moreover, under Mexican law, the May 27, 2009 Resolution had legal effect until the courts declared the Resolution "*insubsistente*."[171]

66. Ultimately, Mexico's argument regarding the May 27, 2009 Resolution has no meaningful relevance to this case. The fact is that this case turns on the illegal cancellation of the autonomous gaming permit that Mexico, through SEGOB, granted Claimants in November of 2012. In the years prior to receiving their own gaming permit, Claimants, through E-Games, operated under the auspices of the E-Mex permit until November 16, 2012 and did so pursuant to the May 27, 2009 Resolution, with SEGOB's authorization, knowledge, and approval. Any argument now by Mexico regarding that status of E-Games' operator status during that time is both contradicted by

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[167] Counter-Memorial, ¶¶ 141, 443-444.

[168] Counter-Memorial, ¶ 102.

[169] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 35-42.

[170] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 36, 68-73.

[171] Second Ezequiel González Matus Report, **CER-6**, ¶ 74.

SEGOB's continual approval and authorization of Claimants' operations over time and again has no real relevance to this Tribunal's legal determinations under the BIT.

67. Mexico also implies that Claimants were operating without an operating authority between April 2008 (when the Transaction Agreement with JEV Monterrey was signed) and December 2008 when they received the initial operator authorization.[172] This is also inaccurate. The purpose of the Transaction Agreement was to terminate the agreement between the B-Mex group and JEV Monterrey, and to outline the key terms of the parties' relationship going forward, including the operation of the Claimants' facilities under the E-Mex permit.[173] The Transaction Agreement also laid out the payment of royalties.[174] The Transaction Agreement was subject to three conditions precedent, one of which is the execution of a future contract with E-Mex for the operation of the establishments (the Operating Agreement).[175] In accordance with the Mexican Civil Code, a suspensive condition does not take effect until the condition occurs.[176] Therefore, applying this principle, the Transaction Agreement which terminated the agreement with JEV Monterrey, *did not* become effective until the Operating Agreement between E-Games and E-Mex was signed.

68. In its Counter-Memorial, Mexico devotes only three short paragraphs to discussing the May 27, 2009 Resolution, which granted E-Games the status of Independent Operator and fails to make any coherent arguments or engage meaningfully with its substance.[177] Mexico states that obtaining the Independent Operator status was somehow risky and that there was deceit in

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[172] Counter-Memorial, ¶ 126.

[173] Transaction Agreement (Apr. 1, 2008), **C-6**.

[174] Transaction Agreement (Apr. 1, 2008), **C-6**.

[175] Transaction Agreement (Apr. 1, 2008), **C-6**; Operating Agreement (Nov. 1, 2008), **C-7**.

[176] Mexican Civil Code, Article 1939 ("*La condición es suspensiva cuando de su cumplimiento depende la existencia de la obligación.*"), **CL-257**.

[177] Counter-Memorial, ¶¶ 140-142.

Claimants' decision to request and obtain the May 27, 2009 Resolution, as its success depended upon E-Mex not finding out about its existence.[178] To be clear, there was no deceit involved in Claimants' decision to request and obtain the May 27, 2009 Resolution, as the Claimants were simply validating their acquired rights with SEGOB, utilizing the Petolof precedent to do so.[179]

69. Mexico's argument is again counterfactual and contradicts SEGOB's contemporaneous findings. As Mr. Gutiérrez explains, E-Games did not seek to permanently establish itself as an Independent Operator.[180] As explained, E-Games always sought to obtain an independent permit as it did in 2011.[181] The May 8, 2009 Resolution and the May 27, 2009 Resolution were proactive measures that E-Games took to ensure the continuity of its operations and to protect itself from the possibility that E-Mex could terminate the Operating Agreement, or that the E-Mex permit could be revoked.[182] E-Games also sought to ensure that it received the same treatment that Petolof received.[183] In fact, as Mr. Gutiérrez explains, these Resolutions did in fact protect E-Games, because although E-Mex asked SEGOB to terminate E-Games' operating authority derived from its unilateral termination of the Operation Contract between E-Mex and E-Games, SEGOB, recognizing E-Games' acquired rights, decided to wait until there was a final decision on the matter in the CAM Arbitration and allowed E-Games to continue to lawfully operate its facilities in Mexico.[184]

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[178] Counter-Memorial, ¶ 142.

[179] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 91.

[180] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 91.

[181] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 91; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 7-9.

[182] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 92.

[183] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 92.

[184] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 92.

70. Mexico then argues that SEGOB's December 8, 2010 correspondence to E-Games was not a "formal invitation" to apply for a permit because the document did not grant E-Games any preauthorization.[185] However, the document did inform E-Games that: (1) E-Games had complied with SEGOB's request for information made on July 21, 2010; (2) E-Games was recognized as an independent operator under E-Mex's permit; and (3) E-Games could apply for an autonomous, independent permit under its own name if E-Mex's permit was revoked or threatened with revocation.[186] Moreover, the December 8, 2010 Resolution reiterated and confirmed E-Games' continued compliance with the Gaming Regulation in its operations.[187]

71. Ultimately, E-Games did apply for and obtain its own independent permit.

2. Mexico's Alleged Policy Not to Increase the Number of Casinos

72. Mexico bases its decision not to issue a permit to E-Games for over a year and until E-Mex was formally declared in bankruptcy on an alleged "policy" not to increase the number of casinos in Mexico.[188] As Claimants' expert and witnesses explain, there was no formal, legal, or approved policy like this in place in Mexico during the time Claimants were operating their gaming facilities.[189] Instead, and as will be explained in the legal section of this Reply, this so-called "policy" was a non-transparent and arbitrary political mandate of the Calderón administration, that prevented the gaming agency from increasing the number of gaming permits notwithstanding that the gaming law established very clear legal requirements that if met should result in one obtaining a gaming permit. As Mr. Gutiérrez explains, Mexico's "decision to wait and to leave the Claimants

185 Counter-Memorial, ¶ 156.

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

187 Memorial, ¶ 130.

188 Counter-Memorial, ¶ 159.

189 Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 58-63; Second Ezequiel González Matus Report, **CER-6**, ¶¶ 49-51.

in limbo for at least a year has no explanation other than SEGOB's own political motivations . . ."[190] Mr. Gutiérrez goes on to explain that under Mexican law, no such public policy with respect to limiting the number of casinos in Mexico existed.[191] Public policies in Mexico are established in accordance with the National Planning Law (*Ley de Planeación*), which obliges state agencies to intervene in the preparation of the National Development Plan (*Plan Nacional de Desarollo*).[192] While SEGOB has the authority to issue public policy, it must also follow this predetermined process and policies cannot be implemented on an ad-hoc or case-by case basis.[193] Here, it did not do so. Mr. González confirms that to have legal effect, SEGOB's administrative acts of a general nature (*actos administrativos de carácter general*) must be published in the Official Gazette of the Federation (*Diario Oficial de la Federación*), as mandated by the Federal Law of Administrative Procedure.[194]

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[190] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 56.

[191] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 60.

[192] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 59.

[193] Second Ezequiel González Matus Report, **CER-6**, ¶ 46 ("The Gaming Law determines the authority of SEGOB to regulate, authorize, control and oversee of games with bets and draws. Although this authority implies that SEGOB has the capacity, at some point, to establish and implement a public policy regarding the issuance of permits**, the exercise of such power cannot be implemented on a case-by-case basis**. SEGOB can only adopt public policy through the general provisions issued in accordance with administrative law. In other words, SEGOB can only adopt public policy as long as it complies with the requirements under Mexican law." **Spanish Original**: "*La Ley de Juegos fija la competencia de la SEGOB para la reglamentación, autorización, control y vigilancia de los juegos con apuestas y sorteos.*[193] *Aunque esa facultad implica que la SEGOB tiene la capacidad de en algún momento establecer e implementar o "adopt[ar]" una política pública respecto de la expedición de permisos, el ejercicio de tal facultad no puede implementarse de manera casuística. La SEGOB sólo puede adoptar una política pública a través de disposiciones de carácter general emitidas conforme a la normatividad administrativa. En otras palabras, la SEGOB puede adoptar una política pública siempre y cuando cumpla con los requisitos de la ley mexicana*.").

[194] Federal Law of Administrative Procedure, Article 4, **R-064** ("*Los actos administrativos de carácter general, tales como reglamentos, decretos, acuerdos, normas oficiales mexicanas, circulares y formatos, así como los lineamientos, criterios, metodologías, instructivos, directivas, reglas, manuales, disposiciones que tengan por objeto establecer obligaciones específicas cuando no existan condiciones de competencia y cualesquiera de naturaleza análoga a los actos anteriores, que expidan las dependencias y organismos descentralizados de la administración pública federal, deberán publicarse en el Diario Oficial de la Federación para que produzcan efectos jurídicos*"); *see also* Second Ezequiel González Matus Report, **CER-6**, ¶ 47.

73. Mexico has not proven that SEGOB instituted any formal, legal public policy limiting the number of casinos in Mexico. In support of its theory that there was a public policy not to increase the number of casinos, Mexico relies only on public statements that were issued after the Casino Royale incident, along with a Resolution SEGOB issued to E-Games in November 2011 in which a policy against encouraging an increase in the number of establishments is mentioned in passing, but no public policy is cited in support of this proposition.[195] This is an astonishing admission by Mexico and one that, with its own words, establishes that there was some secret, arbitrary, non-transparent and politically-motivated mandate in place that prevented the gaming agency in Mexico from complying with the applicable gaming law, which requires the issuance of a permit when one meets all of the legal requirements for obtaining one. Moreover, the Resolution cited by Mexico does not reflect any policy against increasing the number of permitholders.[196] Under Mexican law, a public policy may not be issued through a statement to the media.[197] Instead, it must be formally issued by the government.[198] Mexico has presented no evidence of any formal public policy that would limit the number of gaming establishments in Mexico.[199] SEGOB's actions were merely an adherence to a political mandate to favor casinos owned and operated by the wealthiest of Mexicans (e.g., the Hank family, Televisa, etc.) and designed to appear to the public, including journalists and others in the industry, that it was not granting a new permit to E-Games, but rather substituting one permit for another.[200]

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[195] Counter-Memorial, ¶ 159, fn. 144.

[196] Counter-Memorial, ¶ 159, fn. 144.

[197] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 60.

[198] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 60.

[199] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 60.

[200] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 61; Memorial, ¶ 87.

(a) The Tribunal Should Draw an Adverse Inference Based Upon Mexico's Failure to Produce Any Documents

74. In the document request phase of these proceedings, the Claimants requested from Mexico various documents relating to the government's views and/or analysis of the May 27, 2009 Resolution and/or to the figure of Independent Operator. Specifically, Claimants requested:

- **Request 1:** Any document related to, prepared in connection with, or containing an analysis of SEGOB's May 27, 2009 Resolution, which granted E-Games the status of "independent operator" ("*operador independiente*"), including without limitation, copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (*oficios*), and other documents prepared by, without limitation, the Ministry of Economy, and/or SEGOB, between January 1, 2009 and January 31, 2015.
- **Request 2:** Any document related to, prepared in connection with, or containing an analysis of the status of "independent operator" ("*operador independiente*") under Mexican law, including without limitation, copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (*oficios*), and other documents prepared by, without limitation, the Ministry of Economy, and/or SEGOB, between January 1, 2009 and January 31, 2015.
- **Request 3:** Any document related to or reflecting an analysis or opinion that E-Games was not an independent operator ("*operador independiente*") under E-Mex's permit, including without limitation, copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (*oficios*), and other documents prepared by, without limitation, the Ministry of Economy, and/or SEGOB, between January 1, 2009 and January 31, 2015.

75. In response, Mexico stated that it "has not identified any documents that would be responsive to this request."[201] Mexico would have the Tribunal believe that it has no documents including emails, notes, memoranda, resolutions, etc. regarding the May 27, 2009 Resolution granting E-Games the status of independent operator or regarding the figure of independent

[201] Procedural Order No. 10 (Mar. 26, 2021), Annex I.

operator. Importantly, the term "independent operator" is not a term made up by Claimants, it is derived from SEGOB's May 27, 2009 Resolution. Those are the words utilized by the gaming agency in granting a particular gaming operator status to E-Games. In light of this, Mexico's statement that it has no documents regarding the May 27, 2009 Resolution or this particular gaming operator status is highly dubious and unusual, particularly given that someone within SEGOB would had to have reviewed, analyzed, and approved Claimants' request to de-link itself in various ways from E-Mex permit before issuing the May 27, 2009 Resolution. Mexico would have the Tribunal believe that it generated absolutely no written communications in the course of this analysis. That is not believable. Moreover, Respondent's own expert, Mr. Lazcano, firmly argues that that there is no figure of "independent operator" under Mexican law and that E-Games was not an independent operator.[202] While Claimants disagree with Mr. Lazcano's position, if this were to be the case, one would expect that there would be discussions, memoranda, etc. reflecting SEGOB's changed position on these issues. As a result, the Claimants request that the Tribunal draw an adverse inference with respect to these requests and find that Claimants were appropriately granted the status of Independent Operator by SEGOB in May 2009 and that E-Games having had the status of Independent Operator cannot be a valid basis for Mexico, through SEGOB, to have canceled E-Games' permit.

D. E-Games Obtains an Independent Permit

1. The E-Games Permit Was Independent and Was Not Linked to the E-Mex Permit or to E-Games' Prior Status as an Independent Operator

76. As Claimants explained in detail in their Memorial, the gaming permit granted to E-Games through the November 16, 2012 Resolution, the E-Games Independent Permit, was completely

[202] Counter-Memorial, ¶ 57; *see also* Mr. Lazcano Report (**RER-2**), ¶ 47.

autonomous and independent.[203] E-Games had complied with all the procedural steps and legal requirements to obtain an independent permit, and the E-Games Independent Permit had its own permit number and was separate and distinct from E-Mex's permit.[204] In its Counter Memorial, Mexico presents a distorted account of the genesis of the E-Games Independent Permit.[205] Mexico's central argument as to the scope of the E-Games Independent Permit is that the November 16, 2012 Resolution was simply a transfer or continuation of the E-Mex Permit (with 7 dual-function casinos).[206] Mexico's argument is flawed for various reasons, but it does highlight yet again the factual and legal machinations and contortions that Mexico makes in an effort to remain consistent with its so-called secret and informal "policy" not to increase the number of gaming permits.

77. First, that the E-Games Independent Permit was issued under the "same terms and conditions" as E-Mex's permit does not make the permit simply a transfer or continuation of the E-Mex Permit. E-Games applied for an independent permit, submitted all the required information under Mexican law to obtain an independent permit, was told after a very careful analysis by SEGOB that it met each and every one of the requirements to obtain a permit, and then was issued an independent and autonomous permit by the gaming agency.[207] Moreover, SEGOB's August 15, 2012 Resolution, recognizing that E-Games had acquired rights for the independent use and operation of E-Mex's permit (and, as a result, was entitled to the rights and obligations under E-Mex's permit in its own name), expressly states that the rights that are granted to E-Games are

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[203] Memorial, Section IV.O.

[204] Memorial, ¶ 140.

[205] Counter-Memorial, ¶ 166.

[206] Counter-Memorial, ¶ 166.

[207] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 55; Second Ezequiel González Matus Report, **CER-6**, ¶¶ 86, 95.

independent of any prior or previous contractual relationship.[208] Specifically, clause 1 of the August 15, 2012 Resolution states:

> FIRST. It is determined and recognized the ownership of the acquired rights concerning the use and exploitation of Permit Number DGAJS/SCEVF/P-06/2005, dated May 25, 2005, and its modifications, in favor of [E-Games] within the terms of Resolution DGAJS/SCEV/00619/2008, dated December 09, 2008, DGAJS/SCEV/0059/2009, dated February 13, 2009, DGAJS/SCEV/0194/2009, dated May 8, 2009, DGAJS/SCEV/0260/2009, dated May 27, 2009, DGAJS/SCEV/0260/2009-BIS dated May 27, 2009, DGAJS/SCEV/0321/2010, dated July 21, 2010, DGAJS/SCEV/0550/2010, dated December 8, 2010, which specifically refer to (7) seven Remote Betting Centers and (7) Number Drawing Rooms. [**These] are recognized rights that cannot be infringed, regardless of any prior or precedent contractual relationship**.[209] (English translation of Spanish Original)

78. The November 16, 2012 Resolution, granting the E-Games Independent Permit, states that E-Games had complied with each and every one of the elements and requirements established under the Federal Gaming Law and Gaming Regulation for the issuance of a permit.[210] This is important because it was precisely for this reason, and this reason only, that SEGOB granted the right to become an independent permit holder.[211]

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

[209] SEGOB Resolution No. DGJS/SCEV/0827/2012 (Aug. 15, 2012), p. 6, **C-254** ("*PRIMERO. Se determina y reconoce la titularidad de los derechos adquiridos, sobre el uso y explotación del permiso Numero DGAJS/SCEVF/P-06/2005, de fecha 25 de mayo de 2005, y sus modificaciones, a favor de "Exciting Games S. de R.L de C.V." en terminos de los oficios DGAJS/SCEV/00619/2008, de fecha 09 de diciembre de 2008, DGAJS/SCEV/0059/2009, de fecha 13 de febrero de 2009, DGAJS/SCEV/0194/2009, de fecha 8 de mayo de 2009, DGAJS/SCEV/0260/2009, de fecha 27 de mayo de 2009, DGAJS/SCEV/0260/2009-BIS, de fecha 27 de mayo de 2009, DGAJS/SCEV/0321/2010, de fecha 21 de Julio de 2010, DGAJS/SCEV/0550/2010, de fecha 8 de diciembre de 2010, que se refieren especificamente a (7) siete Centros de Apuestas Remotas y (7) Salas de Sorteos de Numeros, Derechos reconocidos que no pueden ser vulnerados, con independencia de cualquier relación contractual previa o precedente.*).

[210] Second Ezequiel González Matus Report, **CER-6**, ¶ 88; SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16** ("It is confirmed that "Exciting Games, S. de R.L. de C.V." has complied with each of the elements and requirements established by the Federal Gaming and Lotteries Law and its Regulations for the issuance thereto of this federal permit on gaming and lotteries, in terms of the provisions of articles 20, Section I, 22 and 23 of the Regulations of the Federal Law on Gaming and Lotteries." **Spanish Original**: "*Se confirma que "Exciting Games, S. de R.L. de C.V." ha dado cumplido a cada uno de los elementos de los requisitos establecidos por la Ley Federal de Juegos y Sorteos y su Reglamento, para la expedición a su favor del presente permiso federal en materia de juegos y sorteos, en terminos de lo dispuesto por los artículos 20, fracción I, 22 y 23 del Reglamento de la Ley Federal de Juegos y Sorteos*.").

[211] First Ezequiel González Matus Report, **CER-3**, ¶ 106; Second Ezequiel González Matus Report, **CER-6**, ¶ 88; SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16**.

79. Mexico also argues that the E-Games Independent Permit was really a transfer of E-Mex's permit to E-Games.[212] If Mexico's argument on this were factually true (which it is not), this would be illegal under Mexican law. Article 31 of the Gaming Regulation states: "Permits are non-transferable and may not be encumbered, assigned, sold or traded in any way."[213] As Mr. Gutiérrez specifically states: "This would indicate that what this "change of status" did was an assignment of the permit from E-Mex to E-Games, a circumstance that, as Mexico itself has indicated, is prohibited under Mexican law."[214] Rather than concede what it knows to be fact (that the E-Games Independent permit was in fact a separate, independent permit that the agency granted to E-Games just as the November 2012 Resolution establishes), Mexico argues that SEGOB, through its own government agency, violated Mexican law in issuing the E-Games Independent Permit. This contradicts what SEGOB said in the November 16, 2012 Resolution. There is no logical or legal explanation as to why or how SEGOB could justify transferring the E-Mex permit to E-Games while the E-Mex permit was still in force.[215] This simply did not happen.

80. In its Counter-Memorial, Mexico also argues that because the E-Games Independent Permit and E-Mex's permit shared the same number except for the suffix "BIS at the end for E-Games," the E-Games Independent Permit was simply a continuation of the E-Mex permit.[216] This is also incorrect and not only for the reasons laid out in the paragraph immediately preceding this one. As Mr. González explains, the similar numbering of the E-Games and E-Mex permits does

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[212] Counter-Memorial, ¶ 188.

[213] Counter-Memorial, ¶ 49; Gaming Regulation, Article 31, **R-033** ("Permits are non-transferable and may not be encumbered, assigned, sold or traded in any way." **Spanish Original**: "*Los permisos son intransferibles y no podrán ser objeto de gravamen, cesión, enajenación o comercialización alguna*.").

[214] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 70.

[215] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 70.

[216] Counter-Memorial, ¶ 167.

not indicate that the E-Games Independent Permit is in any way dependent upon E-Mex's permit.[217] In contrast, Mr. González explains that in his experience as Deputy Director of SEGOB, it was common for entirely independent permits to have similar permit numbers.[218]

81. Mr. González also explains that in Mexico it is not unusual for administrative entities, including SEGOB, to use the nomenclature including the suffix BIS, TER, QUATER, etc. for their regulations or administrative acts to differentiate them among themselves.[219] In English, these differentiators are equivalent to second, third, fourth, etc. In fact, adding BIS, TER, QUARTER at the end of a regulation or resolution is a long-established administrative practice in Mexico's public sector.[220] By way of example, the Gaming Regulation itself contains multiple articles identified as BIS, TER or QUATER, and the use of this specific suffix differentiates these articles from each other (*i.e*. showing the independent nature of each of these articles).[221] For instance, as Mr. González explains, the Gaming Regulation was modified in 2012 to incorporate new definitions and rules.[222] One of these newly adopted definitions was *Azar* (gambling) and it was added under Article 3 (I) of the Gaming Regulation, using the Latin suffix BIS, so that it could follow the pre-existing numerical order of the definitions, as shown below.[223]

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[217] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 94-96.

[218] Second Ezequiel González Matus Report, **CER-6**, ¶ 95.

[219] For example, the 2012 amendments to the Gaming Regulation added sections I BIS and XII BIS to Article 3, as well as Article 39 BIS; *See* Federal Gaming Regulation, **R-031 - R-033**; *see* also Second Ezequiel González Matus Report, **CER-6**, ¶ 95.

[220] Second Ezequiel González Matus Report, **CER-6**, ¶ 95.

[221] Second Ezequiel González Matus Report, **CER-6**, ¶ 95.

[222] Second Ezequiel González Matus Report, **CER-6**, ¶ 13.

[223] *See* Figure 1, Federal Gaming Regulation, Article 3, Fraction I. BIS, **R-033**.

ARTÍCULO 3.- Para los efectos de este Reglamento, en lo sucesivo se entenderá por:

I. **Apuesta:** Monto susceptible de apreciarse en moneda nacional que se arriesga en un juego contemplado por la Ley y regulado por el presente Reglamento con la posibilidad de obtener o ganar un premio, cuyo monto, sumado a la cantidad arriesgada deberá de ser superior a ésta;

I. BIS. **Azar:** Casualidad a que se fía el resultado de un juego, el cual es completamente ajeno a la voluntad del jugador;

Fracción adicionada DOF 19-10-2012

II. **Beneficiario:** Persona física que sin tener necesariamente el carácter de titular de una acción o parte social de la sociedad permisionaria, recibe a través de cualquier figura jurídica, los frutos producidos por la explotación de un permiso otorgado en los términos de la Ley y este Reglamento y ejerce finalmente, directa o indirectamente, el control de la permisionaria, además de los derechos corporativos de accionista o titular de parte social, a través de quienes son los titulares, y tiene en los hechos la posibilidad de influir o tomar decisiones de la permisionaria o, en su caso, de recibir los beneficios;

Figure 1. Fraction I BIS - Art. 3 of the Gaming Regulation.

82. As this example demonstrates, the use of the Latin suffix BIS in the definition of *Azar* (gambling) is a simple (and typical) way to differentiate the definition of gambling, an entirely separate term, from the definition of *Apuesta* (betting). By doing so, the entire Article did not need to be renumbered.

83. Likewise, the inclusion of the "BIS" at the end of the E-Games Independent Permit actually indicates that it is an autonomous administrative act, different from E-Mex's permit. As explained, SEGOB issued the November 16, 2012 Resolution and granted the E-Games Independent Permit because E-Games had complied with all legal requirements under Mexican law for the issuance of a new gaming permit. While doing so, SEGOB specifically included the BIS at the end of E-Games' permit number to signify that it is a new permit entirely separate from E-Mex's later revoked permit. E-Games' permit number only serves to reinforce its independence and autonomous nature.[224]

[224] Second Ezequiel González Matus Report, **CER-6**, ¶ 96.

E. The E-Games Independent Permit was valid for 25 years, or until at least 2037

84. In its Counter-Memorial, Mexico argues that the E-Games Independent Permit would only have been valid until May 24, 2030, incorrectly linking the validity of the E-Games Independent Permit to the duration of the E-Mex Permit.[225] The E-Games Independent Permit was valid until at least 2037 and more likely until at least 2052.[226] The E-Games Independent Permit commenced on November 16, 2012, the date it was granted by SEGOB, and would have been valid for at least 25 years, pursuant to the Federal Law of Administrative Procedures and the Gaming Regulation.[227] As Mr. González explains, the November 16, 2012 Resolution granting the E-Games Independent Permit states that its duration is the same as the duration of E-Mex's permit, which was granted for a 25 year period.[228] He further explains that while the November 16, 2012 Resolution does not specifically indicate when the E-Games Independent Permit takes effect, (i) under the Federal Law of Administrative Procedures, administrative acts are effective and enforceable as of the effective date on which they are issued, and (ii) the Gaming Regulation provides for a duration of gaming permits between 1-25 years.[229] As such, the effective date of the E-Games Independent Permit was November 16, 2012, and because the E-Games Independent Permit was granted under the same terms and conditions as E-Mex's 25-year permit, under Mexican law, the duration of the E-Games Independent Permit could not be less than 25 years. Hence, E-Games' permit would have

[225] Counter-Memorial, ¶ 171.

[226] Memorial, ¶¶ 153-155.

[227] Memorial, ¶ 154.

[228] First Ezequiel González Matus Report, **CER-3**, ¶¶ 3, 75-78; Second Ezequiel González Matus Report, **CER-6**, ¶ 127.

[229] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 126-129; Memorial, ¶ 154.

been valid for 25 years from 2012, or through 2037, had it not been for Mexico's unlawful rescission of the November 16, 2012 Resolution.[230]

85. Mexico, aside from a passing remark in its damages report, does not rebut that the E-Games Independent Permit was subject to 15-year renewals. Pursuant to the Gaming Regulation, after the expiration of the 25-year permit, the E-Games Independent Permit should have been further extended for subsequent 15-year periods and could even have been extended indefinitely with successive 15-year renewals.[231] Specifically, Article 33 of the Gaming Regulation states:

> [t]he permits referred to in Section I [(such as the E-Games Independent Permit)] may be extended for subsequent periods of up to 15 years, provided that the permit holders are in compliance with all of their obligations.[232] (English Translation of Spanish Original).

86. As Mr. González explains, E-Games could have legitimately expected to continue operations under the E-Games Independent Permit until at least 2037, and then, the permit's validity could have been extended for *at least* one 15-year renewal period as long as it remained in compliance with its obligations.[233] There have even been various permitholders whose permits have been converted to permits of "unlimited duration."[234]

87. Importantly, Mexico's own documents confirm the E-Games Independent Permit's 25-year duration. Mexico argues that the SEGOB website substantiates its view that the E-Games

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[230] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 127-133; Memorial, ¶ 154.

[231] Memorial, ¶ 155; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 64; Second Ezequiel González Matus Report, **CER-6**, ¶ 131-133.

[232] *See* Gaming Regulation, Article 33, **CL-72** ("*Los permisos señalados en la fracción I podrán ser prorrogados por periodos subsecuentes de hasta15 años, siempre que los permisionarios se encuentren al corriente en el cumplimiento de todas sus obligaciones*."). Section I of Article 33 refers to permits "for the opening and operation of betting in racetracks, greyhound tracks, jai alai, remote gambling centers and lottery number rooms or symbols."

[233] Second Ezequiel González Matus Report, **CER-6**, ¶ 133.

[234] Memorial, ¶ 155; Second Ezequiel González Matus Report, **CER-6**, ¶ 135; s*ee e.g.* Grupo Océano Haman, S. A. de C. V. Screenshot, **C-255**; Impulsora Géminis, S. A. de C. V. Screenshot, **C-256**; Espectáculos Deportivos de Cancun, S. A. de C. V. Screenshot, **C-257** available at http://www.juegosysorteos.gob.mx/es/Juegos_y_Sorteos/Salas_de_Sorteos_de_Numeros.

Independent Permit was only valid until 2030.[235] This conclusion is contrary to Mexico's own documents. Since the inception of this case, Claimants have periodically visited the SEGOB website and taken screenshots and downloaded the permitholder information of E-Games and other permitholders. A screenshot of SEGOB's website from June 2017 listing the "Information about the Permit of Exciting Games" (reproduced below as Figure 2, *E-Games Independent Permit Duration – SEGOB website*) reflects that the term of the E-Games Independent Permit was 25 years and that the permit's duration extended until 2037.[236] Notably, this information reflecting that the permit is valid until 2037 has since been removed from SEGOB's website and is now contradicted by Mexico in these proceedings.

Exciting Games, S. de R.L. de C.V.

I.

Fecha de Constitución de la sociedad:	22 de Febrero de 2006
Permiso N°:	DGAJS/SCEVF/P-06/2005-Bis
Fecha del Permiso Inicial:	15 de agosto de 2012
***Actividades autorizadas:**	7 Centros de Apuestas Remotas y 7 Salas de Sorteos de Números
En operación:	6 Centros de Apuestas Remotas
Vigencia:	25 años
Término de vigencia:	14 de agosto de 2037

Figure 2. E-Games Independent Permit Duration – SEGOB website.

88. In addition, even Mexico's own witness, Ms. González Salas, relies upon a document that reaffirms Claimants' arguments regarding the duration and independence of the E-Games

[235] Counter-Memorial, ¶¶ 171-172.

[236] Information on Duration of Exciting Games, SEGOB Website (Dec. 3, 2012), Figure 1, **C-391**.

Independent Permit.[237] In her witness statement, Ms. Salas cites to a document entitled "General Diagnosis of Casinos."[238] This May 2013 document reviews the current status of all gaming permit holders in Mexico and reveals further contradictions with Mexico's arguments in this case. Notably, the document, excerpted and reproduced below, confirms that the E-Games Independent Permit (i) was granted by administrative resolution on November 16, 2012, and (ii) that E-Games had the right to operate seven dual function facilities under its permit.[239] With respect to the duration of the permit, it also confirms that the permit was granted in 2012 and that its validity extends until 2037.[240] The document also confirms that Producciones Móviles' permit was granted by administrative resolution in November 2012 and that its permit is also valid from 2012 until 2037.[241] Notably, nowhere in this document does it link the E-Games Independent Permit with E-Mex or E-Mex's permit. The document then goes on to list what it refers to as "Independent Permitholders" and E-Games is also featured in the list (see excerpts reproduced at Figures 3 and 4 *General Diagnosis of Casinos –Independent Permit Holders (as of May 2013)*).[242]

[237] Salas Statement, **RWS-1**, Annex 1, "*Diagnóstico General de los Casinos*."

[238] Salas Statement, **RWS-1**, Annex 1, "*Diagnóstico General de los Casinos*."

[239] Salas Statement, **RWS-1**, Annex 1, "*Diagnóstico General de los Casinos*," p. 15.

[240] Salas Statement, **RWS-1**, Annex 1, "*Diagnóstico General de los Casinos*," p. 15; *see also* Information on Duration of Exciting Games, SEGOB Website (Dec. 3, 2012), **C-391**.

[241] Salas Statement, **RWS-1**, Annex 1, "*Diagnóstico General de los Casinos*," p. 15.

[242] Salas Statement, **RWS-1**, Annex 1, "*Diagnóstico General de los Casinos*," p. 22.

ANEXO 2 (página 1 / 2)

SITUACIÓN ACTUAL DE LOS PERMISIONARIOS

	PERMISIONARIO	INICIO VIGENCIA	TERMINO VIGENCIA	ESTABLECIMIENTOS AUTORIZADOS 1953 - 2000	ESTABLECIMIENTOS AUTORIZADOS 2001 - 2012	TOTAL AUTORIZADOS	OPERANDO	POR OPERAR
1	Administradora Mexicana de Hipódromo, S.A. de C.V. (14- Mayo, 2007) (a)	1997	2022	45	20	65	53	12
2	Apuestas Internacionales, S.A. de C.V. (25-Mayo-2005) (b)	2005	2030		55	55	22	33
3	Atracciones y Emociones Vallarta, S.A. de C.V. (Acuerdo del 10-06-2009, derivado del Juicio de Amparo 99/2008) (c)	1992	2017	4	46	50	40	10
4	Cesta-Punta Deportes, S.A. de C.V. (d)	1990 1992 1992	2021 2022 2022	9	0	9	0	9
5	Cía. Operadora Megasport, S.A. de C.V. Permiso inicial de fecha 19 de Dic., de 1997 y modificaciones del 23 de Dic., de 1997. (e)	2004 2012	2029 2042	32	64	96	36	60
6	Comercial de Juegos de la Frontera, S.A. de C.V. (Permiso DGG/723/97) (f)	1997	ILIMITADO	18	0	18	18	0
7	Comercializadora de Entretenimiento de Chihuahua, S.A. de C.V. (Sentencia del 9-08-2012, derivada del Juicio de Amparo 1795/2011) (g)	2005	2030		60	60	22	38
8	Divertimex, S.A. de C.V. (Sentencia de 3-Enero-2013 derivada de juicio de garantías 1524/2011) (h)	1991 2006	2016 2031	7	15	22	7	15
9	El Palacio de los Números, S.A. de C.V. (15-Enero, 2006 y 3-Septiembre, 2012) (i)	2006	2031		36	36	23	13
10	Entretenimiento de México, S.A. de C.V. (25-Mayo, 2005 y 1-Febrero, 2006) (j)	2005	2030		50	50	26	24
11	Espectáculos Deportivos de Cancún, S.A. de C.V.	1992	2017	4	0	4	1	3
12	Espectáculos Deportivos de Occidente, S.A. de C.V.	1994	2019	4	0	4	1	3
13	Espectáculos Deportivos Frontón México, S.A. de C.V.	1955	ILIMITADO	1	0	1	0	1
14	Espectáculos Latinoamericanos Deportivos, S.A. de C.V.	1993	2018	5	0	5	2	3
15	Eventos Festivos de México, S.A. de C.V. (06-Mayo, 2005) (K)	2005	2030		20	20	4	16
16	Exciting Games S. de R.L. de C.V. (Por Resolución Administrativa de fecha 16-11-2012) (l)	2012	2037		7	7	6	1

Figure 3. General Diagnosis of Casinos – Current Situation (May 2013).

ANEXO 5 (página 3 / 3)

PERMISIONARIOS INDEPENDIENTES

- Cesta-Punta Deportes, S.A. DE C.V.
- Comercial de Juegos de la Frontera, S.A. DE C.V.
- Comercializadora de Entretenimiento de Chihuahua, S.A. DE C.V.
- Divertimex, S.A. DE C.V.
- Entretenimiento de México, S.A. DE C.V.
- Espectáculos Deportivos de Occidente, S.A. DE C.V.
- Eventos Festivos de México, S.A. DE C.V.
- Exciting Games, S. DE R.L. DE C.V.
- Juegos y Sorteos de Jalisco, S.A. DE C.V.
- Petolof, S.A. DE C.V.
- Producciones Móviles, S.A. DE C.V.

Trabajan con operadores propios y externos.

Figure 4. General Diagnosis of Casinos –Independent Permit Holders (as of May 2013).

89. To state the obvious, Mexico is arguing out of both sides of its mouth, but its documents prove Claimants' case and seriously undermine Mexico's case.

F. Factually and Under Mexican Law, the November 16, 2012 Resolution Is Independent from the May 27, 2009 Resolution

90. As described in Claimants' Memorial, through its May 27, 2009 Resolution, SEGOB granted E-Games' request to operate its Casinos autonomously from E-Mex as an operator under the E-Mex permit.[243] This officially approved E-Games' legal right to operate the Casinos independently of any permission from E-Mex.[244] In its first expert report, Mr. González explained in detail that E-Games had four distinct legal statuses before SEGOB:[245]

Status	SEGOB Resolution	Name
First	DGAJS/SCEV/00619/2008 December 9, 2008 Resolution	E-Games Operator
Second	DGAJS/SCEV/0260/2009-BIS May 27, 2009 Resolution	E-Games Independent Operator
Third	DGAJS/SCEV/0827/2012 August 15, 2012 Resolution	E-Games Exploitation and Operation Rights
Fourth	DGJS/SCEV/1426/2012 (Permit No. DGAJS/SCEVF/P-06/2005-BIS) November 16, 2012 Resolution	E-Games Independent Permit Holder

91. Mexico disagrees with Mr. González's contention and argues that the November 16, 2012 Resolution (which granted the E-Games Independent Permit) is not a distinct legal status and that the November 16, 2012 Resolution is based upon the May 27, 2009 Resolution.[246] It does so not

[243] Memorial, ¶ 105; *see also* SEGOB Resolution No. DGAJS/SCEV/0260/2009-BIS (May 27, 2009), **C-11**; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 23; First Ezequiel González Matus Report, **CER-3**, ¶¶ 12-14.

[244] Memorial, ¶ 106; SEGOB Resolution No. DGAJS/SCEV/0260/2009-BIS (May 27, 2009), **C-11**; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 24; First Ezequiel González Matus Report, **CER-3**, ¶ 12; First Expert Report of Omar Guerrero ("First Omar Guerrero Report"), **CER-2**, ¶ 12.

[245] Second Ezequiel González Matus Report, **CER-6**, ¶ 61.

[246] Counter-Memorial, ¶ 183.

because this argument is consistent with the contemporaneous facts, or the law, it is not. It argues this because doing so is convenient for its legal arguments in this case and provides it with the ability to try to justify the tortured judicial rulings and administrative actions that resulted in the invalidation of E-Games' permit.

92. Mexico does not substantively engage with Claimants' arguments in their Memorial or meaningfully explain its justification for the supposed link between the November 16, 2012 Resolution and the May 27, 2009 Resolution, aside from making the intellectually disingenuous and weak argument that they are related because all of the Resolutions granted in favor of E-Games are related (the May 27, 2009 Resolution, the August 15, 2012 Resolution, and the November 16, 2012 Resolution).[247] In doing so, Mexico attempts to provide a post-hoc justification for SEGOB's revocation of all statuses granted to E-Games based on the *amparo* court's revocation of the May 27, 2009 Resolution.[248]

93. Mexico's argument is flawed for several reasons. First, the November 16, 2012 Resolution does not rely on, nor does it even mention the May 27, 2009 Resolution.[249] This demonstrates that SEGOB did not rely on the May 27, 2009 Resolution or E-Games' independent operator status in issuing the E-Games Independent Permit.[250] Additionally, nowhere in the November 16, 2012 Resolution does it state that the May 27, 2009 Resolution (granting E-Games independent operator

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[247] Counter-Memorial, ¶ 183.

[248] Counter-Memorial, ¶¶ 10-11.

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

[250] First Ezequiel González Matus Report, **CER-3**, ¶ 118 ("This means that, regarding the purpose or cause of each resolution, it can be reasonably interpreted that the issuance of the independent permit was not subject necessarily to the issuance of Resolution DGAJS/SCEV/0260/2009-BIS (independent operator status resolution); and that the independent permit could have its own existence even without the existence of the independent operator resolution." **Spanish Original**: *"Esto quiere decir que, en razón del objeto o materia de cada oficio, conforme al derecho administrativo mexicano se puede afirmar que la expedición del permiso independiente no estaba sujeta necesariamente a la existencia previa del oficio DGAJS/SCEV/0260/2009-BIS (operador independiente), y que el permiso independiente en efecto tenía existencia jurídica propia aun si Exciting Games no hubiera sido reconocido previamente como operador independiente."*).

status) was a precondition, or a legally necessary or even relevant reason, for granting the E-Games Independent Permit.[251] To the contrary, the November 16, 2012 Resolution states that E-Games complied with all of the requirements to become a permitholder under Articles 20, 22, and 23 of the Gaming Regulation and that this, only this, is the reason that SEGOB granted E-Games its permit.[252]

94. Second, as explained in detail in Claimants' Memorial, the May 27, 2009 Resolution arose from an entirely different administrative request and had an entirely different legal effect from the November 16, 2012 Resolution granting the E-Games Independent Permit.[253] Operator and permitholder are entirely distinct statuses,[254] and operators and permitholders must comply with different requirements under the Gaming Regulation.[255] Importantly, the Gaming Regulation does not require that a permitholder have previously been an operator in order to obtain an independent permit.[256] Hence, on its face, Mexico's contention that E-Games' status as a permit holder is legally tied to its prior status as an independent operator is wrong as a matter of fact and law. Mexican law itself clearly distinguishes operators from permitholders, and SEGOB granted E-Games its own permit because of E-Games' compliance with all legal requirements to become a permitholder—and not because of E-Games' prior status as an operator.

95. Finally, and most importantly, there is no link between the November 16, 2012 Resolution granting the E-Games Independent Permit and the May 27, 2009 Resolution because the E-Games

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[251] First Ezequiel González Matus Report, **CER-3**, ¶¶ 113, 118.

[252] First Ezequiel González Matus Report, **CER-3**, ¶¶ 75(b), 80(g).

[253] Memorial, ¶¶ 183-187.

[254] First Ezequiel González Matus Report, **CER-3**, ¶¶ 123-124; First Omar Guerrero Report, **CER-2**, ¶¶ 241-245, 247.

[255] First Ezequiel González Matus Report, **CER-3**, ¶¶ 129-130.

[256] First Ezequiel González Matus Report, **CER-3**, ¶ 131.

Independent Permit was, by its terms (as well as by Mexico's own admission in this case) autonomous and independent.[257] As confirmed by the Sixteenth District Judge in the *Amparo* 1668/2011,[258] and extensively briefed in Claimants prior briefs, the November 16, 2012 Resolution was a "totally independent and autonomous" administrative act bearing no legal or factual link with the May 2009 Resolution.[259]

G. Additionally, There Is No Link Between the August 15, 2012 Resolution and the November 16, 2012 Resolution

96. Mexico also argues that there is a "clear and direct link" between the November 16, 2012 Resolution that granted the E-Games Independent Permit and the August 15, 2012 Resolution in an attempt to argue that the E-Games Independent Permit was a continuation of the E-Mex Permit.[260] Specifically, Mexico argues that when E-Games requested the November 16, 2012 Resolution on November 7, 2012, it did not request that its own permit be given a distinct permit number, but instead, E-Games only requested that SEGOB confirm the rights vested in the August 15, 2012 Resolution.[261]

97. This argument is plainly incorrect as a matter of fact. On November 7, 2012, E-Games requested SEGOB's Director General to correct the August 15, 2012 Resolution and, as a separate matter, to grant E-Games its own independent permit ***with a permit number separate and distinct*** from E-Mex's permit.[262] Moreover, and importantly, SEGOB's conclusions in the November 16,

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[257] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 92, 146; Salas Statement, **RWS-1**, Annex 1, "*Diagnóstico General de los Casinos*," p. 22.

[258] Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), **C-24.**

[259] Memorial, ¶¶ 140-152; Request for Arbitration, ¶¶ 45-48.

[260] Counter-Memorial, ¶¶ 176-182.

[261] Counter-Memorial, ¶ 180.

[262] Memorial, ¶ 140; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 36; First Ezequiel González Matus Report, **CER-3**, ¶¶ 71, 75(a).

2012 Resolution were not motivated by E-Games' request to correct the August 15, 2012 Resolution.[263] Instead, SEGOB made crystal clear that the November 16, 2012 Resolution was motivated by E-Games' request to become an independent permitholder pursuant to Article 20, 21, and 22 of the Gaming Regulation, and its having fulfilled all of the requirements under the Gaming Regulation to become a permit holder:

> In this regard, it is clarified that the decision that gave rise to the primary request of your client was not the change of status referring to the order number DGAJS/SCEV/0827/2012 dated August 15, 2012, rather it was the application for a permit in terms of articles 20, 21, 22 and other related and applicable terms of the Regulations of the Federal Law on Gaming and Lotteries . . . .[264] (English Translation of Spanish Original).

98. Aside from this important factual point, there is no legal correlation between the August 15, 2012 Resolution and the November 16, 2012 Resolution. As Mr. González confirms, the August 15, 2012 Resolution and the November 16, 2012 Resolution had two very different objectives.[265] The August 15, 2012 Resolution granted E-Games the right to use and operate E-Mex's permit, which is not what E-Games had sought from SEGOB, and the November 16, 2012 Resolution granted the E-Games Independent Permit in its own name with a distinctive number, which is precisely what E-Games has requested.[266] E-Games' November 7, 2012 request to SEGOB (whose result was the November 16, 2012 Resolution) sought to ensure that there was no

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[263] First Ezequiel González Matus Report, **CER-3**, ¶ 80 (h); Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 37.

[264] SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), p. 6, **C-16** ("*En tal sentido se aclara que la resolución que dio origen a la petición primaria de su representada, no fue el cambio de estatus a que se refiere el Oficio número DGAJS/SCEV/0827/2012 de fecha de 15 de agosto de 2012, sino por el contrario lo fue la solicitud de un Permiso en terminos de los artículos 20, 21 22 y demas relativos y aplicables del Reglamento Federal de Juegos y Sorteos*."); *see also* First Ezequiel González Matus Report, **CER-3**, ¶ 80 (h); Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 37.

[265] First Ezequiel González Matus Report, **CER-3**, ¶ 112.

[266] First Ezequiel González Matus Report, **CER-3**, ¶ 105.

question that the E-Games Independent Permit was autonomous and independent from the E-Mex permit.[267] SEGOB agreed in the November 16, 2012 Resolution.

99. In support of its argument that the August 15, 2012 and November 16, 2012 Resolutions are linked, Mexico states that in the August 15, 2012 Resolution, SEGOB cited "provisions [of the Gaming Regulation] that are applicable to the issuance of permits."[268] The provisions of the Gaming Regulation that SEGOB cites in the August 15, 2012 Resolution only refer to SEGOB's general powers, but do not refer to the legal requirements to obtain a permit.[269] And while the August 15, 2012 Resolution does not mention the Gaming Regulation's requirements to obtain a permit, the November 12, 2012 Resolution clearly does.[270]

100. Mexico's attempt to link the August 15, 2012 Resolution and the November 16, 2012 Resolution and argue that SEGOB did not grant E-Games an independent permit also is inconsistent with the representations made by SEGOB's General Director, following SEGOB's granting of the E-Games Independent Permit. First, in a Resolution issued on December 18, 2012, Mr. Alejandro Martínez Alvarez took "note of its [E-Games'] agreement with Resolution DGJS/SCEV/1426/2012 dated November 16, 2012" and further confirmed that the November 16, 2012 Resolution recognized "its [E-Games] ownership of the permit."[271] Second, on December 21, 2012, when requesting information regarding E-Games' income and payment details in its

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[267] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 86-93.

[268] Counter-Memorial, ¶¶ 165.

[269] SEGOB Resolution No. DGJS/SCEV/0827/2012 (Aug. 15, 2012), **C-254**; SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16**.

[270] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 71; SEGOB Resolution No. DGJS/SCEV/0827/2012 (Aug. 15, 2012), **C-254**.

[271] SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16** ("*toma conocimiento de su conformidad con respecto del Oficio DGJS/SCEV/1426/2012 de fecha 16 de noviembre de 2012, mediante el cual se le reconoce la titularidad del permiso.*"); SEGOB Resolution No. DGJS/SCEV/1538/2012 Recognizing E-Games' Ownership of its Independent Permit (Dec. 18, 2012), **C-392**.

capacity as a permit holder, Mr. Martínez Álvarez stated that through the November 16, 2012 Resolution, it "granted [E-Games] the permit No. DGJS/SCEVF/P-06/2005-Bis."[272]

101. Not only has Mexico failed to introduce any evidence into the record to bolster this alleged legal correlation between the August 15, 2012 Resolution and the November 16, 2012 Resolution, but—as explained *infra*—it has refused to produce responsive documents that would corroborate Claimants' contentions that there is no legal correlation between the two resolutions, resulting in the need for this Tribunal to issue adverse inferences against Mexico.

H. Mexico Misrepresents Claimants' Briefings in the Administrative Proceedings No. 9606-12-11-02-3 and No. 1080/13-11-03-1

102. In its Counter-Memorial, Mexico incorrectly insists that E-Games' references to the E-Mex permit in administrative and judicial proceedings prove that the E-Games Independent Permit was a mere continuation of the E-Mex Permit.[273] This argument is nonsensical.

103. Specifically, Mexico claims that Claimants allegedly argued in at least two legal proceedings that there was a nexus between the May 27, 2009 Resolution, the August 15, 2012 Resolution, and the November 16, 2012 Resolution.[274] A careful review of the briefs Mexico cites reveal that what E-Games specifically stated was that it "no longer was an operator, but a permit

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[272] SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16** ("*la resolución mediante oficio No. DGAJS/SCEVF/0827/2012 de 15 de agosto de 2012, así como al oficio DGJS/SCEV/1426/2012 de 16 de noviembre del mismo año, a través del cual, de acuerdo al resolutivo tercero, se otorga a su representada el permiso No. DGJS/SCEVF/P-06/2005-Bis*."); SEGOB Resolution No. DGJS/SCEV/1538/2012 Recognizing E-Games' Ownership of its Independent Permit (Dec. 18, 2012), **C-392**.

[273] Counter-Memorial, ¶¶ 187-190.

[274] Counter-Memorial ¶¶ 186, 189-190; SEGOB Resolution No. DGAJS/SCEV/0260/2009-BIS (May 27, 2009), **C-11**; SEGOB Resolution No. DGJS/SCEV/0827/2012 (Aug. 15, 2012), **C-254**; SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16**.

holder," [275] and reiterated that its permit was different (*diverso*) from the E-Mex Permit.[276] For example, in Administrative Proceeding 9606-12-11-02-3, E-Games stated:

> The granting of the precautionary measure is intended to protect the right of my client to continue rendering the service in the manner in which it does, that is to say, that a state of closure is not imposed on the rooms that it operates due to an alleged lack of authorization, since as I have been mentioning, my client only has the duty to file a notice, according to the provisions of official letter UG/211/145/2006 dated January twenty-third, two thousand six, which constitutes a modification to permit DGAJS/SCEVF/P-06/2005 dated May twenty-fifth, two thousand five, which my client has the right to operate, according to the content ***of the different permit DGAJS/SCEVF/P-06/2005-BIS***.[277] (Emphasis added) (English Translation of Spanish Original)

104. Likewise, in Administrative Proceedings 1080/13-11-03-1, E-Games stated:

> [f]rom the analysis of the contents of permit DGAJS/SCEVF/P-06/2005-BIS, it can be confirmed that my client enjoys all the rights derived from ***the different permit DGAJS/SCEVF/P-06/2005***.[278] (English Translation of Spanish Original)

105. Mexico's arguments are misleading, as they inaccurately state that E-Games sought to prove that there was a legal relationship or link between its permit and the E-Mex permit.[279] Instead, E-Games only restated in these filings that the E-Games Independent Permit was a different and distinct (*diverso*) permit from the E-Mex permit.[280] Mr. González further

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[275] E-Games Nullity Action Brief (Dec. 14, 2012), p. 3, **R-049**.

[276] E-Games Nullity Action Brief (Dec. 14, 2012), p. 3, **R-049**.

[277] E-Games Nullity Action Brief (Dec. 14, 2012), p. 16, **R-049** ("*Con el otorgamiento de la medida cautelar se pretende resguardar el derecho de mi representada de continuar prestando el servicio en la manera en que lo hace, es decir, que no se imponga el estado de clausura a las salas que opera con motivo de una supuesta falta de autorización ya que como lo he venido mencionando, mi representada únicamente tiene el deber de presentar un aviso, acorde a lo dispuesto en el oficio UG/211/145/2006 de fecha veintitrés de enero de dos mil seis, que constituye una modificación al permiso DGAJS/SCEVF/P-06/2005 de veinticinco de mayo de dos mil cinco, que mi representada tiene el derecho de explotar, acorde al contenido del* ***diverso permiso*** *DGAJS/SCEVF/P-06/2005-BIS*."). (Emphasis added).

[278] E-Games Brief (Feb. 18, 20130), p. 11, **R-050** *("[D]el análisis que se realice al contenido del permiso DGAJS/SCEVF/P-06/2005-BIS, se podrá constatar que mi representada goza de todos los derechos emanados* ***del diverso*** *DGAJS/SCEVF/P-06/2005*."). (Emphasis added).

[279] Counter-Memorial, ¶ 186.

[280] E-Games Nullity Action Brief (Dec. 14, 2012), **R-049**.

corroborates this point in his report.[281] He states unequivocally that E-Games' reference to E-Mex's permit in filings in administrative or judicial proceedings does not mean that the administrative act that gave rise to the independent permit was based on any of E-Games' prior legal statuses before SEGOB.[282]

I. The Tribunal Should Draw an Adverse Inference Based Upon Mexico's Failure to Produce Documents Related to the E-Games Independent Permit

106. In the document request phase of these proceedings, the Claimants requested various documents relating to (i) the August 15, 2012 Resolution; (ii) the November 16, 2012 Resolution; (iii) Mexico's decision to grant the November 16, 2012 Resolution; (iii) the duration of the E-Games' Independent Permit granted under the November 16, 2012 Resolution; and (iv) the renewal of SEGOB's gaming permits under Mexican law.[283] Specifically, Claimants requested that Mexico produce the following documents:

- **Request 9:** Any documents related to, prepared in connection with, or reflecting an analysis of the relationship between E-Mex and E-Games, including without limitation, copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (*oficios*), and other documents prepared by, without limitation, the Ministry of Economy, and/or SEGOB, between May 1, 2008 and January 31, 2015.[284]
- **Request 10:** Any documents related to, prepared in connection with, or reflecting an analysis of SEGOB Resolution DGJS/SCEV/0827/2012 (the "August 15, 2012 Resolution"), including without limitation, copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (oficios), and other documents prepared by, without limitation, the Ministry of Economy, and/or SEGOB, between January 1, 2011 and January 31, 2015.[285]

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[281] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 150-151.

[282] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 150-151.

[283] Procedural Order No. 10 (Mar. 26, 2021), Annex I.

[284] Procedural Order No. 10 (Mar. 26, 2021), Annex I.

[285] Procedural Order No. 10 (Mar. 26, 2021), Annex I.

- **Request 11:** Any documents related to, prepared in connection with, or reflecting an analysis of SEGOB Resolution DGJS/SCEV/1426/2012 (the "November 16, 2012 Resolution"), including without limitation, copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (*oficios*), and other documents prepared by, without limitation, the Ministry of Economy, and/or SEGOB, between January 1, 2011 and January 31, 2015.[286]
- **Request 12:** Any documents related to, prepared in connection with, or reflecting an analysis of the granting of DGAJS/SCEVF/P- 06/2005-BIS in favor of E-Games, including without limitation, copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (oficios), and other documents prepared by, without limitation, the Ministry of Economy, and/or SEGOB, between January 1, 2011 and January 31, 2015.[287]
- **Request 13:** Any documents related to, prepared in connection with, or reflecting an analysis of the duration of E-Games' permit, including without limitation, copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (oficios), and other documents prepared by, without limitation, the Ministry of Economy, and/or SEGOB, between January 1, 2011 and January 31, 2015."[288]
- **Request 14:** Any documents related to, prepared in connection with, or reflecting an analysis of possible 15 year renewals of gaming permits as provided in the 2004 Gaming Regulation, Article 33, as well as this Article's application to E-Games, including without limitation, copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (*oficios*), and other documents prepared by, without limitation, the Ministry of Economy, and/or SEGOB, between January 2011 and January 31, 2015.[289]

[286] Procedural Order No. 10 (Mar. 26, 2021), Annex 1.

[287] Procedural Order No. 10 (Mar. 26, 2021), Annex I.

[288] Procedural Order No. 10 (Mar. 26, 2021), Annex I.

[289] Procedural Order No. 10 (Mar. 26, 2021), Annex I.

107. Mexico's response to all of the above requests was the same: that it has not identified any documents that would be responsive to these requests.[290] As Claimants stated in their Redfern, Mexico's failure to identify any documents is simply unbelievable.[291]

1. Mexico Produced No Documents Related to the August 15, 2012 Resolution, the November 16, 2012 Resolution, or SEGOB's Decision to Grant the November 16, 2012 Resolution

108. In response to Claimants' contentions that there is no legal correlation between SEGOB's August 15, 2012 Resolution and SEGOB's November 16, 2012 Resolution, Mexico argues in its Counter-Memorial that (i) there is a "clear and direct link" between the August 15, 2012 Resolution and the November 16, 2012 Resolution, which makes it possible to conclude that the "latter is a consequence of the former;"[292] and (ii) "a comprehensive reading" of the November 16, 2012 Resolution makes it possible to observe the clear relationship with the August 15, 2012 Resolution "since the former intended to confirm the terms of the second."[293] Mexico produced no documents to support these contentions.

109. Mexico should at least have correspondence and/or analysis of the August 15, 2012 and the November 16, 2012 Resolutions discussing its understanding of their scope, application, etc. It is simply not credible that Mexico has no documents related to either Resolution and/or discussing the E-Games' Independent Permit. Mexico would have this Tribunal believe that it did not exchange even one email, letter, memorandum, or other document related to the granting of the E-Games Independent Permit. In addition to this, in its Counter-Memorial, Mexico's witness, Mr. Landgrave, specifically states that he recommended that the Games and Raffles Division

[290] Procedural Order No. 10 (Mar. 26, 2021), Annex I.

[291] Procedural Order No. 10 (Mar. 26, 2021), Annex I.

[292] Counter-Memorial, ¶¶ 178-181.

[293] Counter-Memorial, ¶¶ 178-181.

prepare for any possible consequences of the Sixteenth District Judge ordering that SEGOB rescind any Resolutions deriving from the May 27, 2009 Resolution.[294] In other words, Mr. Landgrave asked the Games and Raffles Division to analyze resolutions that were based on or derived from the May 2009 Resolution, granting E-Games the status of independent operator.[295] In performing this exercise, Mexico certainly would have generated correspondence, including emails, memoranda, or other documents reflecting an analysis of the various SEGOB resolutions granted in favor of E-Games, including the November 16, 2012 Resolution granting the E-Games Independent Permit and explaining how, in its review, these subsequent resolutions were purportedly derived from the May 27, 2009 Resolution. Here, once again, Mexico produced nothing. This lack of documents suggests that SEGOB conducted no analysis of the Resolutions issued in favor of E-Games before deciding to hastily revoke the E-Games Independent Permit, which cannot be true. The other conclusion is that Mexico is purposefully hiding the relevant documents because they contradict the arguments they are making in this case and support Claimants' arguments.

110. Given that Mexico has not produced any documents to support its contention that there was "a clear and direct link between the August 15, 2012 Resolution and the November 16, 2012 Resolution," or its argument that the E-Games Independent Permit was merely a continuation of the E-Mex permit, Claimants respectfully request that the Tribunal draw an adverse inference and infer that any further responsive documents would corroborate Claimants' contentions and the documentary evidence submitted in this case that there is no legal correlation between SEGOB's August 15, 2012 Resolution and SEGOB's November 16, 2012 Resolution and that the November

[294] Witness Statement of Mr. José Raúl Landgrave Fuentes ("Fuentes Statement"), **RWS-2**, ¶¶ 12, 14-16.

[295] Fuentes Statement, **RWS-2**, ¶¶ 12, 14-16; Counter-Memorial, ¶ 285.

16, 2012 Resolution granted E-Games an independent permit in its own right that was not dependent upon E-Mex's permit.

2. Mexico Produced No Documents Related to the Duration of the E-Games Independent Permit or the 15-year Renewals of SEGOB's Gaming Permits

111. In response to Claimants' argument that the November 16, 2012 Resolution granted E-Games an independent permit for a period of at least 25 years and the permit would have been valid until at least 2037 with the possibility of indefinite 15-years renewals,[296] Mexico asserts only that E-Games' permit was set to expire on May 24, 2030 because E-Games' permit was a mere continuation or transfer of E-Mex's permit.[297]

112. As described *supra*, this argument by Mexico is contradicted by some of the documents generated by Mexico that Claimants—not Mexico—have produced as evidence in this case.[298] Claimants requested Mexico to produce documents related to the duration of E-Games' permit as well as the 15-year renewals of gaming permits as provided in the Gaming Regulation, Article 33, as well as this article's application to E-Games.[299] Once again, Mexico's response that it had not identified any responsive documents, other than the select self-serving exhibits that it has submitted with its Counter-Memorial and some of which were indeed created by SEGOB following the initiation of this arbitration, is simply disingenuous.[300]

113. Mexico has produced no documents that credibly support its argument that the duration of E-Games' new permit would be any less than 25 years and would not have at least one 15-year renewal. Claimants have provided the testimony of their expert, Mr. González, as well as various

[296] Memorial, ¶¶ 153-155.

[297] Counter-Memorial, ¶¶ 169-172.

[298] *See e.g.*, Salas Statement, **RWS-1**, Annex 1, "*Diagnóstico General de los Casinos*."

[299] Procedural Order No. 10 (Mar. 26, 2021), Annex I.

[300] Procedural Order No. 10 (Mar. 26, 2021), Annex I.

documents issued by SEGOB (including one submitted with Mexico's Counter-Memorial) to reaffirm their contention that the E-Games Independent Permit would have been valid for 25 years, or until at least 2037 and have at least one 15-year renewal.[301] It is simply not credible that Mexico would not have generated correspondence, internal analyses, or other documents that reflected SEGOB's views related to the duration of the E-Games Independent Permit or the 15-year renewals under Mexican law. Based on the foregoing, Claimants respectfully request that the Tribunal infer that any further responsive documents would corroborate Claimants' contentions that the E-Games Independent Permit was valid until at least 2037 with the potential for successive 15-year renewals, pursuant to Article 33 of the Gaming Regulation.[302]

J. Mexico Disclaims Any Political Motive To Harm the Claimants, But the Evidence Shows That E-Games' Permit Was Revoked for Political Reasons and to Benefit Powerful Local Interests

1. Ms. Salas Does Not Offer an Explanation for Her Comments That E-Games' Permit Was "Illegal"

114. In her witness statement, Ms. Salas denies without more that there was any political motivation with respect to the government's treatment of E-Games. This statement is provably false. Just days after assuming her role as the Director of SEGOB's Games and Raffles Division, Ms. Salas referred to E-Games' permit as "illegal" in the press without any basis or justification.[303] It is telling that Ms. Salas devotes only one sentence of her witness statement to this hostile message given just days after she occupied her position, at a time when there is absolutely no way she could have done sufficient due diligence to make such a statement.[304] Her dismissive

[301] Second Ezequiel González Matus Report, **CER-6**, ¶ 133; Salas Statement, **RWS-1**, Annex 1, "*Diagnóstico General de los Casinos*," p. 15; Information on Duration of Exciting Games, SEGOB Website (Dec. 3, 2012), **C-391**.

[302] Memorial, ¶¶ 153-155.

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

[304] Witness Statement of Mrs. Marcela Gonzalez Salas ("Salas Statement"), **RWS-1**, ¶ 9.

explanation for the statement is that it concerned the permit's "irregularity, since the actions taken for granting it were questionable, since they transformed two operators into two permit holders."[305] This does nothing to explain her toxic message that the permit was "illegal."[306] And neither she nor Mexico have produced one single piece of paper that she reviewed that would have allowed her to reach this flawed opinion. Are we to believe that she came up with this on her own just days after joining the gaming agency to which he had zero affiliation? Or doesn't this prove that this statement was one she was instructed to give, which was politically motivated? Nor does Ms. Salas explain why it was important to deliver this message publicly to the media, just days after assuming office. The only logical explanation was that she was trying to smear and tarnish E-Games' reputation for political and other improper gain.

115. Importantly, people in the gaming industry paid attention to this public message. Mr. Burr explains that this message was like a "black eye" for E-Games and caused potential partners to express hesitance about working with E-Games.[307] People in the industry did not want to work with a partner whose permit was in jeopardy in the eyes of the government.[308] Moreover, contemporaneous documents affirm Mr. Burr's concerns. Internal emails following a January 30, 2013 meeting between Mr. Gutiérrez and Mr. Vejar reflect that the Claimants sought to understand why Ms. Salas was referring to E-Games' permit as "illegal," as well as why representatives of the

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[305] Salas Statement, **RWS-1**, ¶ 9 ("*En relación con la entrevista del 27 de enero de 20 13 al periódico La Jornada. 3 referida en el párrafo 201 de la Demanda, recuerdo la entrevista. y recuerdo que mi comentario se refería a irregularidad, pues las acciones tomadas para su otorgamiento, resultaban cuestionables, ya que transformaron a dos operadoras en dos permisionarias.*").

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

[307] Fourth Gordon Burr Statement, **CWS-59**, ¶ 55.

[308] Fourth Gordon Burr Statement, **CWS-59**, ¶ 55.

Mexican government would not meet with them to discuss these matters. Specifically, Respondent's own notes from the meeting state:

> Recently, the statements of the General Director of Games and Raffles of SEGOB, Ms. Marcela González Salas, regarding the fact that at the end of the last administration, permits were granted to some companies "without an alleged legal basis for the construction and operation of casinos" have been aired in the media. Exciting Games is among the companies mentioned.
>
> Given these statements and the fear that the permit granted to Exciting Games will be revoked, the legal representatives of the company approached this General Directorate to inform us that the permit granted in favor of Exciting Games was legally issued. And, that in the event that the permit were to be arbitrarily revoked, without due justification and reasoning, and without adhering to the legal framework, they would seriously evaluate the possibility of initiating an investor-State arbitration under Chapter XI of the NAFTA. They also told us that they have sought to meet with the heads of the General Directorate of Games and Raffles; the Government Unit and the Undersecretary of Government of SEGOB but, as of today, have not been received by them." (English translation of Spanish original).[309]

116. Respondent's internal correspondence is consistent with the Claimants' narrative in this case. As the Claimants have previously explained, they sought to understand why Ms. Salas and the new Peña Nieto government took such an adversarial position against them.[310] Their requests to meet with the Mexican government, both before and after they were closed, were either

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[309] Draft email from G. Hernández Salvador to C. Vejar transmitting draft email re: meeting with representatives of E-Games (Feb. 6, 2013), **C-393**.

> ("*Recientemente, se han ventilado en los medios de comunicación las declaraciones de la Directora General de Juegos y Sorteos de la SEGOB, la Mtra. Marcela González Salas, respecto a que al final de la administración pasada fueron otorgados permisos a algunas empresas "sin una supuesta base legal para la construcción y operación de casinos". Entre las empresas que se mencionan se encuentra Exciting Games.*
>
> *Ante dichas declaraciones y el temor a que sea revocado el permiso otorgado a Exciting Games, los representantes legales de la empresa se acercaron a esta Dirección General para hacer de nuestro conocimiento que el permiso otorgado a favor de Exciting Games fue emitido legalmente. Y, que en caso de que el permiso fuera revocado arbitrariamente, sin la debida fundamentación y motivación, y sin apegarse al marco de legalidad, evaluarían seriamente la posibilidad de iniciar un arbitraje inversionista-Estado al amparo del Capitulo XI del TLCAN. Asimismo, nos comentaron que han buscado reunirse con los titulares de la Dirección General de Juegos y Sorteos; la Unidad de Gobierno y de la Subsecretaria de Gobierno de la SEGOB sin que al día de hoy los hayan recibido*.").

[310] First Gordon Burr Statement, **CWS-1**, ¶¶ 33-34; First Julio Gutiérrez Statement, **CWS-3**, ¶¶ 10-11.

perfunctory, or fell on deaf ears.[311] This January 30, 2013 meeting did not provide Claimants with any further understanding as to why the government was taking this aggressive posture against their permit, as the officials in attending merely repeated that the permit was illegal without giving any explanation as to why.[312]

117. In another contemporaneous email following a February 28, 2013 meeting between Messrs. Burr, Gutiérrez, Vejar, and Vera, dated March 15, 2013, Carlos Vejar wrote to Ms. Salas to summarize the meeting.[313] Ms. Salas did not attend the meeting. Concerning the meeting, Mr. Vejar states that the representatives of Exciting Games presented concerns regarding the possible revocation of their permit and that the situation regarding the uncertainty of their permit was damaging their business and discouraging them from continuing to invest in Mexico.[314] Moreover, among other important requests in this meeting, Mr. Burr expressly requested that no more statements be made in the media about the possible suspension of the permit, because such statements damage the image of the business.[315] Notably, Respondent's contemporaneous notes do not reflect any statement from Mr. Vejar or others who attended the meeting responding to the concerns regarding the potential revocation of E-Games' permit, nor do they reflect any response to Mr. Burr's request that the government avoid making any further damaging statements in the

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311 First Gordon Burr Statement, **CWS-1**, ¶¶ 35-38; First Julio Gutiérrez Statement, **CWS-3**, ¶¶ 8, 11-17.

312 Fourth Gordon Burr Statement, **CWS-59**, ¶ 57.

313 Email from C. Vejar to M. Salas re: meeting with representatives of E-Games (Mar. 15, 2013), **C-394**.

314 Email from C. Vejar to M. Salas re: meeting with representatives of E-Games (Mar. 15, 2013), **C-394** ("*Le escribo en seguimiento a la reunión que sostuvimos hace un par de semanas con los dueños y representantes legales de Exciting Games, ya la que nos acompañó el Lic. Hugo Vera, quienes nos expusieron sus preocupaciones respecto a la posible revocación del permiso que se les otorgó en agosto de 2012 y nos manifestaron que esta situación está dañando sus negocios y desincentiva su interés para continuar invirtiendo en México*.").

315 Email from C. Vejar to M. Salas re: meeting with representatives of E-Games (Mar. 15, 2013), **C-394** ("*Solicitan que no se hagan más declaraciones en los medios de comunicación sobre la posible suspensión del permiso, ya que dichas declaraciones dañan la imagen de la empresa*.")

media. The Mexican government's lack of meaningful engagement with the Claimants' concerns at the time is consistent with Claimants' narrative throughout this entire case.

118. Moreover, Ms. Salas' witness testimony that E-Games' permit was "irregular" only further reinforces Claimants' narrative that the statements were nothing more than politically motivated attacks, and that there was a complete lack of transparency and arbitrariness in how SEGOB was dealing with the Claimants and their permit.[316] Ms. Salas' purported explanation for her damaging statement to the media uses exactly the same terminology as the internal memorandum from the Ministry of Economy ("**Economía**") from a few months later.[317] Both Ms. Salas' declaration as well as the Economía memorandum state that E-Games' permit was "irregular," without any further explanation.[318]

119. Mexico's only other explanation for Ms. Salas' antagonistic statement to the press in January 2013 is that she undertook a general review of the gaming industry in Mexico and that she "took special care with the authorizations given to the Rojas Cardona family, due to the particular media attention that was focused on the permit holder E-Mex and public claims on corruption and fraud."[319] This argument not only does not make sense, but it is also contrary to Mexico's own documents submitted in this case. First, as explained, E-Games' permit was independent and autonomous.[320] SEGOB has concluded this just months before Ms. Salas made her damaging

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316 Salas Statement, **RWS-1**, ¶ 5.

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

318 Salas Statement, **RWS-1**, ¶ 5; Memo E-Games, **C-261** ("*La DGJS nos comunicó que el Permiso Bis fue cancelado debido a que el mismo era un permiso que había sido otorgado al final de la administración anterior de manera irregular*.").

319 Salas Statement, **RWS-1**, ¶ 5 ("*…tuvimos especial cuidado con las autorizaciones dadas a l familia Rojas Cardona, por la particular atención mediática hacia la permisionaria E-Mex y los señalamientos públicos sobre corrupción y fraude*.").

320 Memorial, Section IV.O; Second Ezequiel Gonzalez Matus Report, **CER-6**, ¶¶ 84-96.

statement to the media.[321] As such, any "special care" required for the permits granted to the Rojas Cardona family should not have impacted E-Games or its permit, or Ms. Salas' consideration of it.[322]

120. The single document Ms. Salas relies upon as support for her statements that she undertook a review of the games and raffles sector in Mexico further proves Claimants' argument that Ms. Salas was under political pressure to cancel permits that had been granted under the prior administration. In her witness statement, Ms. Salas cites to a document entitled "General Diagnosis of Casinos."[323] The first important thing to point out is that the document is dated May 2013, and it therefore could not have served as the basis for her statements to the media in January of 2013 that the permit held by E-Games was illegal.

121. This May 2013 document discusses the legal framework for gaming in Mexico as well as the "disorderly growth" of the industry in the period of 2005-2012, the period of the prior PAN presidency of Calderón.[324] The document attributes a lot of the growth in casinos between 2005 and 2012 to municipalities governed by the PAN.[325] This further reinforces the political animosity between the political parties in Mexico, and the PRI's desire to undo what had been done under the prior PAN affiliated administration.[326]

122. Then, the document reviews the current status of all permit holders and reveals further contradictions with Mexico's arguments in this case. Notably, as seen below in Figure 5, the

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[321] Memorial, Section IV.O; Second Ezequiel Gonzalez Matus Report, **CER-6**, ¶ 134.

[322] Moreover, and as explained *infra*, Mexico provided no documents or additional explanation regarding the "special care" that it was giving to E-Mex's permit, what "special care" meant in this context, and/or how that would have impacted the E-Games Independent Permit.

[323] Salas Statement, **RWS-1**, Annex 1, "*Diagnóstico General de los Casinos*."

[324] Salas Statement, **RWS-1**, Annex 1, "*Diagnóstico General de los Casinos*," pp. 1-7.

[325] Salas Statement, **RWS-1**, Annex 1, "*Diagnóstico General de los Casinos*," p. 9.

[326] Salas Statement, **RWS-1**, Annex 1, "*Diagnóstico General de los Casinos*," pp. 1-7.

document confirms that Exciting Games' permit was granted by administrative resolution on November 16, 2012, and that E-Games has the right to operate 7 dual function facilities under its permit.[327] With respect to the duration of the permit, it also confirms that the permit was granted in 2012 and that its validity extends until 2037.[328] The document also confirms that Producciones Móviles' permit was granted by administrative resolution in November 2012 and that its permit is also valid from 2012 until 2037.[329]

ANEXO 2 (página 1 / 2)

SITUACIÓN ACTUAL DE LOS PERMISIONARIOS

	PERMISIONARIO	INICIO VIGENCIA	TERMINO VIGENCIA	ESTABLECIMIENTOS AUTORIZADOS 1953 - 2000	ESTABLECIMIENTOS AUTORIZADOS 2001 - 2012	TOTAL AUTORIZADOS	OPERANDO	POR OPERAR
1	Administradora Mexicana de Hipódromo, S.A. de C.V. (14- Mayo, 2007) (a)	1997	2022	45	20	65	53	12
2	Apuestas Internacionales, S.A. de C.V. (25-Mayo-2005) (b)	2005	2030		55	55	22	33
3	Atracciones y Emociones Vallarta, S.A. de C.V. (Acuerdo del 10-06-2009, derivado del Juicio de Amparo 99/2008) (c)	1992	2017	4	46	50	40	10
4	Cesta-Punta Deportes, S.A. de C.V. (d)	1990 1992 1992	2021 2022 2022	9	0	9	0	9
5	Cía. Operadora Megasport, S.A. de C.V. Permiso inicial de fecha 19 de Dic., de 1997 y modificaciones del 23 de Dic., de 1997. (e)	2004 2012	2029 2042	32	64	96	36	60
6	Comercial de Juegos de la Frontera, S.A. de C.V. (Permiso DGG/723/97) (f)	1997	ILIMITADO	18	0	18	18	0
7	Comercializadora de Entretenimiento de Chihuahua, S.A. de C.V. (Sentencia del 9-08-2012, derivada del Juicio de Amparo 1795/2011) (g)	2005	2030		60	60	22	38
8	Divertimex, S.A. de C.V. (Sentencia de 3-Enero-2013 derivada de juicio de garantías 1524/2011) (h)	1991 2006	2016 2031	7	15	22	7	15
9	El Palacio de los Números, S.A. de C.V. (15-Enero, 2006 y 3-Septiembre, 2012) (i)	2006	2031		36	36	23	13
10	Entretenimiento de México, S.A. de C.V. (25-Mayo, 2005 y 1-Febrero, 2006) (j)	2005	2030		50	50	26	24
11	Espectáculos Deportivos de Cancún, S.A. de C.V.	1992	2017	4	0	4	1	3
12	Espectáculos Deportivos de Occidente, S.A. de C.V.	1994	2019	4	0	4	1	3
13	Espectáculos Deportivos Frontón México, S.A. de C.V.	1955	ILIMITADO	1	0	1	0	1
14	Espectáculos Latinoamericanos Deportivos, S.A. de C.V.	1993	2018	5	0	5	2	3
15	Eventos Festivos de México, S.A. de C.V. (06-Mayo, 2005) (K)	2005	2030		20	20	4	16
16	Exciting Games S. de R.L. de C.V. (Por Resolución Administrativa de fecha 16-11-2012) (l)	2012	2037		7	7	6	1

Figure 5. General Diagnosis of Casinos – Current Situation of Permitholders (May 2013).

[327] Salas Statement, **RWS-1**, Annex 1, "*Diagnóstico General de los Casinos*," p. 15.

[328] Salas Statement, **RWS-1**, Annex 1, "*Diagnóstico General de los Casinos*," p. 15; *see also* Information on Duration of Exciting Games, SEGOB Website (Dec. 3, 2012), **C-391**. This document also reflects that the term of the E-Games permit was 25 years and that the permit's duration extended until 2037.

[329] Salas Statement, **RWS-1**, Annex 1, "*Diagnóstico General de los Casinos*," p. 15.

123. Notably, nowhere in this document does it link E-Games' permit with E-Mex. As shown in Figure 6, the document then goes on to list what it refers to as "Independent Permit Holders" and E-Games is also featured in the list.

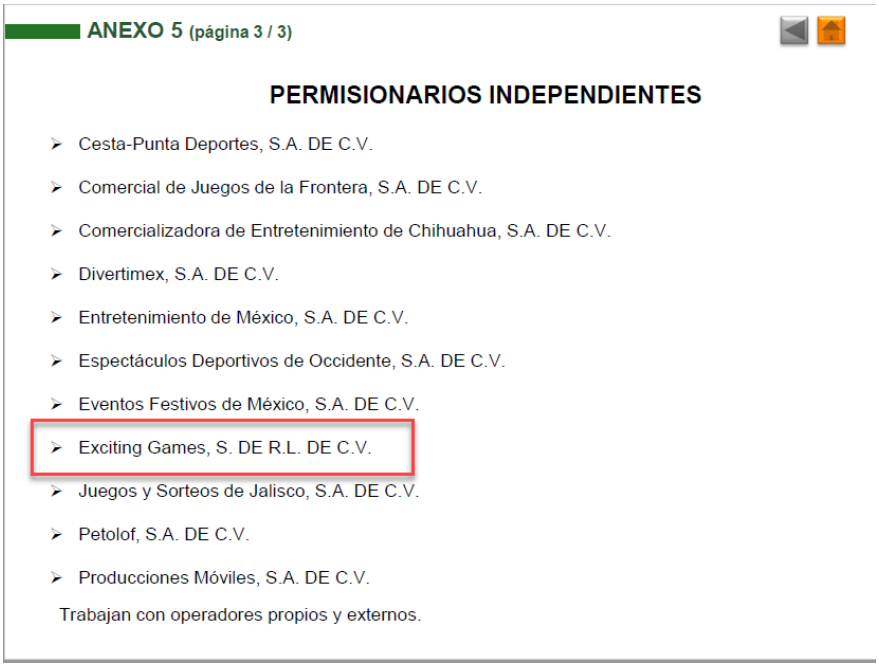

Figure 6. General Diagnosis of Casinos – Independent Permitholders (May 2013).

124. This evidence produced by Mexico reinforces the political motivations that ran through SEGOB once the PRI took over for the PAN and confirm that the government recognized that E-Games had an independent permit and the treatment that the Claimants' received was politically motivated. Moreover, these documents also reaffirm the duration, independence, and autonomous nature of the E-Games Independent Permit, undermining Mexico's arguments.

2. Mr. Burr Reported Mr. Rojas Cardona' Illegalities to the Mexican Government on Various Occasions and Was Rebuffed

125. Mexico argues that Claimants knew that Mr. Rojas Cardona had engaged in criminal activity but that they never took action with law enforcement to try to stop Mr. Rojas Cardona's unlawful activities. This is untrue. First, Mr. Rojas Cardona is now known in Mexico for his

involvement in unlawful activities.[330] It was the Claimants, who, as foreigners investing for the first time in Mexico in the 2005-2008 timeframe, were initially and understandably unaware of Mr. Rojas Cardona's reputation. As explained, the Claimants sought the assistance of private investigators who looked into Mr. Rojas Cardona's background. It was this initial report from Prescience mentioned above that provided the Claimants with a basic understanding of Mr. Rojas Cardona's background. Mr. Burr made the U.S. authorities aware of the relationship with Mr. Rojas Cardona, including the settlement that Claimants entered into with him so that there could be no implication that they were involved in attempting to exert improper influence over the *Amparo* judge.[331] Mr. Burr reported Mr. Rojas Cardona's bad conduct to the Mexican government,[332] and it is Mexico that failed to act to stop Mr. Rojas Cardona.

126. In the aforementioned meeting with Mr. Vejar and Mr. Vera on February 28, 2013, Mr. Burr told Mr. Vejar and Mr. Vera that E-Games had no association with E-Mex and that the government should clean up the gaming industry in Mexico by working to get rid of E-Mex and actors like Mr. Rojas Cardona.[333] Mr. Burr told them that Mr. Rojas Cardona was a dangerous person and that getting rid of him would only improve the industry.[334] Once again, Respondent's own contemporaneous notes reflect that Mr. Burr told SEGOB to act against E-Mex and Mr. Rojas Cardona. In Mr. Vejar's notes from the meeting which he sent to 'mmgonzalez@segob.gob.mx' (which Claimants presume is Ms. Salas), Mr. Vejar states that the Claimants requested "[t]hat

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330 *Quien es Rojas Cardona*, El Norte, http://www.elnorte.com/local/articulo/400/798505 (Nov. 9, 2007), **C-395**.

331 Third Gordon Burr Statement, **CWS-50**, ¶ 120.

332 Fourth Gordon Burr Statement, **CWS-59**, ¶ 57.

333 Fourth Gordon Burr Statement, **CWS-59**, ¶ 57.

334 Fourth Gordon Burr Statement, **CWS-59**, ¶ 57.

SEGOB carry out the steps at its disposal to extinguish or revoke E-Mex's permit."[335] The notes also reflect E-Games' request that SEGOB "disassociate them from any kind of commercial, political or contractual relationship with E-Mex or Producciones Móviles."[336] In light of these contemporaneous records of what Claimants were saying to Mexico about E-Mex in early 2013, it is frankly surprising that Mexico argues in this case that Claimants and their permit were linked to Mr. Rojas Cardona and E-Mex. At that time in 2013, Mexico permitted Mr. Rojas Cardona's activities to continue unfettered. Claimants, on the other hand, had to hire extra security and had to involve the Federal Bureau of Investigation (FBI) and U.S. authorities to protect themselves from Mr. Rojas Cardona.[337]

3. Mexico Notably Does Not Address Claimants' Discussion of the Historical Link Between Politics and Gaming in Mexico

127. Claimants devote an entire section of their Memorial to the known historical links between politics and gaming in Mexico and the systemic involvement and environment of corruption between the two. This information reveals how since the advent of the gaming industry in Mexico, politically connected individuals have led many of the major gaming companies, surely with corruption paving the way.[338] These powerful individuals leverage their political contacts and grease palms to make allies within the Mexican government and to ensure smooth sailing for their permits and their Casinos, free from important foreign competition. One such example is the Hank family (owners of the casino conglomerate in Mexico Grupo Caliente) who have known links to

[335] Email from C. Vejar to M. Salas re: meeting with representatives of E-Games (Mar. 15, 2013), **C-394** ("*Que la SEGOB realice las gestiones a su alcance para extinguir o revocar el permiso de Entretenimientos de México*.").

[336] Email from C. Vejar to M. Salas re: meeting with representatives of E-Games (Mar. 15, 2013), **C-394** ("*Solicitan que se les desvincule de toda clase de relación comercial, política o contractual con Entretenimientos de México y con Producciones Móviles*.").

[337] Fourth Gordon Burr Statement, **CWS-59**, ¶ 86.

[338] Memorial, ¶¶ 244-248.

powerful politicians in Mexico, and as a result, are able to receive preferential treatment from the Mexican government.[339] The Hank family, who have been referred to as Mexico's Rockefellers, have long been known as allies of the PRI party.[340] Carlos Hank González, the patriarch of the Hank family, was mayor of Mexico City, and held two cabinet positions in the government of former president Carlos Salinas de Gortari.[341] Known as a "political businessman," he sought the presidency but was prohibited from doing so under the Mexican Constitution at the time because both of his parents were not Mexican by birth.[342] As one political analyst commented about Mr. Hank González, "He was the most powerful fixture in Mexican politics for 30 years because his influence extended beyond the length of any one presidential term."[343] Another commentator stated that his critics would say he "represented the traditional, old style Mexican politics of corruption in business and government and the stealing of elections and the buying of votes."[344]

128. His son, Jorge Hank Rhon, former mayor of Tijuana, now leads Grupo Caliente, long-time major player in Mexico's casino industry.[345] Along with allegations of criminality and strange extravagances, Jorge Hank Rhon has converted Tijuana into the city with the second largest

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[339] Memorial, ¶ 246.

[340] Mario Maldonado, *Los Casinos de Hank Rhon Que Autorizo la 4T* (Jan. 24, 2020). Retrieved from https://www.eluniversal.com.mx/opinion/mario-maldonado/los-casinos-de-hank-rhon-que-autorizo-la-4t, **C-265**; Douglas Farah, *Prominent Mexican Family Viewed As Threat to the US*, The Washington Post, https://www.washingtonpost.com/wp-srv/inatl/longterm/mexico/stories/hank060299.htm (June 2, 1999), **C-396**.

[341] Douglas Farah, *Prominent Mexican Family Viewed As Threat to the US*, The Washington Post, https://www.washingtonpost.com/wp-srv/inatl/longterm/mexico/stories/hank060299.htm (June 2, 1999), **C-396**.

[342] *Carlos Hank González, 73, Veteran Mexican Politician*, The Washington Post, https://www.nytimes.com/2001/08/13/world/carlos-hank-gonzalez-73-veteran-mexican-politician.html (Aug. 1, 2013), **C-397**.

[343] *Carlos Hank González, 73, Veteran Mexican Politician*, The Washington Post, https://www.nytimes.com/2001/08/13/world/carlos-hank-gonzalez-73-veteran-mexican-politician.html (Aug. 1, 2013), **C-397**.

[344] *The Hank Family of Mexico*, PBS, https://www.pbs.org/wgbh/pages/frontline/shows/mexico/family/bergman.html (Nov. 9, 2007), **C-398**.

[345] Mario Maldonado, *Los Casinos de Hank Rhon Que Autorizo la 4T* (Jan. 24, 2020). Retrieved from https://www.eluniversal.com.mx/opinion/mario-maldonado/los-casinos-de-hank-rhon-que-autorizo-la-4t, **C-265**.

number of casinos in Mexico.[346] Through connections, political donations, and otherwise, he has been able to ensure that the Grupo Caliente "casinos can continue with smooth sailing."[347] Against this backdrop, it is unsurprising that Ms. Salas sought to put Claimants out of business to benefit Grupo Caliente and the Hank family, a longtime close ally of the PRI Party and a known and strong supporter of former President Peña Nieto.[348]

129. Although current Mexican President Andrés Manuel López Obrador made assurances that he would not grant new gaming permits, on March 15, 2019, SEGOB modified three of Grupo Caliente's permits, granting them indefinite validity.[349] Televisa and CIE are also similarly situated to Caliente, positioning themselves close to key government decision makers to ensure that they have political access and influence. Televisa's Emilio Azcarraga Milmo has referred to himself as a "soldado del PRI," and the company's close ties to the PRI were even depicted in a movie.[350] These gaming companies are able to ensure that that their casinos can operate with smooth sailing through key contacts and by greasing the appropriate palms. Mexico does not even attempt to respond to these arguments, which in part and as proven by Claimants explain the discriminatory and arbitrary cancellation of Claimants' gaming permit an the highly illegal and irregular closing of their Casinos.

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[346] Mario Maldonado, *Los Casinos de Hank Rhon Que Autorizo la 4T* (Jan. 24, 2020). Retrieved from https://www.eluniversal.com.mx/opinion/mario-maldonado/los-casinos-de-hank-rhon-que-autorizo-la-4t, **C-265**.

[347] Mario Maldonado, *Los Casinos de Hank Rhon Que Autorizo la 4T* (Jan. 24, 2020). Retrieved from https://www.eluniversal.com.mx/opinion/mario-maldonado/los-casinos-de-hank-rhon-que-autorizo-la-4t, **C-265** ("*Por lo demás, Jorge Hank Rhon ha sido un hombre que siempre ha sabido estar del lado de la Secretaría de Gobernación para que sus casinos sigan más que viento en popa*.").

[348] First Black Cube Statement, **CWS-57**, ¶ 46; Black Cube Recordings, **C-399**; Black Cube Recordings Transcripts, **Appendix B**.

[349] Mario Maldonado, *Los Casinos de Hank Rhon Que Autorizo la 4T* (Jan. 24, 2020). Retrieved from https://www.eluniversal.com.mx/opinion/mario-maldonado/los-casinos-de-hank-rhon-que-autorizo-la-4t, **C-265**.

[350] Jenaro Villamil, *Televisión para Jodidos* (Mar. 19, 2013). Retrieved from https://www.proceso.com.mx/336733/television-para-jodidos, **C-267**.

4. Mexico's Internal Memorandum

(a) Mexico Provides No Explanation for its Internal Memorandum That States the Claimants' Permit was Granted in an Irregular Manner

130. Very importantly, with respect to the internal memorandum (the "**Internal Memorandum**") that reflects that Mexico canceled the Claimants' permit because it had been "irregularly granted at the end of the previous administration", Mexico has no answer and tries to disclaim that the Internal Memorandum means what it says.[351] To be clear, the text of the Internal Memorandum, which is on letterhead from the Secretary of Economy, states: "The DGJS [Dirección General de Juegos y Sorteos, or the Games and Raffles Division] informed us that the Bis Permit [Claimants' independent permit] was canceled because it was a permit that had been irregularly granted at the end of the previous administration."[352] The document is not dated and its author is unknown. What is known is that it attributes the cancelation of the E-Games Independent Permit to unspecified "irregular granting" of gaming permits by the PAN Administration.

131. When Claimants asked Mexico for the source of the document and its state, Mexico responded vaguely that it "assumes" that the Internal Memorandum was prepared in 2014 after the filing of the Claimants' Notice of Intent, and that the statement that E-Games' permit had been issued "irregularly" could have been simply a reference to the nexus between the E-Games permit and the May 27, 2009 Resolution.[353]

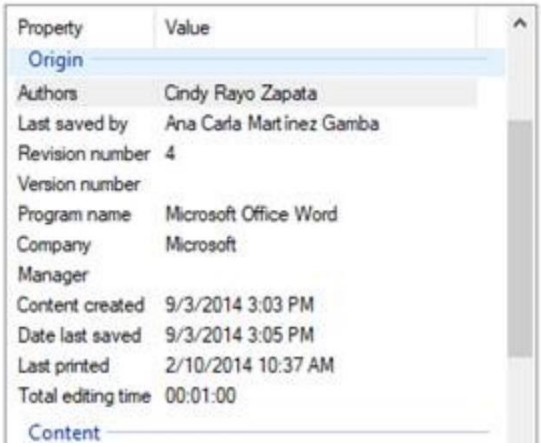
132. These explanations make no sense and reflect nothing more than a convenient, post-hoc justification. Claimants know, however, that Mexico's own lawyers and witnesses in this case

[351] Memorial, ¶ 211.

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

[353] Counter-Memorial, ¶ 209.

prepared and disseminated the Internal Memorandum. The metadata of this memorandum and Respondent's own admission reveal that the Internal Memorandum was created by Cindy Rayo Zapata ("**Ms. Rayo**") counsel for Mexico in this case (although Mexico claims that she does not remember creating the document).[354] As the Tribunal may recall, Claimants' requested that Respondent provide additional detail regarding the Internal Memorandum, but Respondent has been unable to confirm the date that the document was created. The document's metadata reveals that Ms. Rayo authored the document on September 3, 2014, and that the document was last saved by Ms. Ana Carla Martínez Gamba ("**Ms. Martínez Gamba**") on the same date. The Tribunal will surely recall that Ms. Martínez Gamba was a witness for Mexico in the jurisdictional phase of these proceedings.



Property	Value
Origin	
Authors	Cindy Rayo Zapata
Last saved by	Ana Carla Martinez Gamba
Revision number	4
Version number	
Program name	Microsoft Office Word
Company	Microsoft
Manager	
Content created	9/3/2014 3:03 PM
Date last saved	9/3/2014 3:05 PM
Last printed	2/10/2014 10:37 AM
Total editing time	00:01:00
Content	

Figure 7. Metadata of Internal Memorandum

133. Notably, Ms. Martínez Gamba shared the Internal Memorandum by email with Francisco Leopoldo de Rosenzweig Mendialdua ("**Mr. Rosenzweig**") and Mr. Vejar on September 3, 2014.[355] Mr. Rosenzweig was, at the time, the Deputy Minister of Foreign Trade at the Ministry

[354] *See* Memorial, footnote 509 for Respondent's explanation of the history of the memorandum.

[355] Email from A. C. Martínez Gamba to F. L. Rosenzweig Mendialdua and C. Vejar transmitting the Internal Memorandum re: E-Games (Sept. 3, 2014), **C-400**.

of the Economy. In transmitting the Internal Memorandum, Ms. Martínez Gamba notes that the memorandum contains the "most important things about Exciting Games."[356] Mexico claims to know nothing about the Internal Memorandum and its contents, but its own documents show not only that Mexico's counsel prepared the memorandum, but that its only witness in the jurisdictional phase of the proceedings transmitted the Internal Memorandum to the Deputy Minister of Foreign Trade.[357] Mexico feigns a lack of knowledge about the Internal Memorandum, its contents, and who created it, because it seeks to distance itself from the memorandum's key conclusion: E-Games' permit was cancelled because it had supposedly been irregularly granted at the end of the last administration.[358]

134. This document is damning evidence against Mexico. It proves that the cancellation of the E-Games Independent Permit was motivated by political reasons, not by an order from court in the *Amparo* 1668/2011. It further proves that Mexico canceled the E-Games Independent Permit for unspecified "irregularities" that were never the subject of any administrative proceedings, and that Claimants were never told what the so-called "irregularities" were, nor were they given any opportunity to defend against them. To this day, Claimants have no idea what the supposed "irregularities" associated with the E-Games Independent Permit are, as Mexico still will not reveal them, and they nonetheless are the reason, at least in part, that the Claimants had their investments expropriated by Mexico and their Casino operations shut down.

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[356] Email from A. C. Martínez Gamba to F. L. Rosenzweig Mendialdua and C. Vejar transmitting the Internal Memorandum re: E-Games (Sept. 3, 2014), **C-400** ("*te mando una nota con lo más importantes de Exciting Games*.").

[357] Email from A. C. Martínez Gamba to F. L. Rosenzweig Mendialdua and C. Vejar transmitting the Internal Memorandum re: E-Games (Sept. 3, 2014), **C-400** ("*te mando una nota con lo más importantes de Exciting Games*.").

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

5. Ms. Rayo's notes affirm the memorandum

135. Another contemporaneous document that Mexico produced in the document exchange phase of these proceedings also interestingly reflects the same language that E-Games' permit was granted in an "irregular" manner. Specifically, Mexico produced an email and corresponding attachment also from Ms. Rayo, who as explained above, is a member of Mexico's legal team in this arbitration.[359] The document appears to be notes that Ms. Rayo took during a meeting with Ms. Salas.[360] While the notes are not dated, the corresponding email reflects that Ms. Rayo sent the notes from her personal email address (hosoi28@hotmail.com) to her professional email address (cindy.rayo@economia.gob.mx) on February 22, 2013.[361] On May 8, 2017, Ms. Rayo then forwarded the same email and attachment to Mr. Geovanni Hernández Salvador, another member of Mexico's legal team in this case.[362] While the document metadata does not reveal when the document was created (and the Claimants' own investigation reveals that the metadata from the document may have even been affirmatively removed before the document was produced to the Claimants), given the context as well as the date of Ms. Rayo's email, Claimants assume that the document was created in or around February 22, 2013. While the document also does not indicate the meeting's attendees, Claimants can infer that at least Ms. Rayo and Ms. Salas attended the meeting.

[359] Email from C. Rayo Zapata re: Meeting and Notes with M. Salas re: E-Games (Feb. 22, 2013), **C-401**.

[360] Email from C. Rayo Zapata re: Meeting and Notes with M. Salas re: E-Games (Feb. 22, 2013), **C-401**.

[361] Email from C. Rayo Zapata re: Meeting and Notes with M. Salas re: E-Games (Feb. 22, 2013), **C-401**.

[362] Email from C. Rayo Zapata re: Meeting and Notes with M. Salas re: E-Games (Feb. 22, 2013), **C-401**.

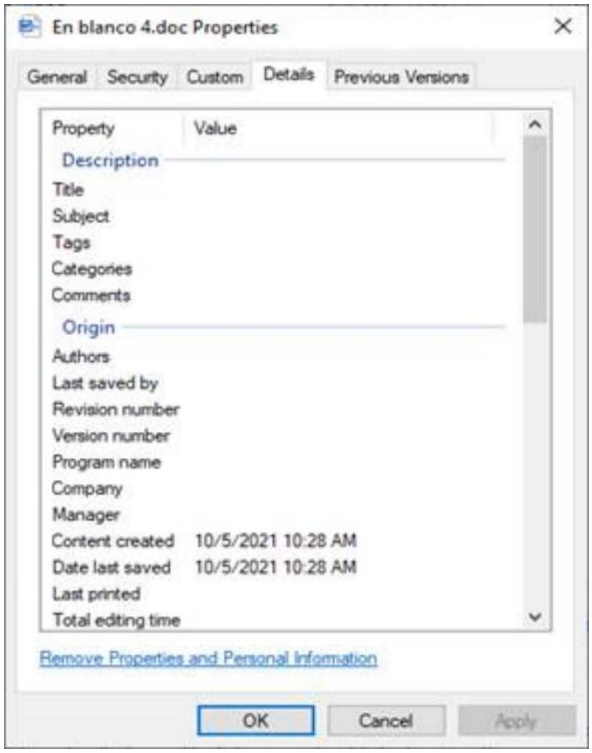

Figure 8. Metadata of Ms. Rayo's February 22, 2013 Notes

136. The notes describe the history of E-Mex's permit, as well as the granting of the E-Games Independent Permit. The notes state that "Exciting [E-Games] is in a proceeding before the court, if it declares that they were given irregularly, then they will be revoked."[363] This statement also reflects the same language that the permit was granted "irregularly" used in Ms. Salas' statements to the press as well as in SEGOB's internal memorandum.[364] The document states that if the courts declared that the E-Games Independent Permit was granted irregularly, then the permit will be revoked.[365] At the time, in February 2013, the E-Games Independent Permit was not the subject of any proceedings before the court. The document also shows that Ms. Salas, and therefore,

[363] Email from C. Rayo Zapata re: Meeting and Notes with M. Salas re: E-Games (Feb. 22, 2013), **C-401** ("*Exciting* [E-Games] *Están en proceso ante juzgado, si declara que fueron dados de manera irregular van a ser revocados*.").

[364] Memo E-Games, **C-261**; *Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón* (Jan. 27, 2013). Retrieved from http://www.jornada.unam.mx/2013/01/27/politica/013n1pol, **C-17**.

[365] Email from C. Rayo Zapata re: Meeting and Notes with M. Salas re: E-Games (Feb. 22, 2013), **C-401** ("*Exciting* [E-Games] *Están en proceso ante juzgado, si declara que fueron dados de manera irregular van a ser revocados*.").

SEGOB, predicted that the E-Games Independent Permit would be revoked in February 22, 2013, long before there was a final court ruling in the ongoing *Amparo* case or before the Casinos were shuttered. SEGOB apparently intended to use the courts to destroy Claimants' investments *before the legality of the E-Games Independent Permit* was even before the courts. The document further confirms that it was the intent of SEGOB as early as February of 2013 to put the Claimants out of business. This is again damning and telling, as it explains the subsequent irregularities that took place and that ultimately resulted in SEGOB's cancellation of Claimants' permit and its illegal closing of their Casinos. By extension, this also means that SEGOB knew the posture to take in its public statements as well as before the courts to ensure that the E-Games Independent Permit would be revoked.

137. As the Claimants have expressed repeatedly throughout this Reply, Mexico's document production in this case was suspiciously small and as a result, the Claimants are asking that this tribunal draw adverse inferences from Mexico's failure to produce documents in response to various of Claimants' requests. That said, it is telling that two of the only documents that Mexico produced reflecting its internal impressions regarding the E-Games Independent Permit confirm the Claimants' narrative and expressly reflect the political and illegal motives behind the permit's revocation. For Ms. Salas to call the E-Games Independent Permit "illegal" and state that it had been irregularly granted without any basis for doing so in early 2013 was not only improper and highly suspicious.[366] For Mexico (and likely Ms. Salas) to predict the E-Games' permit would be revoked in February 2013—over a year before the Casinos were closed—and that in order to revoke the E-Games Independent Permit, that the courts needed only to state that the permit had

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

been granted in an irregular manner, reflects that SEGOB knew precisely what needed to be done to put the Claimants out of business, and that it intended to do so.[367] Finally, for SEGOB to double down on this flawed view and communicate this message to the Secretary of Economy as early as September 2014 confirms SEGOB's actions against Claimants were politically motivated.[368]

6. The Testimony of Messrs. Chow and Mr. Pelchat Support Mexico's Political Motive

138. In its Counter-Memorial, Mexico rejects that there was any political motive on the part of the Mexican government to harm the Claimants.[369] Despite Mexico's denials, in addition to the Claimants' testimony and the documents in the record, the testimony of Messrs. Chow and Pelchat reaffirm Mexico's political motive to destroy the Claimants' investments. Notably, both Messrs. Chow and Pelchat explained in their witness statements, as well as in their live testimony in the jurisdictional phase of this case, that in meetings with both Ms. Salas as well as with her successor Mr. Cangas, they both affirmed that the Casinos would not reopen because of the affiliation with U.S. investors and that SEGOB would never allow Exciting Games or E-Mex to reopen any casinos in Mexico.[370] It was in part for this reason that Messrs. Chow and Pelchat sought to replace the Juegos Companies' Boards with Mexican nationals and to execute the proposed transaction.[371] The entire premise of the proposed transaction with Messrs. Chow and Pelchat was to show the

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[367] Email from C. Rayo Zapata re: Meeting and Notes with M. Salas re: E-Games (Feb. 22, 2013), **C-401** ("*Exciting* [E-Games] *Están en proceso ante juzgado, si declara que fueron dados de manera irregular van a ser revocados*.").

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

[369] Counter-Memorial, ¶¶ 191-197.

[370] Luc Pelchat Statement, **CWS-10**, ¶ 9; Benjamin Chow Statement, **CWS-11**, ¶ 25.

[371] *See* Hearing on Jurisdictional Objections, Day 3; 7755-9 ("Yes. She told us it was very important. That if we wanted to move forward that we could not be shareholders of the company Exciting Games and the U.S. 7 shareholders could also not be shareholders of Exciting Games."); 791;8-16 ("The purpose of the shareholders meeting was to– was after the second meeting with Ms. Marcela, who was saying that no U.S. citizen could be part of the company. Q. So, the idea was to convince SEGOB that the U.S. capital was no longer involved? A. Yes, that the shares were going to be transferred to Grand Odyssey and that the Americans were no longer involved.").

Mexican government that the U.S. shareholders were no longer directly involved in E-Games or the Juegos Companies.[372] Messrs. Chow and Pelchat convinced the Claimants to do this because they understood that this was a SEGOB requirement—Mexico did not want the U.S. investors involved. This testimony is fully consistent with Claimants' narrative as to what occurred and supports that there were political and other illegal reasons underlying Mexico's illegal cancellation of Claimants permit and closing of their Casinos.

7. The Tribunal Should Draw an Adverse Inference Based Upon Mexico's Failure to Produce Any Documents

139. Mexico produced little to no documents to support its arguments related to E-Games, its permit, and/or the unusual statements Ms. Salas made about E-Games in the press. For example, Mexico produced no documents in response to the following requests:

- **Request 16:** Any documents related to, prepared in connection with, or reflecting an analysis of the Peña Nieto government's views of E- Games and its permit, DGAJS/SCEVF/P-06/2005-BIS, including without limitation, copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (*oficios*), and other documents prepared by, without limitation, the Ministry of Economy, and/or SEGOB, between December 2012 and January 31, 2015.
- **Request 17:** Any documents related to, prepared in connection with, or reflecting an analysis of any instructions that Ms. Salas received from superiors or gave to others within the Mexican government during her time as Director of the Games and Raffles Division at SEGOB with respect to E-Games, E-Mex, or Producciones Móviles, including without limitation, copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (*oficios*), and other documents prepared by, without limitation, the Ministry of Economy, and/or SEGOB, between December 1, 2012 and March 31, 2015.

[372] *See* Hearing on Jurisdictional Objections, Day 3; 7755-9 ("Yes. She told us it was very important. That if we wanted to move forward that we could not be shareholders of the company Exciting Games and the U.S. 7 shareholders could also not be shareholders of Exciting Games."); 791;8-16 ("The purpose of the shareholders meeting was to– was after the second meeting with Ms. Marcela, who was saying that no U.S. citizen could be part of the company. Q. So, the idea was to convince SEGOB that the U.S. capital was no longer involved? A. Yes, that the shares were going to be transferred to Grand Odyssey and that the Americans were no longer involved.").

- **Request 18:** Any documents related to, prepared in connection with, or reflecting an analysis of the Mexican government's view on the independent nature of E- Games' permit and/or any links between E-Games' permit and E- Mex's permit, including without limitation, copies of internal or externalgovernment correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (*oficios*), and other documents prepared by, without limitation, the Ministry of Economy, and/or SEGOB, between January 1, 2011 and January 31, 2015.
- **Request 21:** Any documents related to, prepared in connection with, or reflecting an analysis of the Mexican government's efforts to "give special care to the authorizations granted to the Rojas Cardona family," including without limitation, copies of internal or external government correspondence, calendar records, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (*oficios*), and other documents prepared by, without limitation, the Ministry of Economy, and/or SEGOB, between January 1, 2011 and April 30, 2014.
- **Request 22:** Any documents related to, prepared in connection with, or reflecting an analysis of any instructions and/or directions that Ms. Salas received from superiors and/or gave to staff who reported to her reflecting the basis for her or the government's opinion related to her interview with *La Jornada* in January 2013 where she stated that E-Games' permit was "illegal," including without limitation, copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (*oficios*), and other documents prepared by, without limitation, the Ministry of Economy, and/or SEGOB, between December 1, 2012 and March 30, 2015.
- **Request 53:** Any documents related to, prepared in connection with, or reflecting an analysis of Ms. Salas receiving Mr. Burr for a meeting in her office with Mr. Garay and Mr. Hugo Vera as well as the substance, date, and other details of the meeting, including without limitation, copies of internal or external government correspondence, calendar records, reports, agendas, notes, transcripts, minutes, recordings, memoranda, analyses, official resolutions (*oficios*), and other documents prepared by, without limitation, the Ministry of Economy, and/or SEGOB, between January 1, 2013 and March 31, 2015.
- **Request 56:** Any documents related to, prepared in connection with, or reflecting an analysis of Mexico's 2011 general review of casinos in the country, and any documents related to E-Games and/or Claimants' Casinos arising from that review, including without limitation, copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (*oficios*), and other documents prepared by, without limitation, the Ministry of Economy, and/or SEGOB, between January 1, 2011 and January 31, 2013.

140. With the exception of the one general report for the casino industry from May 2013 that Mexico produced as an exhibit to Ms. Salas' witness statement, which arguably is not responsive to any of the above requests, Mexico produced nothing in response to these very relevant requests that go to the heart of this dispute. It is not believable that none exist. Respondent would have the Tribunal believe that it conducted no written internal analysis of E-Games and/or its permit, either in internal email communication, memoranda, or otherwise, before or after making statements to the press that Claimants' permit was "illegal" or that it was "granted in an unusual way" and then ultimately shutting Claimants profitable Casinos. In response to Request 16, Respondent states that Claimants' Exhibit C-289 would be the only document that is responsive to this request.[373] Exhibit C-289 is an August 28, 2013 Resolution which SEGOB issued less than 24 hours after it was notified of the Sixteenth District Judge's order which ordered SEGOB to rescind all resolutions based on or derived from the May 27, 2009 Resolution. Within 24 hours, SEGOB issued a 12-page resolution rescinding seven additional resolutions, including, among others, the November 16, 2012 Resolution which granted the E-Games Independent Permit allowing Claimants to operate their casino businesses in Mexico through 2037.[374] Mexico will have the Tribunal believe that before issuing a 12-page Resolution explaining to the Sixteenth District Judge why the various Resolutions, including the Resolution that granted Claimants their independent permit, should be revoked, that it prepared no internal memoranda, email, or other written documents or communication concerning this very important issue. This is simply not credible.

[373] The context surrounding **C-289** is explained in detail in ¶¶ 306-309 of Claimants' Memorial.

[374] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 59; First Omar Guerrero Report, **CER-2**, ¶¶ 162, 191, 312; SEGOB Resolution (Aug. 28, 2013), **C-289**.

141. Similarly, with respect to Request 17, Mexico's position is that Ms. Salas *never* provided or received any written instructions in her entire time as the Director of SEGOB's Games and Raffles Division with respect to E-Games, E-Mex, or Producciones Móviles. Again, this is not credible. If Mexico's view were to be believed, then Ms. Salas never sent an email, note, or memorandum providing an instruction related to E-Games, E-Mex, or Producciones Móviles. Ms. Salas also never received an email, note, or memorandum with an instruction or direction with respect to these permit holders. It is hard to conceive of what Ms. Salas' job actually entailed if it did not involve giving instructions and directions to her staff with respect to specific permit holders. Moreover, in Request 22, Mexico also stated that it has no documents which reflect any instructions and/or directions that Ms. Salas received from superiors and/or gave to staff who reported to her reflecting the basis for her or the government's opinion related to her interview with *La Jornada* in January 2013 where she stated that E-Games' permit was "illegal." This is also highly dubious as this statement was made just weeks after Ms. Salas assumed office. Without having received some direction or instruction, it would have been unusually quick if not impossible for Ms. Salas to have formed a judgment on the legality of the E-Games Independent Permit on her own without receiving even a single piece of paper about the circumstances leading to the issuance of the E-Games Independent Permit. Moreover, the fact that the same terminology that the permit was "illegal" or that it was granted in an "irregular manner" were then repeated in various internal memoranda makes Mexico's claim even more suspect.

142. For Request 18, Mexico also maintained that it did not have any documents reflecting the government's view or analysis of the independent nature of the E-Games Independent Permit and/or any links between the E-Games Independent Permit and E- Mex's permit. Once again, this assertion is highly dubious and suspicious. If Mexico's assertion is to be believed, then it never

prepared *any* internal communications, discussions, memoranda, etc. reflecting the government's views on the E-Games Independent Permit or E-Mex's permit. This means that there were no emails, letters, memoranda or otherwise discussing its views on the E-Games Independent Permit or E-Mex's permit. Notably, Mexico did produce documents with its Counter-Memorial that support Claimants' arguments in this regard.[375]

143. In Ms. Salas' witness statement, she stated that the Mexican government "took special care with the authorizations given to the Rojas Cardona family." However, in response to Claimants' Request 21, Mexico states that it has no documents (emails, memoranda, other presentations, etc.) to support and/or explain this assertion. Similarly, in Mexico's Counter-Memorial, it states that it was not targeting the Claimants in revoking the E-Games Independent Permit, but instead, it had undertaken a "general review of all casinos in the country."[376] However, when pressed for these documents in Claimants' Request 56, Mexico has stated that it does not have any documents that would be responsive to this request.

144. Finally, although Ms. Salas testifies to having met with Mr. Burr at SEGOB (despite Mr. Burr vehemently denying this having happened), Mexico produced no documents to substantiate that the meeting actually occurred and/or any notes, emails, and/or documents from the meeting. Mr. Burr has steadfastly and consistently denied that he had a meeting with Ms. Salas. And the only documents that have been produced in relation to meetings between Claimants and SEGOB reflect no meeting between Mr. Burr and Ms. Salas.

145. In this context, it is clear that Mexico has refused to produce, and is hiding from this Tribunal and from Claimants, relevant documentation that would shed light on very key issues in

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375 Salas Statement, **RWS-1**, Annex 1, "*Diagnóstico General de los Casinos*."

376 Counter-Memorial, ¶ 191.

this dispute. Consequently, Claimants request that the Tribunal draw adverse inferences arising from Mexico's gross failure to produce any documents reflecting the basis and/or providing documentary support for contemporaneous statements made by the Mexican government regarding E-Games' permit, as well as assertions made in Respondent's Counter-Memorial. As a result, Claimants respectfully request that the Tribunal conclude that the attacks against the Claimants and E-Games' permit were politically motivated and that the revocation of Claimants validly issued gaming permit was politically motivated, improper, unlawful, and without justification. This inference is wholly consistent with the evidence that Claimants have produced in this case.

K. Mexico's Arguments Regarding SEGOB's Discretion as It Relates to Gaming Are Misleading and Misstate Mexican Administrative Law

146. Throughout its Counter-Memorial, Mexico attempts to cloak its illegal actions in an overly broad and incorrect interpretation of Mexican administrative law and discretion. In essence, Mexico argues that "as a sovereign state, it has broad discretion to pursue its legitimate policy objectives through various measures under both domestic and international law."[377] Mexico expands on this claim, in particular with respect to SEGOB's powers to issue and monitor gaming permits but fails to point any provision under Mexican law that grants it this ostensibly unfettered discretion. Mexico's conclusion is based on the assumption that a sovereign state's policy-making powers give them a *carte blanche* to do anything they want, to whomever they want, or to undertake discriminatory measures cloaked as supposed legitimate policy objectives. This conclusion, however, is inconsistent with Mexican administrative law and international law.

[377] Counter-Memorial, ¶ 835.

147. As Mr. González explains, while Mexican governmental authorities do have some discretion, the exercise of this discretion is not absolute.[378] Under Mexican law, there are basic guidelines on how discretionary powers are exercised, so that administrative acts are not arbitrary, do not exceed the basic principles of the rule of law, and do not work to the detriment of the principles of legality and legal certainty which place constraints on governmental actions.[379]

148. In Mexico, under principle of legality (*el principio de legalidad*), a constitutional guarantee provided by Article 16 of the Mexican Constitution, government authorities, including SEGOB, can only do what has been explicitly entrusted to them in the Constitution and under Mexican law.[380] Mexican government authorities like SEGOB may only act within the confines of their governing law.[381] Specifically, SEGOB's actions are regulated and governed by the Organic Law of the Federal Public Administration (*Ley Orgánica de la Administración Pública Federal*), the Internal Regulation of SEGOB (*Reglamento Interior de la SEGOB*), and the Federal Law of Administrative Procedures (*Ley Federal de Procedimiento Administrativo*).[382]

149. Moreover, Mexican courts have established specific guidelines to limit the discretionary powers of government authorities, including SEGOB. In 2011, for example, Mexico's Supreme Court stated:

> The granting of discretionary powers to the authorities is not prohibited, and occasionally their use may be convenient or necessary to achieve the purpose established by law; however, their exercise must be limited in such a way as to prevent arbitrary action by the authority, a limitation that may arise from the regulatory provision itself, which may establish certain parameters that reasonably limit the exercise of the power, or from the

[378] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 35-42.

[379] Constitution of Mexico, Article 16, **CL-77**; Second Ezequiel González Matus Report, **CER-6**, ¶¶ 35-42.

[380] Second Ezequiel González Matus Report, **CER-6**, ¶ 148.

[381] Second Ezequiel González Matus Report, **CER-6**, ¶ 37.

[382] Second Ezequiel González Matus Report, **CER-6**, ¶ 45.

> obligation to justify and give reasons for any act of the authority.[383] (English translation of Spanish original).

150. Notably, the *raison d'être* of constitutional limits to discretionary powers of government authorities is to prevent those authorities from committing arbitrary and unjustifiable measures or actions.[384] In other words, under Mexican law, discretion is limited specifically in order to prevent abuses of power. In the history of this proceeding, Mexico far exceeded the bounds of its discretion under Mexican law. Some examples of Mexico's arbitrary actions taken against Claimants in excess of its legal discretion include: (i) Ms. Salas' politically-motivated statements to the media in January of 2013 that Claimants' permit was "illegal", beginning the onslaught of measures that would follow and lead to the total destruction of Claimants' investments; (ii) SEGOB's cancellation of Claimants' permit on as yet unspecified grounds of "irregularity" and without providing Claimants with any due process prior to the cancellation or afterwards; (iii) Mexico's decision to cancel Claimants' permit and close their Casinos for illegitimate and illegal reasons, including political paybacks to the Hank family; (iv) the manner in which Mexico closed Claimants' Casinos, without providing them any due process in advance, and doing so in an

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[383] *See* DISCRETIONARY POWERS OF THE AUTHORITIES. LIMITATION TO ITS EXERCISE. Case No.: 160855. Instance: First Chamber. Tenth Epoch. Subject Matter(s): Constitutional, Common. Thesis: 1a. CLXXXVII/2011 (9th.). Source: Judicial Weekly of the Federation and its Gazette. Book I, October 2011, Volume 2, p. 1088. Type: Isolated ("*El otorgamiento de facultades discrecionales a las autoridades no está prohibido, y ocasionalmente su uso puede ser conveniente o necesario para lograr el fin que la ley les señala; sin embargo, su ejercicio debe limitarse de manera que impida la actuación arbitraria de la autoridad, limitación que puede provenir de la propia disposición normativa, la cual puede establecer determinados parámetros que acoten el ejercicio de la atribución razonablemente, o de la obligación de fundamentar y motivar todo acto de autoridad*."), **CL-259**; Second Ezequiel González Matus Report, **CER-6**, ¶ 39.

[384] *See* DISCRETIONARY POWERS OF THE AUTHORITIES. LIMITATION TO ITS EXERCISE. Case No.: 160855. Instance: First Chamber. Tenth Epoch. Subject Matter(s): Constitutional, Common. Thesis: 1a. CLXXXVII/2011 (9th.). Source: Judicial Weekly of the Federation and its Gazette. Book I, October 2011, Volume 2, p. 1088. Type: Isolated ("*El otorgamiento de facultades discrecionales a las autoridades no está prohibido, y ocasionalmente su uso puede ser conveniente o necesario para lograr el fin que la ley les señala; sin embargo, su ejercicio debe limitarse de manera que impida la actuación arbitraria de la autoridad, limitación que puede provenir de la propia disposición normativa, la cual puede establecer determinados parámetros que acoten el ejercicio de la atribución razonablemente, o de la obligación de fundamentar y motivar todo acto de autoridad*."), **CL-259**; Second Ezequiel González Matus Report, **CER-6**, ¶ 40.

aggressive, military-raid manner with no transparency, refusing even to provide copies of the closure orders; (v) Mexico's illegal and arbitrary closure of the Casinos in violation of Mexico's own laws, including a judicial injunction prohibiting the closures and shutting down the facilities before Claimants had a full and fair opportunity to be heard on the closure orders; (vi) Mexico's illegal and arbitrary handling of the Closure Administrative Review Proceedings, which were plagued by irregularities and violations of Claimants' due process rights (including Mexico's disregard of applicable limitations periods), and were dispatched, under direct pressure from the President's personal attorney, without considering (much less addressing) all of Claimants' arguments and claims of illegality as Mexican law required; (vii) SEGOB's application of different standards to different permit holders, specifically Petolof and Producciones Móviles; (viii) SEGOB violating the principle of legal certainty and breaching E-Games' legitimate expectations to operate its Casinos as an independent permit holder under the permit granted to it through the November 16, 2012 Resolution;[385] (ix) SEGOB arbitrarily exceeding its compliance with the *Amparo* 1668/2011 judgment by arbitrarily and illegally revoking the November 16, 2012 Resolution within 24 hours of having received notice of the judge's decision and, without any legitimate reasoning and in furtherance of a preordained decision to cancel Claimant's permit and close their Casinos, depriving Claimants of its 25-year E-Games Independent Permit, which had been lawfully procured in accordance with all of the requirements under Mexican law; and, (xi) allowing Producciones Móviles, who obtained its permit under nearly if not identical circumstances, to remain in business without any adequate explanation or justification.[386] Here, SEGOB's improper use of its discretion beyond bounds of Mexican law to the detriment of

[385] First Ezequiel González Matus Report, **CER-3**, ¶¶ 55–56; Memorial ¶ 126.

[386] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 120-125.

Claimants, amounted to a complete misuse and an abuse of power. In the sections that follow, Claimants further explain how Mexico's violations of its legal discretion constituted or contributed to measures that violated the NAFTA.

L. Mexico Fails To Rebut Claimants' Claim that Judicial Irregularities, Unlawful Executive Interferences and an Arbitrary and Discriminatory Reversal of SEGOB's Legal Stance Resulted in the Illegal Taking of Claimants' Investments

151. In its Counter-Memorial, Mexico attempts to evade responsibility for an *Amparo* 1668/2011 proceeding plagued with innumerable irregularities, egregious violations of Mexican law and Claimants' due process rights, and repeated improper acts by the executive branch of Mexico to influence and undermine the judicial branch's independence. Mexico points to Claimants' supposed ability to defend their interests in the *Amparo* 1668/2011 and claims that the relevant courts properly assessed the arguments presented by the Claimants,[387] but unsurprisingly, almost completely ignores the evidence submitted by Claimants proving that Mexico violated both Mexican law and Claimants' due process rights including through the acts of (i) the Sixteenth District Judge on Administrative Matters for the Federal District (*Juez Decimo Sexto de Distrito en Materia Administrativa en el Distrito Federal*) ("**Sixteenth District Judge**" or "**Judge Gallardo**")—the judge to which the *Amparo* 1668/2011 was assigned; (ii) the Seventh Collegiate Tribunal on Administrative Matters in the First District (*Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito*) ("**Collegiate Tribunal**" or "***Tribunal Colegiado***")—the three judge appellate panel assigned to these proceedings; (iii) the Mexican Supreme Court who assessed the matter for months and then refused to further consider it after being pressured by the President's personal attorney to drop the case; and (iv) SEGOB.

[387] Counter-Memorial, ¶ 215.

152. Mexico argues that Claimants only assert that the *Amparo* 1668/2011 was plagued with irregularities because the judgment in the proceeding was unfavorable to Claimants, and that they are attempting to relitigate arguments that were already presented before the Mexican courts.[388] Mexico also tries to deflect attention from its own wrongdoing by claiming that "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."[389] Instead, as explained in the Memorial and below, Mexico invalidated the November 16, 2012 Resolution which granted the E-Games Independent Permit in *Amparo* 1668/2011 without even affording Claimants an opportunity to argue in favor of the constitutionality or legality of the November 16, 2012 Resolution. If the *Amparo* 1668/2011 proceedings had not been plagued with the judicial irregularities and unlawful executive interferences explained in the Memorial and below, Claimants and E-Games would not have been deprived of the rights that, as an independent permit holder, they acquired through the November 16, 2012 Resolution.[390]

1. The Sixteenth District Judge and the Collegiate Tribunal Improperly Admitted E-Mex's Untimely Third Amendment

(a) The Sixteenth District Judge Was Required Under Mexican Law to Dismiss E-Mex's Third Amendment Because There Was a Manifest and Unquestionable Ground of Inadmissibility, But He Did Not Do So Likely Because He Was Being Bribed By E-Mex

153. As explained in the Memorial, E-Mex did not claim the unconstitutionality of the May 27, 2009 Resolution in its initial request for *Amparo* filed on December 30, 2011.[391] It was only in E-Mex's third amendment to its request for *Amparo*, filed on June 5, 2012, that E- Mex sought to

[388] Counter-Memorial, ¶ 216.

[389] Counter-Memorial, ¶ 215; Exhibit **RER-1**; Expert Report of Dr. Mijangos ("Dr. Mijangos Report"), **RER-1**, ¶ 35.

[390] First Omar Guerrero Report, **CER-2**, ¶ 24(f).

[391] E-Mex Request for Amparo (Dec. 30, 2011), **C-268**; First Omar Guerrero Report, **CER-2**, ¶ 41.

declare unconstitutional the May 27, 2009 Resolution (the "**Third Amendment**").[392] Despite the evident inadmissibility of the Third Amendment, which should have resulted in its immediate dismissal (*desechamiento de plano*), the Sixteenth District Judge admitted the Third Amendment only one day after the request for amendment was filed, on June 6, 2021 (the "**June 6, 2012 Order**") *without giving Claimants an opportunity to be heard and oppose the improper amendment*.[393] In its Counter-Memorial, Mexico does not contest or deny that the central question for purposes of determining whether the Third Amendment was untimely is to ascertain the date on which E-Mex was notified of, became aware of, or claimed to have knowledge of SEGOB's May 27, 2009 Resolution, since this was the act (*acto reclamado*) that E-Mex challenged in the Third Amendment.[394] Mexico also does not contest or deny that under Mexican law, a request for *amparo* or amendment to an *amparo,* must be filed within 15 business days from the date following the day in which the person filing the request for *amparo* was notified of, became aware of, or claimed to have knowledge of the act it wishes to challenge (*acto reclamado*).[395] This is basic Mexican law that is uncontestable.

154. However, Mexico disagrees with Claimants' assertion that it should have been clear to the Sixteenth District Judge that there was a "manifest and unquestionable" (*manifiesta e indudable*) ground for inadmissibility (*causal de improcedencia*) as to E-Mex's Third Amendment. Mexico argues that it was not evident from the *Amparo* 1668/2011 case file that E-Mex had learned of the May 27, 2009 Resolution in advance of May 15, 2012 and, as a result, the Third Amendment was

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[392] First Omar Guerrero Report, **CER-2**, ¶ 41; E-Mex Third Amendment to Request for Amparo (June 5, 2012), **C-269**; E-Mex's First Amendment to its Writ of Amparo was filed on January 18, 2012, and E-Mex's Second Amendment to its Writ of Amparo was filed on March 29, 2012.

[393] Order of the *Juez Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (June 6, 2012), **C-270**; First Omar Guerrero Report, **CER-2**, ¶¶ 42.

[394] First Omar Guerrero Report, **CER-2**, ¶¶ 74-75.

[395] First Omar Guerrero Report, **CER-2**, ¶¶ 50, 74.

timely.[396] As explained in the Memorial, E-Mex argued in the Third Amendment that it only became aware of the May 27, 2009 Resolution on May 15, 2012 through its participation in a hearing that took place in another *amparo* proceeding initiated by E-Games ("***Amparo* 356/2012**").[397] However, as Claimants explained in the Memorial, there were verifiable and reliable records in the *Amparo* 1668/2011 case file at the time the Third Amendment was filed—which Judge Gallardo incorrectly either failed to identify and consider or he knew of them and ignored them—proving that E-Mex learned of the May 27, 2009 Resolution at least on three separate occasions, all of which were considerably before May 15, 2012.[398] Judge Gallardo was required under Mexican law to immediately dismiss (*desechar de plano*) E-Mex's Third Amendment, as it was clearly untimely.[399] Nevertheless, he failed to do so and instead, in contravention of Mexican law, admitted E-Mex's Third Amendment the day after it was filed.[400] The very likely explanation for this is that the judge was being bribed by E-Mex and therefore ignored his duty to dismiss the amendment as untimely. Elsewhere in this Reply, Claimants have provided evidence that E-Mex claimed to "control" this judge and that he would issue rulings at its request.

155. In the Memorial, Claimants explained that there are three clearly verifiable instances, all of which can be ascertained through certified copies of public documents, certified copies of judicial proceedings (*actuaciones judiciales*), and writs filed by E-Mex itself, confirming that E-Mex had knowledge of SEGOB's May 27, 2009 Resolution prior to May 15, 2012. Claimants

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396 Counter-Memorial, ¶ 227.

397 First Omar Guerrero Report, **CER-2**, ¶ 46; E-Mex Third Amendment to Request for *Amparo* (June 5, 2012), **C-269**.

398 First Omar Guerrero Report, **CER-2**, ¶ 75.

399 First Omar Guerrero Report, **CER-2**, ¶ 44.

400 Memorial, ¶¶ 250-253.

respectfully request that the Tribunal refer to such explanation in Claimants' Memorial.[401] Suffice it to say that there is clear evidence that E-Mex learned of SEGOB's May 27, 2009 Resolution on: (i) March 27, 2012; (ii) April 9, 2012; and (iii) April 12, 2012;[402] and that the evidence that E-Mex learned of the resolution on each of these instances was part of the record in the *Amparo* 1668/2011 case file at the moment the Third Amendment was filed.[403] In fact, as Claimants explained in their Memorial, on April 16, 2012, Judge Gallardo sent the *Amparo* 356/2012 judge a court order requesting that the *Amparo* 356/2012 judge send him certified and legible copies of the entire *Amparo* 356/2012 case file.[404] The *Amparo* 356/2012 case file contained the May 27, 2009 Resolution.[405] On April 19, 2012, the *Amparo* 356/2012 judge complied with the order and sent the *Amparo* 356/2012 case file to the Sixteenth District Judge.[406] Therefore, Judge Gallardo was well aware of all of the instances in which E-Mex learned of the May 27, 2009 Resolution as a result of its participation as an interested third party in the *Amparo* 356/2012 proceeding. As a result, the Sixteenth District Judge should have found that the Third Amendment was untimely, but again did not do so in dereliction of his duties and to the detriment of Claimants' rights.[407] *Had the amendment been rejected, as was required by Mexican law, there would have been no basis whatsoever in these judicial proceedings to raise any questions about any resolution involving the E-Games Independent Permit*.[408]

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401 Memorial, ¶¶ 269-271.

402 Memorial, ¶ 269.

403 First Omar Guerrero Report, **CER-2**, ¶ 79.

404 Memorial, ¶ 270; First Omar Guerrero Report, **CER-2**, ¶ 69; Order of the *Juez Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Apr. 16, 2012), **C-278**.

405 Memorial, ¶ 270; First Omar Guerrero Report, **CER-2**, ¶ 69; Order of the *Juez Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Apr. 16, 2012), **C-278**.

406 First Omar Guerrero Report, **CER-2**, ¶ 69; Order in the *amparo* 356/2012 proceeding (Apr. 19, 2012), **C-369**.

407 First Omar Guerrero Report, **CER-2**, ¶¶ 73, 76, 79.

408 First Omar Guerrero Report, **CER-2**, ¶¶ 73, 76, 79.

156. Despite this clear evidence to the contrary, Mexico claims that Judge Gallardo's decision to admit the Third Amendment was correct because there was not a "manifest and unquestionable" ground for inadmissibility.[409] In support of this argument, Mexico states that the Mexican Supreme Court has established that in order to consider that grounds for inadmissibility are "manifest" and "unquestionable," two conditions must be met. First, the grounds for inadmissibility must be "manifest" and "unquestionable" based solely on the request for *amparo* or the amendment to the *amparo* and its exhibits.[410] Second, the grounds for inadmissibility cannot be rebutted by any evidence that the parties may obtain throughout the proceeding.[411] Mexico asserts that the three dates Claimants identify as moments in which E-Mex learned of the May 27, 2009 Resolution fail to satisfy these two conditions.[412]

157. In particular, Mexico claims that Claimants' allegation that Judge Gallardo was aware of all of the instances prior to May 15, 2012 in which E-Mex learned of the May 27, 2009 Resolution because the Sixteenth District Judge had received certified and legible copies of the entire *Amparo* 356/2012 case file at the time the Third Amendment was filed (i) does not satisfy the first condition that the grounds for inadmissibility were "manifest" and "unquestionable",[413] and (ii) in any event, is inaccurate.[414] Mexico argues that Claimants' stated ground for inadmissibility (the untimeliness of the Third Amendment) does not follow from the filing of the Third Amendment itself.[415] In addition, Mexico claims that the document that the Claimants cite does not prove that the copies

[409] Counter-Memorial, ¶¶ 224, 227.

[410] Counter-Memorial, ¶ 231.

[411] Counter-Memorial, ¶ 231.

[412] Counter-Memorial, ¶¶ 231-235.

[413] Counter-Memorial, ¶ 232.

[414] Counter-Memorial, ¶ 233.

[415] Counter-Memorial, ¶ 234.

of the case file (reflecting E-Mex's knowledge of the May 27, 2009 Resolution) had actually been sent to the Sixteenth District Court.[416] Mexico is incorrect on both counts.

158. First, that E-Mex's Third Amendment was untimely does follow from the filing of the Third Amendment itself.[417] In the Third Amendment, E-Mex itself argued that it became aware of the May 27, 2009 Resolution when it participated in a hearing that took place in the *Amparo* 356/2012 proceeding on May 15, 2012.[418] In the *Amparo* 356/2012 case file, there were verifiable and reliable records evidencing that E-Mex learned of the May 27, 2009 Resolution in at least three instances before May 15, 2012.[419] And, as explained in the Memorial and above, at the moment the Third Amendment was filed, the Sixteenth District Judge received certified and legible copies of the entire *Amparo* 356/2012 case file, which means that he was well aware of the extemporaneity of E-Mex's Third Amendment.[420] Therefore, contrary to Mexico's arguments, this ground for inadmissibility (the extemporaneity of the Third Amendment) does in fact follow from the filing of the Third Amendment itself.[421]

159. Second, Claimants have submitted undeniable proof that copies of the *Amparo* 356/2012 case files were sent to and received by Judge Gallardo. As Claimants explained in the Memorial, on April 19, 2012 the *Amparo* 356/2012 judge sent the Sixteenth District Judge certified and legible copies of the entire *Amparo* 356/2012 case file (which contained proof of when E-Mex

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416 Counter-Memorial, ¶ 233.

417 Second Expert Report of Omar Guerrero ("Second Omar Guerrero Report"), **CER-5**, ¶ 17.

418 First Omar Guerrero Report, **CER-2**, ¶ 46; E-Mex Third Amendment to Request for *Amparo* (June 5, 2012), **C-269**.

419 Memorial, ¶¶ 269-270.

420 Memorial, ¶¶ 269-270.

421 Second Omar Guerrero Report, **CER-5**, ¶ 17.

learned of the Third Amendment).[422] Mexico claims that the *Amparo* 356/2012 judge's order that the case file be sent to Judge Gallardo does not prove that copies of the *Amparo* 356/2012 case file were actually sent.[423] Mexico ignores the evidence that Claimants provided evidence in the Memorial that the receipt of copies of the *Amparo* 356/2012 case file was formally recorded in a certification issued by the Secretary of the Sixteenth District Court.[424] Mexico overlooks the very evidence that it itself argued was necessary to prove that the files were actually sent and received. As a result, the grounds for inadmissibility invoked by Claimants manifestly satisfy the first of the conditions necessary for inadmissibility.

160. Mexico next asserts that the second condition—that the grounds for inadmissibility cannot be rebutted by any evidence that the parties may obtain throughout the proceeding[425]—was not satisfied because E-Mex declared that it had learned of the May 27, 2009 Resolution on May 15, 2012.[426] It claims that, as a result, there were doubts concerning whether the extemporaneity of the Third Amendment could be rebutted during the proceeding.[427] Mexico's allegation is incorrect. Mexican jurisprudence has established that the date on which the person challenging an act is considered to have gained knowledge of such act must be established through the records (*constancias*) in the proceeding at issue.[428] The date that is reflected in the request for *amparo* must be accepted as true only if the date in which the person challenging the act gained knowledge

[422] Memorial, ¶ 270; First Omar Guerrero Report, **CER-2**, ¶ 69; Order in the *amparo* 356/2012 proceeding (Apr. 19, 2012), **C-369**.

[423] Counter-Memorial, ¶ 233.

[424] Sixteenth District Judge receipt (July 10, 2012), **C-287**.

[425] Counter-Memorial, ¶ 231.

[426] Counter-Memorial, ¶ 234.

[427] Counter-Memorial, ¶ 234.

[428] Second Omar Guerrero Report, **CER-5**, ¶¶ 22-23.

of such act cannot be ascertained through the records (*constancias*) in the proceeding.[429] But that is not the case here. E-Mex's statement that it only learned of the May 27, 2009 Resolution on May 15, 2012 is not sufficient for there to be a "margin of doubt" (*margen de duda*) regarding the extemporaneity of the Third Amendment. This is because the Sixteenth District Judge had more than sufficient evidence in the *Amparo* 1668/2011 case file to determine the real date on which E-Mex learned of the May 27, 2009 Resolution, which was long before May 15, 2012.[430] As a result, there is no legitimate question that the Third Amendment was extemporaneous and as a result, should have been dismissed.[431]

161. Claimants have thus proven that Judge Gallardo improperly admitted E-Mex's Third Amendment in contravention of Mexican law and in doing so, committed a gross miscarriage of justice.

(b) The Collegiate Tribunal Improperly Rejected the Evidence Offered by SEGOB To Prove that E-Mex's Third Amendment Was Extemporaneous

162. As explained in Claimants' Memorial, SEGOB's Games and Raffles Division appealed the Sixteenth District Judge's June 6, 2012 Order admitting E-Mex's Third Amendment through *Recurso de Queja* 68/2012, which was assigned to a three judge panel in the Collegiate Tribunal.[432] In *Recurso de Queja* 68/2012, SEGOB explained to the Collegiate Tribunal the instances that proved that E-Mex had knowledge of the May 27, 2009 Resolution in advance of May 15, 2012,

[429] Second Omar Guerrero Report, **CER-5**, ¶¶ 22-23.

[430] Memorial, ¶¶ 268-271.

[431] Second Omar Guerrero Report, **CER-5**, ¶¶ 24-26; Memorial, ¶¶ 268-271.

[432] First Omar Guerrero Report, **CER-2**, ¶¶ 42, 81; SEGOB *Recurso de Queja* 68/2012 (June 13, 2012), **C-280**.

and accompanied its appeal with copies of all of the legal proceedings (*actuaciones*).[433] These copies included the May 27, 2009 Resolution.[434]

163. It is important to note here that at this juncture in 2012 during the Calderón administration, SEGOB was defending its own administrative acts in relation to E-Games. As we have argued elsewhere in this Reply and in the Memorial, once President Peña Nieto's administration took over, SEGOB, for political reasons and proven cronyism, began to attack its own administrative acts in relation to E-Games that were taken by the prior Calderón administration.

164. On June 22, 2012, the Collegiate Tribunal, in a complete misapplication of the *Amparo* Law,[435] incorrectly rejected and failed to consider (*no admitió*) the evidence offered by SEGOB.[436] Mexico attempts to legitimize the Collegiate Tribunal's actions by claiming that it did not reject the evidence offered by SEGOB, but rather stated that "only the evidence submitted to the Judge hearing the case will be considered, *except for such evidence presented for the purposes of proving the existence of grounds for inadmissibility*."[437] This is incorrect. As explained in the Memorial,[438] the Collegiate Tribunal based its rejection of the evidence offered by SEGOB on Article 91 of the *Amparo* Law.[439] Mexico claims that there is no evidence that the Collegiate Tribunal failed to take any evidence into consideration based on Article 91 of the *Amparo* Law.[440] However, the Collegiate Tribunal did in fact fail to take into account evidence that it was legally required to

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433 First Omar Guerrero Report, **CER-2**, ¶¶ 82-83; SEGOB *Recurso de Queja* 68/2012 (June 13, 2012), **C-280**.

434 First Omar Guerrero Report, **CER-2**, ¶¶ 82-83; SEGOB *Recurso de Queja* 68/2012 (June 13, 2012), **C-280**.

435 Memorial, ¶¶ 273-274.

436 First Omar Guerrero Report, **CER-2**, ¶ 83; Order of the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (June 22, 2012), **C-281**.

437 Counter-Memorial, ¶ 237 (emphasis added).

438 Memorial, ¶¶ 273-274.

439 First Omar Guerrero Report, **CER-2**, ¶ 83; Article 91 of the Abrogated *Amparo* Law, **CL-75**.

440 Counter-Memorial, ¶ 237.

consider. The Collegiate Tribunal's basis to reject the evidence showing that E-Mex had earlier knowledge of the May 27, 2009 Resolution was manifestly erroneous because Article 91 of the *Amparo* Law was inapplicable to the case at issue.[441] Article 91 applies only to *recursos de revisión* (a distinct type of appeal under Mexican law), and not to *recursos de queja*.[442] In this case, SEGOB filed a *recurso de queja*, not a *recurso de revisión* and therefore, the evidence SEGOB offered to prove that E-Mex had earlier knowledge of the May 27, 2009 Resolution should have been admitted.[443] The failure to admit the evidence was a gross miscarriage of justice that prejudiced Claimants, as again the admission of this evidence by the appellate court would have led to the inadmissibility of E-Mex's Third Amendment adding the May 27, 2009 Resolution to the *amparo* proceedings and thus there would have been no way in which the legitimacy or legality of Claimants' permit could have been questioned in the *amparo* proceedings.

165. Even assuming that Article 91 of the *Amparo* Law applied which as noted, it did not, this article specifically states that ". . . in accordance with article 91, section II, of the *Amparo* Law, with respect to petitions for constitutional relief (*asuntos en revisión*), only the evidence submitted to the Judge hearing the case will be considered, *except for such evidence presented for the purposes of proving the existence of grounds for inadmissibility*."[444] The Collegiate Tribunal itself pointed to this provision, and the exception contained in this provision dictates that the Collegiate Tribunal should have considered the evidence offered by SEGOB.[445] The evidence offered by SEGOB was precisely aimed at proving the inadmissibility of the Third Amendment because it

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441 First Omar Guerrero Report, **CER-2**, ¶ 84(a); Article 91 of the Abrogated *Amparo* Law, **CL-75**.

442 First Omar Guerrero Report, **CER-2**, ¶ 84(a); Article 91 of the Abrogated *Amparo* Law, **CL-75**.

443 First Omar Guerrero Report, **CER-2**, ¶ 84(a); Article 91 of the Abrogated *Amparo* Law, **CL-75**.

444 First Omar Guerrero Report, **CER-2**, ¶ 84(b); Article 91 of the Abrogated *Amparo* Law (emphasis added), **CL-75**; Memorial, ¶ 274.

445 First Omar Guerrero Report, **CER-2**, ¶ 84(b); Article 91 of the Abrogated *Amparo* Law, **CL-75**.

reflected that E-Mex had earlier knowledge of the May 27, 2009 Resolution.[446] Therefore, contrary to Mexico's argument, the Collegiate Tribunal was required to consider the evidence offered by SEGOB in support of its appeal both because Article 91 did not apply and the law that did apply required the consideration of the evidence of inadmissibility and because even considering the application of Article 91 the judge was required to admit the evidence of inadmissibility but improperly failed to do so.[447]

166. Contrary to Mexico's arguments, Claimants have never claimed that the Collegiate Tribunal's rejection of SEGOB's evidence showing when E-Mex had learned of the May 27, 2009 Resolution "was of no consequence."[448] As Claimants explained in the Memorial,[449] the Collegiate Tribunal's rejection of SEGOB's evidence was improper under Mexican law and its failure to consider the evidence constituted a gross miscarriage of justice for all the reasons set forth above.[450]

(c) The Collegiate Tribunal Also Failed To Perform an Ex Officio Review of the Admissibility of the Amparo Proceeding

167. As explained in the Memorial, judges are required to perform an *ex officio* analysis of the admissibility (*procedencia*) of an *amparo* proceeding.[451] Therefore, the Collegiate Tribunal was itself also required to analyze *ex officio* whether there were any grounds for inadmissibility of the Third Amendment.[452] This was particularly true given that the existence of possible grounds for

[446] First Omar Guerrero Report, **CER-2**, ¶ 84(b).

[447] First Omar Guerrero Report, **CER-2**, ¶ 84(b).

[448] Counter-Memorial, ¶ 237.

[449] Memorial, ¶¶ 276-277.

[450] Second Omar Guerrero Report, **CER-5**, ¶ 31; First Omar Guerrero Report, **CER-2**, ¶ 86(a); Memorial, ¶¶ 276-277.

[451] Second Omar Guerrero Report, **CER-5**, ¶ 66; First Omar Guerrero Report, **CER-2**, ¶ 86(c).

[452] Second Omar Guerrero Report, **CER-5**, ¶ 66; First Omar Guerrero Report, **CER-2**, ¶ 86(c).

inadmissibility of the Third Amendment (*causales de improcedencia*) was directly at issue in the case and SEGOB itself was arguing that the Third Amendment was inadmissible.[453] Despite the legal obligation to do so under Mexican law, the Collegiate Tribunal failed to analyze *ex officio* whether the Third Amendment was inadmissible.[454] This is yet another miscarriage of justice that prejudiced Claimants for the reasons set forth above.

168. In its Counter-Memorial, Mexico fails to address Claimants' argument that the Collegiate Tribunal was required to analyze *ex officio* whether there were any grounds for inadmissibility of the Third Amendment. Mexico simply states that it "does not share this view," but fails to provide any explanation or evidence to support its claim and fails to address or rebut Claimants' claim. The reason behind such failure is clear: if the Collegiate Tribunal had (i) reviewed *ex officio* the admissibility of the *Amparo* 1668/2011 proceeding (as it was required to do under Mexican law); (ii) considered the evidence offered by SEGOB; and (iii) provided a response with respect to SEGOB's claims that E-Mex learned of the May 27, 2009 Resolution on April 9, 2012 and April 12, 2012, *it would have ordered the dismissal of E-Mex's Third Amendment as it related to admission of the claims by E-Mex attacking the May 27, 2009 Resolution.*[455] In failing to abide by Mexican law and to detect the aforementioned issues, the Collegiate Tribunal's actions in declaring SEGOB's *Recurso de Queja* 68/2012 unsubstantiated (*infundado*) constituted yet another gross miscarriage of justice.

[453] Second Omar Guerrero Report, **CER-5**, ¶ 66.

[454] Second Omar Guerrero Report, **CER-5**, ¶ 66; First Omar Guerrero Report, **CER-2**, ¶ 86(c).

[455] Second Omar Guerrero Report, **CER-5**, ¶ 70; First Omar Guerrero Report, **CER-2**, ¶¶ 81-87.

2. The Sixteenth District Judge and the Collegiate Tribunal Improperly Concluded that the Third Amendment Was Admissible with Respect To SEGOB's May 27, 2009 Resolution

169. As explained in the Memorial, the Sixteenth District Judge (Judge Gallardo) and the Collegiate Tribunal's failure to dismiss E-Mex's Third Amendment did not render the amendment timely and did not conclude the issue.[456] Under Mexican law, the timeliness of the Third Amendment itself would still have to be examined and resolved at a later stage, even after being improperly accepted.[457] In practice, this means that both the Sixteenth District Judge and the Collegiate Tribunal had the obligation to examine *de novo* and *ex officio* whether the Third Amendment should be considered on the merits or should be dismissed for having been filed late.[458]

(a) The Sixteenth District Judge Incorrectly Failed To Dismiss the Amparo with Respect To SEGOB's May 27, 2009 Resolution

170. Mexico claims that in Judge Gallardo's January 31, 2013 order—the order concluding that the May 27, 2009 Resolution was unconstitutional, because the Gaming Regulation did not expressly recognize the figure of an "independent operator" (the "**January 31, 2013 Order**" or the "***Amparo* judgment**")—Judge Gallardo once again analyzed E-Mex's Third Amendment but did not find any grounds for inadmissibility.[459] This is incorrect. Judge Gallardo did not find any grounds for inadmissibility because he improperly—and likely purposefully because he was being "controlled" by E-Mex—ignored clear evidence supporting the Third Amendment's inadmissibility.[460]

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[456] First Omar Guerrero Report, **CER-2**, ¶¶ 94, 106, 109.

[457] First Omar Guerrero Report, **CER-2**, ¶¶ 94, 109.

[458] First Omar Guerrero Report, **CER-2**, ¶¶ 54, 55.

[459] Counter-Memorial, ¶¶ 241-246.

[460] Memorial, Section IV.X.1.a.

171. Very importantly, as explained in the Memorial,[461] while Judge Gallardo confirmed in its January 31, 2013 Order that Ms. María del Rocío Leal Arriaga received certified copies of the Amparo 356/2012 case file,[462] he unexplainably concluded that this was insufficient to prove that E-Mex had in fact learned of the May 27, 2009 Resolution at the time of the receipt of the certified copies because:

> … of said receipt of certified copies signed by María del Rocío Leal Arriaga, authorized for that purpose by [E-Mex], which displays her signature and that of the court clerk who recorded the delivery of the totality of the records (*constancias*) that comprise the case file, it cannot be reliably established that [E-Mex] also received a copy of the annexes that are included separately (*que obran por separado*), in which the [May 27, 2009 Resolution] can be found, which is why this judge considers that the date of delivery of the copies of the case file cannot be considered as a starting point for the computation of the fifteen day period to file the *amparo* if there was no specification as to the pages of the record (*fojas de las constancias*) that were delivered, or if copies of the annexes that comprise a separate evidentiary file (*copias de los anexos que constan en cuaderno por separado*), because as previously stated, there is no certainty that [E-Mex] had direct, accurate and complete knowledge of the [May 27, 2009 Resolution].[463] (English translation of the Spanish original).

172. Interestingly, Mexico points to this precise language in support of its claim that Judge Gallardo properly analyzed again E-Mex's Third Amended but did not find any grounds for inadmissibility because it confirmed that even though there was proof that E-Mex received a copy of all of the legal proceedings (*todo lo actuado*) in the *Amparo* 356/2012 case file, there was no

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461 Memorial, ¶¶ 287-289.

462 First Omar Guerrero Report, **CER-2**, ¶ 113; *See* Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Jan. 31, 2013), **C-18**.

463 First Omar Guerrero Report, **CER-2**, ¶ 111; See Order of the Juzgado Decimosexto de Distrito en Materia Administrativa en el Distrito Federal (Jan. 31, 2013), p. 62, **C-18** ("*…porque de dicha razón de recepción de copias certificadas firmada por María del Roció Leal Arriga, autorizada para tal efecto por la citada tercero perjudicada, en la que consta su firma y la del secretario del juzgado que hizo constar la entrega de la totalidad de las constancias del expediente, no se advierte de manera fehaciente que haya recibido también copias de los anexos que obran por separado, en donde consta el oficio reclamado, por lo que este juzgador considera no puede tomarse como punto de partido para realizar el cómputo de quince días para promover amparo, la fecha de entrega de las copias del expediente si no se especificaron las fojas de las constancias entregadas, ni se entregaron copias de los anexos que constan en cuaderno por separado, pues se reitera, no se tiene plena certeza de que la quejosa tuvo conocimiento directo, exacto y completo del acto reclamado*.").

record (*constancia*) showing that E-Mex had actually received a copy of the May 27, 2009 Resolution.[464] Mexico ignores Claimants' clear and convincing arguments evidencing that the Sixteenth District Judge's determination to this effect is manifestly incorrect under Mexican law.

173. First, Mexico does not even respond to Claimants' contention that under Mexican law, when a party to an *amparo* proceeding requests certified copies of the totality of the legal proceedings (*constancias*) that comprise the case file, it receives copies of the *entire* case file including all annexes: attached documents, resolutions, *oficios*, judicial proceedings, etc.[465] Here, the Sixteenth District Judge confirmed that the "court clerk . . . recorded the delivery of the totality of the records (*constancias*) that comprise the case file."[466] The totality of the legal proceedings (*constancias*) that comprise the case file include, precisely, *all* legal proceedings (*constancias*), including the resolution in question. There simply can be no doubt that the May 27, 2009 Resolution was included in the copies E-Mex received on April 25, 2012 and that E-Mex therefore had knowledge of the May 27, 2009 Resolution as of that date.[467] The judge's statement to the contrary can only be explained by the improper influence that E-Mex was asserting over him. Any unbiased and independent judge would have concluded that E-Mex had notice of the May 27, 2009 Resolution long before the 15 days required under the law and would have dismissed the amendment as untimely.

174. Second, Mexico also fails to respond to Claimants' assertion that the court clerk possesses authority of attestation (*fe pública*), so clerk's certification recording the delivery of the totality of

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[464] Counter-Memorial, ¶ 245; First Omar Guerrero Report, **CER-2**, ¶ 95; *See* Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Jan. 31, 2013), **C-18**.

[465] First Omar Guerrero Report, **CER-2**, ¶ 115.

[466] *See* Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Jan. 31, 2013), p. 62, **C-18**.

[467] First Omar Guerrero Report, **CER-2**, ¶ 118.

the case file constitutes conclusive evidence (*prueba plena*) that the totality of the case file was delivered to Ms. María del Rocío Leal.[468] The Sixteenth District Judge stated that the court clerk "recorded the delivery of the totality of the records (*constancias*) that comprise the case file,"[469] and also concluded that "it cannot be reliably established ("*no se advierte de manera fehaciente*") that [E-Mex] also received a copy of the annexes that are included separately, in which the [May 27, 2009 Resolution] can be found."[470] As explained in the Memorial,[471] these statements are incorrect and contradictory because there *was* in fact conclusive evidence (*prueba fehaciente*), in the form of the court clerk's certification, that E-Mex had received the entirety of the case file, including the May 27, 2009 Resolution.[472]

175. Third, Mexico also ignores Claimants' allegations concerning authority of attestation (*fe pública*). As explained in the Memorial,[473] authority of attestation (*fe pública*) can be contested only by irrefutably demonstrating that the facts that the clerk attested to are incorrect by proving the contrary.[474] In the present case, to contest the court clerk's certification that E-Mex received a copy of the May 27, 2009 Resolution, E-Mex had to irrefutably prove (*demostrar fehacientemente*) that it did not receive certified copies of the entirety of the *Amparo* 356/2012 proceeding case file, and instead only received certain portions of the file, which did not include the May 27, 2009 Resolution.[475] E-Mex never contested the court clerk's authority of attestation

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[468] First Omar Guerrero Report, **CER-2**, ¶ 114.

[469] First Omar Guerrero Report, **CER-2**, ¶ 119; Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa el Distrito Federal* (Jan. 31, 2013), p. 62, **C-18**.

[470] First Omar Guerrero Report, **CER-2**, ¶ 120; Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa el Distrito Federal* (Jan. 31, 2013), p. 62, **C-18**.

[471] Memorial, ¶¶ 290-291.

[472] First Omar Guerrero Report, **CER-2**, ¶ 121.

[473] Memorial, ¶ 291.

[474] First Omar Guerrero Report, **CER-2**, ¶ 121.

[475] First Omar Guerrero Report, **CER-2**, ¶ 122.

(*fe pública*) despite it being relatively easy in Mexico to prove whether or not particular documents are part of the record because certified copies of all documents in the record are provided as part of the case file (*legajo*).[476] It was therefore conclusively proven (*plenamente probado*) as a matter of Mexican law that E-Mex received a certified copy of the entirety of the *Amparo* 356/2012 case file, including the May 27, 2009 Resolution.[477]

176. As the foregoing shows, Judge Gallardo committed a gross and flagrant legal error in concluding that E-Mex's receipt of a copy of the May 27, 2009 Resolution had not been reliably established.[478] The evidence is clear: if Judge Gallardo had acted in accordance with the law, he would undoubtedly have found that the Third Amendment was filed extemporaneously, and that as a result, the *amparo* had to be dismissed with respect to SEGOB's May 27, 2009 Resolution.[479]

(b) The Collegiate Tribunal Also Incorrectly Failed To Dismiss the Amparo with Respect To SEGOB's May 27, 2009 Resolution

177. As did Judge Gallardo, the Collegiate Tribunal also erred in concluding that the Third Amendment had been filed in a timely manner, and as a result, erred in not dismissing the *amparo* with respect to SEGOB's May 27, 2009 Resolution.[480] Claimants have addressed this argument above and will not repeat it here. Instead, below, we address some of the additional arguments made by Mexico, or its failure to respond to certain of Claimants' arguments, on this point and will refute them.

178. First, Mexico does not substantively consider Claimants' argument that the Collegiate Tribunal erred in concluding that the Third Amendment had been filed in a timely manner because

[476] First Omar Guerrero Report, **CER-2**, ¶ 123; Memorial, ¶ 291.

[477] First Omar Guerrero Report, **CER-2**, ¶ 123.

[478] First Omar Guerrero Report, **CER-2**, ¶ 125.

[479] First Omar Guerrero Report, **CER-2**, ¶ 106.

[480] Memorial, ¶¶ 293-301.

on April 25, 2012 E-Mex received certified copies of *all* legal proceedings (*todo lo actuado*) in the *Amparo* 356/2012 case file, which included the May 27, 2009 Resolution.[481] In response to Claimants' assertion, Mexico simply states that the Collegiate Tribunal indicated that it had reviewed the case file for *Amparo* 356/2012 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] had not yet been added to the record, because that occurred on the following tenth of May when the certified copy was submitted by the [SEGOB]."[482]

179. Mexico ignores the irrefutable evidence submitted by Claimants confirming that the May 27, 2009 Resolution was part of the record in the *Amparo* 356/2012 before May 10, 2012. As explained in detail in the Memorial,[483] the May 27, 2009 Resolution was annexed to E-Games' February 10, 2012 request for *amparo* in the *Amparo* 356/2012 proceeding.[484] In item (*antecedente*) number 4 of the procedural history section of E-Games' request for *amparo*, E-Games expressly referred to the May 27, 2009 Resolution, and accompanied the request with a copy of the May 27, 2009 Resolution.[485] The court itself confirmed E-Games' filing of a copy of the May 27, 2009 Resolution with its request for *amparo*.[486] Therefore, the Collegiate Tribunal's

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[481] Memorial, ¶ 295.

[482] Counter-Memorial, ¶ 249; Order of the *Séptimo Tribunal Colegiado en Materia Administrativa* (July 10, 2013), **C-20**.

[483] Memorial, ¶ 295.

[484] First Omar Guerrero Report, **CER-2**, ¶ 140; E-Games' Request for *amparo* in the *Amparo* 356/2012 proceeding (Feb. 10, 2012), **C-277**

[485] First Omar Guerrero Report, **CER-2**, ¶ 140; E-Games' Request for *amparo* in the *Amparo* 356/2012 proceeding (Feb. 10, 2012), **C-277**.

[486] First Omar Guerrero Report, **CER-2**, ¶ 140; E-Games' Request for *amparo* in the *Amparo* 356/2012 proceeding (Feb. 10, 2012), **C-277**.

statement that the May 27, 2009 Resolution was not added to the *Amparo* 356/2012 until May 10, 2012 is demonstrably incorrect.[487]

180. *Second*, Mexico also does not meaningfully respond to Claimants' argument that the Collegiate Tribunal should have analyzed E-Games' claim that the effects of the May 27, 2009 Resolution had ceased by virtue of SEGOB's November 16, 2012 Resolution, which granted the E-Games Independent Permit. The Collegiate Tribunal's failure to do so was contrary to Mexican law, a violation of Claimants' due process rights, and another gross miscarriage of justice.[488] The Collegiate Tribunal purportedly failed to consider E-Games' claim because E-Games did not submit the November 16, 2012 Resolution as evidence. In response to Claimants' assertion, rather than rebutting Claimants' allegations, Mexico simply states that Claimants are seeking to "minimize an error that can only be attributed to E-Games and unlawfully transfer their responsibility to the Respondent."[489] Contrary to Mexico's claim, E-Games did not commit any error by not annexing the November 16, 2012 Resolution. It was the Collegiate Tribunal who grossly erred in its determination.[490]

181. As explained in the Memorial,[491] E-Games' argument that the effects of the May 27, 2009 Resolution had ceased by virtue of SEGOB's November 16, 2012 Resolution which granted the E-Games Independent Permit constituted a clear ground for dismissal (*causal de improcedencia*), and therefore the Collegiate Tribunal had a duty to (i) examine the issue *ex officio*, and (ii) obtain

[487] First Omar Guerrero Report, **CER-2**, ¶ 141.

[488] First Omar Guerrero Report, **CER-2**, ¶ 145; Order of the *Séptimo Tribunal Colegiado en Materia Administrativa* (July 10, 2013), **C-20**.

[489] Counter-Memorial, ¶ 251.

[490] First Omar Guerrero Report, **CER-2**, ¶ 146.

[491] Memorial, ¶ 299.

the evidence necessary to perform such analysis.[492] However, the Collegiate Tribunal improperly failed to do either of those things as explained in detail in Claimants' Memorial.[493] Claimants will not burden the Tribunal with a full restatement of that explanation here, but request that the Tribunal reject Respondent's unsupported assertions on the legality of the Collegiate Tribunal's July 10, 2013 judgement confirming the Sixteenth District Judge's January 31, 2013 Order (the "**July 10, 2013 Order**") for all of the reasons established by Claimants and their experts in the Memorial. The Collegiate Tribunal's determination in its July 10, 2013 Order is yet another gross miscarriage of justice affecting Claimants' rights and investments.

3. The Sixteenth District Judge Never Served Notice on E-Games of SEGOB's July 19, 2013 Resolution

182. Following the Collegiate Tribunal's July 10, 2013 Order affirming the Sixteenth District Judge's January 31, 2013 Order, the Sixteenth District Judge ordered SEGOB to comply with its January 31, 2013 Order.[494] SEGOB complied on July 19, 2013 by rescinding the May 27, 2009 Resolution which gave E-Games the ability to function as an independent operator under E-Mex's permit.[495] As Claimants explained in the Memorial,[496] under Mexican law, following Judge Gallardo's receipt of SEGOB's resolution confirming compliance with the January 31, 2013 Order, he was required by law to notify (*dar vista*) the complainant and any interested third party of SEGOB's resolution.[497] In this case, E-Mex was the complainant because it filed the request for *amparo*, and E-Games was an interested third party. The reason behind this notification

[492] First Omar Guerrero Report, **CER-2**, ¶ 146.

[493] Memorial ¶¶ 276-279.

[494] First Omar Guerrero Report, **CER-2**, ¶ 245.

[495] First Omar Guerrero Report, **CER-2**, ¶ 245; SEGOB Resolution (July 19, 2013), **C-272**.

[496] Memorial, ¶¶ 302-303.

[497] First Omar Guerrero Report, **CER-2**, ¶¶ 246-247; Abrogated *Amparo* Law, Article 196, **CL-75**.

requirement is to afford the claimant and any interested third party an opportunity to state whatever may be in their best interest (*para manifestar lo que a su derecho convenga*) in relation to SEGOB's administrative actions.[498] However, despite this clear mandate under Mexican law,[499] Judge Gallardo notified E-Mex regarding SEGOB's July 19, 2013 Resolution, but failed to serve notice (*dar vista*) on E-Games.[500] Again, this is but another flagrant violation of Claimants' due process rights in this judicial proceeding and can only be explained by the improper influence that E-Mex had over this judge. As a result, E-Games was effectively deprived of the opportunity to be heard with regard to SEGOB's compliance with Judge Gallardo's January 31, 2013 Order.[501]

183. Mexico attempts to rebut Claimants' assertion that the Sixteenth District Judge (Judge Gallardo) failed to serve notice (*dar* vista) on E-Games of SEGOB's July 19, 2013 Resolution by claiming that SEGOB notified E-Games of the resolution on July 24, 2013 (Exhibit C-272).[502] Exhibit C-272 is simply SEGOB's notification to E-Games of its supposed compliance with the Sixteenth District Judge's January 31, 2013 Order. However, it is unrebutted that Judge Gallardo never notified E-Games of its compliance with the January 31, 2013 Order, as he is required to do under Article 196 of the Amparo Law.[503] Under Mexican law, notice by another government agency does not suffice to discharge a judge's obligation under the law to provide notice.[504] Thus, SEGOB's "notification" is not equivalent to the Sixteenth District Judge serving notice (*dar vista*)

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498 First Omar Guerrero Report, **CER-2**, ¶ 247; Abrogated *Amparo* Law, Article 196, **CL-75**.

499 Abrogated *Amparo* Law, Article 196, **CL-75**.

500 First Omar Guerrero Report, **CER-2**, ¶ 248; Abrogated *Amparo* Law, Article 196, **CL-75**; Order of the *Juez Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Aug. 12, 2013), **C-288**.

501 First Omar Guerrero Report, **CER-2**, ¶ 248; Abrogated *Amparo* Law, Article 196, **CL-75**; Order of the *Juez Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Aug. 12, 2013), **C-288**.

502 Counter-Memorial, ¶ 258.

503 Second Omar Guerrero Report, **CER-5**, ¶¶ 100, 102.

504 Second Omar Guerrero Report, **CER-5**, ¶ 103.

on E-Games,[505] and in no way remedies the clear violation of Article 196 of the *Amparo* Law and of E-Games' due process rights, including its right of defense under Mexican law.[506] Consequently, to point out as Mexico does that E-Games had been notified by SEGOB of this resolution, does not in any way remedy the gross violation of due process rights at issue.

4. The Actions of the Sixteenth District Judge, the Collegiate Tribunal, and SEGOB in the Enforcement Stage of *Amparo* 1668/2011 Were Highly Irregular, Contrary to Mexican Law, and Violated E-Games' Due Process Rights

184. The innumerable irregularities and egregious violations of Mexican law in *Amparo* 1668/2011 did not stop after Mexico improperly admitted and failed to dismiss E-Mex's untimely Third Amendment, and then failed to serve notice (*dar vista*) on E-Games of SEGOB's July 19, 2013 Resolution. Mexico's irregular and unlawful actions continued in the enforcement stage of *Amparo* 1668/2011. Mexico's main strategy to attempt to evade responsibility for the Sixteenth District Judge, the Collegiate Tribunal, and SEGOB's actions in the enforcement stage of *Amparo* 1668/2011 is to attempt to improperly place blame on the Claimants. Mexico points to Claimants having been provided access to the means of defense at their disposal to defend their interests,[507] while almost completely ignoring the evidence submitted by Claimants proving that Mexico's actions were in clear violation of Mexican law, Claimants' due process rights, and international law. Mexico's arguments with respect to its actions in the enforcement stage of the Amparo 1668/2011 fail when juxtaposed against the evidence of Mexico's egregious violations.

[505] Second Omar Guerrero Report, **CER-5**, ¶¶ 100-103.

[506] Second Omar Guerrero Report, **CER-5**, ¶ 103; First Omar Guerrero Report, **CER-2**, ¶ 248; Abrogated *Amparo* Law, Article 196, **CL-75**.

[507] Counter-Memorial, ¶¶ 252-289.

(a) The Sixteenth District Judge's January 31, 2013 Order Was Clear and Precise, and Therefore Compliance Deviating from its Terms Constituted an Excess in the Fulfilment of the Order

185. On August 22, 2013, with the matter before Judge Gallardo for execution, E-Mex argued that SEGOB had failed to comply with the January 31, 2013 Order when it only rescinded the May 27, 2009 Resolution.[508] E-Mex moved Judge Gallardo to rescind not only the May 27, 2009 Resolution, which originally was the *only* one directly involving E-Games in the *Amparo* 1668/2011 proceeding, but also all other resolutions that flowed from the May 27, 2009 Resolution.[509]

186. On August 26, 2013, Judge Gallardo issued an orderstating that SEGOB had not complied with the January 31, 2013 Order (the "**August 26, 2013 Order**").[510] The Sixteenth District Judge ordered SEGOB to rescind all resolutions based on or legally derived from the May 27, 2009 Resolution, but did not specify which resolutions should be rescinded.[511] Judge Gallardo simply stated that "having revoked the [May 27, 2009 Resolution], [SEGOB] is also obligated to revoke any other action or actions **issued as a result of** [the May 27, 2009 Resolution]."[512] On August 28, 2013, just 24 hours after it was notified of the August 26, 2013 Order, SEGOB issued a 12-page resolution rescinding seven additional resolutions granted in favor of E-Games, including, among others, the November 16, 2012 Resolution granting the E-Games Independent Permit.[513]

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[508] E-Mex Motion to Rescind, **C-21**.

[509] E-Mex Motion to Rescind, **C-21**; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 85.

[510] Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Aug. 26, 2013), **C-23**; First Omar Guerrero Report, **CER-2**, ¶ 190; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 58; Third Gordon Burr Statement, **CWS-50**, ¶ 119; Third Erin Burr Statement, **CWS-51**, ¶ 127.

[511] Fist Omar Guerrero Report, **CER-2**, ¶ 190; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 58; Third Gordon Burr Statement, **CWS-50**, ¶ 119; Third Erin Burr Statement, **CWS-51**, ¶ 127.

[512] First Omar Guerrero Report, **CER-2**, ¶ 190; Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Aug. 26, 2013), **C-23** (emphasis added).

[513] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 59; First Omar Guerrero Report, **CER-2**, ¶¶ 162, 191, 312; SEGOB Resolution (Aug. 28, 2013), **C-289**.

SEGOB's hastily issued resolution did not explain how the November 16, 2012 Resolution was "issued as a result of"[514] the May 27, 2009 Resolution.

187. As noted earlier, that SEGOB would issue a 12-page resolution nullifying seven of its prior resolutions relating to E-Games less than 24 hours after learning of Judge Gallardo's ruling is inexplicable. An international law firm with a robust team of lawyers would have a hard time producing such a document so quickly. This is especially so when one considers that the agency had to go through and presumably analyze each of the seven resolutions and make a legal determination as to whether each one was "issued as a result of" the May 27, 2009 Resolution. It simply is not credible to believe that this Mexican gaming agency with its limited resources was able to perform this task in less than 24 hours. This obviously suggests very strongly that the August 28, 2013 Resolution issued by SEGOB was a preordained result that the agency was ready to go as soon as it received the judge's order. Even more perplexing is that a governmental administrative agency normally takes the view that it should defend its own administrative actions, not look to actively overturn them.

188. On October 14, 2013, the Sixteenth District Judge (Judge Gallardo) determined that SEGOB exceeded its authority in complying with Judge Gallardo's January 31, 2013 Order (the "**October 14, 2013 Order**").[515] Importantly, the Sixteenth District Judge ruled that E-Games had been operating its casinos under its own permit as of November 16, 2012 as a result of SEGOB's November 16, 2013 Resolution, which Judge Gallardo asserted was "totally independent and autonomous and is not related in any way to the resolution declared unconstitutional."[516]

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[514] Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Aug. 26, 2013), **C-23**; First Omar Guerrero Report, **CER-2**, ¶ 190; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 58

[515] Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), **C-24**; First Omar Guerrero Expert Report, **CER-2**, ¶ 164: Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 62.

[516] Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), **C-24** (emphasis added).

189. In response, one would think that SEGOB would have immediately reinstated the November 16, 2012 Resolution so as to respond to the judge's criticism. That is what one would normally expect an administrative agency to do, especially when one considers that part of its mandate is to defend its prior administrative resolutions. But SEGOB did not do this. Instead, *quite incredibly*, as discussed below, it took the view that the judge was wrong about what *he meant and what he intended* when he issued his prior decision from January 31, 2013 rescinding the May 27, 2009 Resolution. The reasoning for that January decision was that the gaming regulation does not recognize the figure of "independent operator". What on earth that has to do with whether a company has complied with the legal requirements to be issued a gaming permit is beyond explanation. SEGOB nonetheless took the view that Judge Gallardo's January ruling required it to nullify the November 16, 2012 Resolution granting E-Games its permit, because somehow, inexplicably, that resolution was issued "as a result of" the May 27, 2009 Resolution. This notwithstanding that failing to comply with the judge's order could subject the agency to sanctions and also that the resolutions dealt with materially different requests, and an entirely different gaming status that had been granted on each occasion to E-Games. Even one who does not know much about the gaming industry can easily conclude that a resolution granting a company a particular status as an operator under a different company's permit has absolutely nothing to do with and is not "issued as a result of" a separate resolution issued over three years later by the same gaming agency determining that the same company has met all of the separate and distinct legal requirements to be issued an independent and autonomous gaming permit. This is especially so when the very resolution that produced the gaming permit says very clearly that the sole cause and reason it is being issued is because the company requesting it has met all of the legal requirements for the issuance of the permit.

190. As a result of the above, the Sixteenth District Judge initiated another type of enforcement proceeding (known in Mexico as an *incidente de inejecución*) against SEGOB, seeking to have the appellate court force SEGOB to comply with his order, and sent the proceeding to the Collegiate Tribunal, where *Incidente de Inejecución* 82/2013 was registered.[517]

191. On February 19, 2014, despite the Sixteenth District Judge's October 14, 2013 Order and interpretation of its own ruling, the Collegiate Tribunal, in contravention of Mexican law, as will be explained in detail below,[518] found 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**").[519] The reasoning employed by the Collegiate Tribunal is baffling. They invented their own logic and rationale for the judge's ruling on the unconstitutionality of the May 27, 2009 Resolution and through that tortured reasoning found that SEGOB properly invalidated the November 16, 2012 Resolution granting the E-Games Independent Permit. As noted below, the Collegiate Tribunal grossly exceeded its mandate and authority in doing this. It is also perplexing that the Collegiate Tribunal was telling the *amparo* judge what his order meant and did not mean in direct contradiction to what Judge Gallardo clearly said he intended and did not intend through his ruling. All of this can only be explained once again by the severe irregularities that were introduced in the proceeding. As we know, we have evidence that the President's office directly intervened later in the Supreme Court to prevent Claimants' right to an effective appeal, so one can only conclude that there was similar political pressure placed on the Collegiate Tribunal.

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517 First Omar Guerrero Report, **CER-2**, ¶¶ 164, 191.

518 First Omar Guerrero Report, **CER-2**, ¶¶ 180-251; Memorial, ¶¶ 317-329.

519 First Omar Guerrero Report, **CER-2**, ¶¶ 165, 253, 334-335; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 65; Order of the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (Feb. 19, 2014), **C-290**.

192. On March 10, 2014, the Sixteenth District Judge, on remand, complied with the Collegiate Tribunal's February 19, 2014 Order, thus accepting SEGOB's fulfillment of the January 31, 2013 Order (the "**March 10, 2014 Order**").[520] The March 10, 2014 Order thus confirmed (wrongfully) the rescission of the November 16, 2012 Resolution which had granted the E-Games Independent Permit.

193. As explained in detail in the Memorial, Mexican law establishes a number of fundamental principles regarding *amparo* proceedings. Particularly, *amparo* judgments must "clearly and precisely"[521] establish the acts that are granted *amparo* protection, and compliance with an *amparo* judgment must be precise (*puntual*), in other words, without excesses or defects.[522]

194. The *Amparo* judgment here was "clear and precise."[523] The Sixteenth District Judge granted E-Mex's *amparo* only with respect to the May 27, 2009 Resolution.[524] This came in a later order in August. The Sixteenth District Judge did not mention in its January 31, 2013 Order that SEGOB had to rescind all resolutions based on or derived from the May 27, 2009 Resolution.[525] Therefore, to comply with the *Amparo* judgment, SEGOB had to revoke only the May 27, 2009 Resolution.[526] Therefore, rescinding any resolution other than the one from May 27, 2009 constituted an excess in the fulfilment of the *Amparo* judgment, as the Sixteenth District

[520] First Omar Guerrero Report, **CER-2**, ¶ 255; Order of the *Juez Decimosexto en Materia Administrativa del Primer Circuito* (Mar. 10, 2014), **C-291**.

[521] First Omar Guerrero Report, **CER-2**, ¶ 183.

[522] First Omar Guerrero Report, **CER-2**, ¶ 184.

[523] First Omar Guerrero Report, **CER-2**, ¶ 187.

[524] First Omar Guerrero Report, **CER-2**, ¶ 188

[525] First Omar Guerrero Report, **CER-2**, ¶ 189; Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Jan. 31, 2013), **C-18**.

[526] First Omar Guerrero Report, **CER-2**, ¶ 192.

Judge himself established in its October 14, 2013 Order.[527] There should be no question whatsoever that compliance did not require the revocation of the November 16, 2012 Resolution.

195. Mexico's arguments as to these points are equally unavailing. First, in rebutting Claimants' argument that the *Amparo* judgment was "clear and precise"[528] Mexico claims that because E-Mex generically indicated in its request for *amparo* that it was challenging the May 27, 2009 Resolution and "[a]ll of the effects and consequences derived from the challenged acts (*actos reclamados*)," [529] this was sufficient for purposes of SEGOB rescinding the November 16, 2012 Resolution without this constituting an excess in the fulfillment of the *Amparo* judgement.[530]

196. This is incorrect under Mexican law. The challenged act (*acto reclamado*) cannot be stated in a generic manner in an *amparo* proceeding.[531] It must be expressed with precision.[532] Mexican jurisprudence has clearly stated that if the challenged act is not identified with precision, it cannot become part of the legal action (*litis*).[533] E-Mex did not identify the November 16, 2012 Resolution with any sort of precision in its request for *amparo*.[534] In fact, E-Mex didn't even mention the November 16, 2012 Resolution in its request for *amparo*.[535] Therefore, this resolution was not a part of the legal action (*litis*) in *Amparo* 1668/2011.[536] And, as noted, the Sixteenth District Judge

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[527] First Omar Guerrero Report, **CER-2**, ¶ 192.

[528] First Omar Guerrero Report, **CER-2**, ¶ 187.

[529] E-Mex Third Amendment to Request for *Amparo* (Jun. 5, 2012), **C-269**.

[530] Counter-Memorial, ¶¶ 271-273; Second Omar Guerrero Report, **CER-5**, ¶ 74.

[531] Second Omar Guerrero Report, **CER-5**, ¶ 76; Abrogated *Amparo* Law, Art. 146, **CL-75**.

[532] Second Omar Guerrero Report, **CER-5**, ¶ 76; Abrogated *Amparo* Law, Art. 146, **CL-75**.

[533] Second Omar Guerrero Report, **CER-5**, ¶ 77.

[534] Second Omar Guerrero Report, **CER-5**, ¶¶ 78, 80; E-Mex Third Amendment to Request for *Amparo* (June 5, 2012), **C-269**.

[535] Second Omar Guerrero Report, **CER-5**, ¶¶ 78, 80; E-Mex Third Amendment to Request for Amparo (June 5, 2012), **C-269**.

[536] Second Omar Guerrero Report, **CER-5**, ¶ 77.

himself determined that the November 16, 2012 Resolution was "totally independent and autonomous and is not related in any way to the resolution declared unconstitutional," and that, as a result, SEGOB had exceeded its authority in nullifying that resolution when it fulfilled his January 31, 2013 Order.[537]

197. Second, Mexico claims that invalidating the effects or consequences of an act that has been declared unconstitutional does not violate the principle of relativity (*principio de relatividad)* under Mexican law (*i.e.*, that the judgment only affects the party who filed the complaint).[538] In other words, Mexico argues that the *Amparo* judgment invalidating the November 16, 2012 Resolution impacted only E-Mex, as the party who filed the complaint. This argument is as astonishing as it is silly. How can Mexico seriously maintain that the invalidation of the November 16, 2012 Resolution granting the E-Games Independent Permit does not impact Claimants and only impacted E-Mex? The *Amparo* judgment ultimately had a very meaningful and serious impact on circumstances that were not a part of the legal action (*litis*) in *Amparo* 1668/2011: a resolution that was not part of the legal action in the *amparo* (the November 16, 2012 Resolution granting the E-Games Independent Permit) was rescinded in the *amparo*.[539] For the reasons explained in the Memorial and above, the November 16, 2012 Resolution which granted the E-Games Independent Permit is completely independent from the May 27, 2009 Resolution.[540] The November 16, 2012 Resolution was also, as explained, not raised or identified in the request for *Amparo*. Therefore, rescinding the November 16, 2012 Resolution despite it having been

[537] Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), **C-24**.

[538] Counter-Memorial, ¶ 274.

[539] Second Omar Guerrero Report, **CER-5**, ¶ 84.

[540] Memorial, Section IV.P; *supra* Section II.F.

expressly established that it was granted independently from the May 27, 2009 Resolution violates the principle of relativity (*principio de relatividad)* under Mexican law.[541]

198. *Third*, Mexico claims that it does not constitute an irregularity that it was the Collegiate Tribunal, rather than the Sixteenth District Judge, who ruled the doctrine of acquired rights as unconstitutional).[542] Mexico claims that under Mexican law, "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" and that "the fact that the first and second ruling are not in agreement does not imply an error in either decision."[543] While this general statement is theoretically correct,[544] Mexico's argument to this effect is a deflection and misses the point.

199. The Collegiate Tribunal's actions were not irregular, illegal, and improper under Mexican law simply because its ruling was different from that of the Sixteenth District Judge. The Collegiate Tribunal's actions were irregular, illegal, and improper because, as explained in detail in the Memorial and below,[545] (i) the Collegiate Tribunal violated the fundamental principle in *amparo* proceedings that any considerations made in the enforcement stage of an *amparo* judgment must be limited exclusively to determining whether or not the competent authority complied in a precise manner, without excesses or defects, with the *amparo* judgment;[546] and, in doing so, (ii) it deprived E-Games of the rights conferred to it in the November 16, 2012 Resolution without affording E-Games the right to a separate judicial proceeding to be heard on the important question whether the November 16, 2012 Resolution that directly impacted its rights should be invalidated.

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[541] Second Omar Guerrero Report, **CER-5**, ¶ 90.

[542] Counter-Memorial, ¶ 275.

[543] Counter-Memorial, ¶ 275.

[544] Second Omar Guerrero Report, **CER-5**, ¶¶ 91-92.

[545] Memorial, Section IV.X.1.d.ii; Reply, Section II.D.

[546] First Omar Guerrero Report, **CER-2**, ¶ 182.

(b) The Collegiate Tribunal Deprived E-Games of the Rights Conferred to It in the November 16, 2012 Resolution Without Affording E-Games the Right to a Separate Judicial Proceeding

200. In its February 19, 2014 Order, the Collegiate Tribunal found 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 when it rescinded the November 16, 2012 Resolution.[547] Claimants argued that the February 19, 2014 Order was based upon a false premise and departed grossly from applicable Mexican law. Mexico's rebuttal is simply that Claimants' statement that the rebuttal was based upon a false premise is incorrect.

201. The Collegiate Tribunal's determination was based on an erroneous premise.[548] The Collegiate Tribunal's finding that the November 16, 2012 Resolution had been ruled unconstitutional by the *Amparo* judge was based on an (incorrect) finding by the Collegiate Tribunal that the Sixteenth District Judge had ruled the doctrine of acquired rights as unconstitutional."[549] The Collegiate Tribunal concluded that: "the fact is that both [permit] designations were based on the legal principle of acquired rights, a legal principle declared unconstitutional by the district judge."[550] This is incorrect and directly contrary to what the Sixteenth District Judge ruled. The Sixteenth District Judge stated in very clear terms that he did not find this doctrine unconstitutional: "[i]ndeed, in the *Amparo* judgment, Resolution DGAJS/SCEV/0260/2009-BIS dated May twenty-seven of two thousand and nine was declared unconstitutional, and not the legal principle of acquired rights [….]"[551] Despite the Sixteenth

[547] Memorial, ¶¶ 325-327.

[548] Memorial, ¶¶ 325-327.

[549] First Omar Guerrero Report, **CER-2**, ¶ 200.

[550] Order of the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (Feb. 19, 2014), pp. 98-99, **C-290**.

[551] Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), p. 23, **C-24**.

District Judge's clear findings, the Collegiate Tribunal declared the principle of acquired rights unconstitutional improperly, perplexingly and erroneously attributing that ruling to Judge Gallardo. Again, such a gross mischaracterization of the Sixteenth District Judge's ruling and such a fundamental and material departure from the requirements of Mexican law can only be explained by the exercise of political pressure on the Collegiate Tribunal.

202. Mexico claims that the Collegiate Tribunal did not declare the principle of acquired rights unconstitutional.[552] This is false. The language in the Collegiate Tribunal's February 19, 2014 Order is indisputable evidence. The Collegiate Tribunal found: "the fact is that both [permit] designations were based on the legal principle of acquired rights, a legal principle declared unconstitutional by the district judge."[553] Mexico's argument falls flat by the weight of this indisputable evidence. The Collegiate Tribunal clearly declared the principle of acquired rights unconstitutional, improperly attributing that ruling to the lower court.[554] This perhaps was the only way it could justify its improper and illegal ruling allowing SEGOB's invalidation of the November 2012 Resolution to stand.

203. In any event, Mexico claims that contrary to Claimants' argument that the rescission of the November 16, 2012 Resolution violated E-Games' right to a separate judicial proceeding to adjudicate the constitutionality of the November 16, 2012 Resolution, this did not infringe on E-Games right to defense.[555] Rather than rebut Claimants' extensive explanation regarding the impropriety of the Collegiate Tribunal's actions in the enforcement stage of the *amparo*

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[552] Counter-Memorial, ¶¶ 276-277; First Omar Guerrero Report, **CER-2**, ¶¶ 165, 253, 334-335; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 65; Order of the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (Feb. 19, 2014), **C-290**.

[553] Order of the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (Feb. 19, 2014), pp. 98-99, **C-290**.

[554] Second Omar Guerrero Report, **CER-5**, ¶ 95.

[555] Counter-Memorial, ¶¶ 278-280.

proceeding, Mexico simply asserts that Claimants were an "active participant" in *Amparo* 1668/2011, and had the opportunity to present a defense in each stage of the trial and to challenge the decisions rendered by the Sixteenth District Court and the Collegiate Tribunal.[556] The reason behind Mexico's failure to rebut Claimants' arguments is understandable: Mexico is well aware that, under Mexican law:

204. the enforcement stage of the *Amparo* judgment may only involve considerations as to whether SEGOB properly complied with the Sixteenth District Judge's order to rescind the May 27, 2009 Resolution and all administrative resolutions that legally derived from it and that were clearly specified by the *amparo* judge in the *Amparo* judgment.[557] The November 16, 2012 Resolution was not clearly specified by the *amparo* judge in the *Amparo* judgment.

205. that to rescind any further acts that were related to the May 27, 2009 Resolution (whether or not such acts were derived from one another), the rescission of such acts would have had to be stated in the *Amparo* judgment in a "clear and precise" manner.[558] SEGOB, of its own volition, determined which acts were related to the May 27, 2009 Resolution and should be rescinded and these Resolutions were not stated in the *Amparo* judgment in a "*clear and precise manner*;" and

206. that given that the *Amparo* judgment did not order the rescission of the November 16, 2012 Resolution in a "clear and precise" manner; it ordered only the rescission of the May 27, 2009 Resolution,[559] Mexican law dictates that in order to rescind the November 16, 2012 Resolution and to deprive E-Games of the rights originating from the November 16, 2012 Resolution, it would have needed to initiate a separate and independent judicial proceeding to consider the November

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[556] Counter-Memorial, ¶¶ 278-280.

[557] First Omar Guerrero Report, **CER-2**, ¶ 215.

[558] First Omar Guerrero Report, **CER-2**, ¶ 218; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 55.

[559] First Omar Guerrero Report, **CER-2**, ¶ 192.

16, 2012 Resolution, and any such proceeding would need to comply with the essential legal formalities under Mexican law.[560]

207. Additionally, Mexico has no meaningful response to Claimants' argument that the Collegiate Tribunal rescinded the November 16, 2012 Resolution without providing E-Games with the required judicial process and procedure under Mexican law.[561] This was a gross violation of E-Games' due process rights.

(c) The Collegiate Tribunal Improperly Determined in the Enforcement Stage of the Amparo Proceeding that the November 16, 2012 Resolution Derived from the May 27, 2009 Resolution

208. Mexico claims that the Collegiate Tribunal's determination that the November 16, 2013 Resolution derived from the May 27, 2009 Resolution was correct because, according to Mexico, the August 15, 2012 Resolution and the November 16, 2012 Resolution were a consequence of the May 27, 2009 Resolution.[562] Mexico's post hoc rationale is incorrect. The November 16, 2012 Resolution was not based on or derived from the May 27, 2009 Resolution or the August 15, 2012 Resolution.[563] One need only read the November 16, 2012 Resolution carefully to reach that conclusion. Claimants will not burden the Tribunal with a full restatement of that explanation here, but respectfully request that the Tribunal refer to such explanation above and in Claimants' Memorial.[564] Suffice it to say that (i) the November 16, 2012 Resolution itself stated that it was not based on or derived from the May 27, 2009 Resolution or the August 15, 2012 Resolution;[565]

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[560] First Omar Guerrero Report, **CER-2**, ¶ 243.

[561] First Omar Guerrero Report, **CER-2**, ¶ 242; Second Omar Guerrero Report, **CER-5**, ¶ 98.

[562] Counter-Memorial, ¶¶ 281-283.

[563] First Omar Guerrero Report, **CER-2**, ¶ 228, 237; Second Omar Guerrero Report, **CER-5**, ¶¶ 85-87.

[564] Memorial, Section IV.P; *see supra* Section II.F, II.G.

[565] First Omar Guerrero Report, **CER-2**, ¶¶ 228, 237; Second Omar Guerrero Report, **CER-5**, ¶ 86; SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), p. 6, **C-16** ("…it is hereby clarified that the resolution that gave rise to the primary petition of your client was not the change of status referred to in Resolution number DGAJS/SCEV/0827/2012 dated August 15, 2012, but on the contrary it was the request for a permit in terms of articles

and (ii) SEGOB's determination to that effect within the body of the November 16, 2012 Resolution constitutes an administrative act, and therefore, it is presumed valid and to have been issued in accordance with the law, unless proven otherwise by means of an administrative or judicial proceeding.[566] There was no administrative or judicial proceeding declaring invalid SEGOB's determination that the November 16, 2012 Resolution was not based on or derived from the May 27, 2009 Resolution. As a result, SEGOB's determination that the November 16, 2012 Resolution was not based on or derived from the May 27, 2009 Resolution was valid and binding at the time and it was wholly improper for the Collegiate Tribunal to conclude to the contrary.[567]

209. As explained in the Memorial, the Collegiate Tribunal's actions in reviewing the constitutionality of an administrative act (the November 16, 2012 Resolution) in the enforcement stage of *Amparo* 1668/2011 resulted in the irregular and unlawful alteration of the terms and scope of the *Amparo* judgment.[568] This irregular and unlawful action deprived Claimants of their independent permit, and was adopted without affording Claimants the opportunity to address the Collegiate Tribunal's findings in any substantive way.[569] This constituted yet another gross miscarriage of justice and a further violation of Claimants' due process rights.

20, 21, 22 and other relative and applicable regulations of the Games and Raffles Federal Law (. . . .)". **Spanish original**: "…*se aclara que la resolución que dio origen a la petición primaria de su representada, no fue el cambio de estatus a que se refiere el Oficio número DGAJS/SCEV/0827/2012 de fecha 15 de agosto de 2012, sino por el contrario lo fue la solicitud de Permiso en términos de los artículos 20, 21, 22 y demás relativos y aplicables del Reglamento de la Ley Federal de Juegos y Sorteos* (. . . .)").

[566] First Omar Guerrero Report, **CER-2**, ¶ 229; Second Omar Guerrero Report, **CER-5**, ¶ 87.

[567] First Omar Guerrero Report, **CER-2**, ¶ 230; Second Omar Guerrero Report, **CER-5**, ¶ 87.

[568] First Omar Guerrero Report, **CER-2**, ¶ 208.

[569] First Omar Guerrero Report, **CER-2**, ¶¶ 205-207.

(d) SEGOB's Politically Motivated Volte Face Results in its Repudiation of its Prior Resolutions Granting Claimants Their Autonomous Permit

210. As explained above, on August 26, 2013, the Sixteenth District Judge ruled that SEGOB had not complied with the January 31, 2013 Order and ordered SEGOB to rescind all resolutions based on or derived from the May 27, 2009 Resolution without specifying which resolutions were to be rescinded.[570] However, this time, unlike in his *Amparo* judgment—in which the Sixteenth District Judge ordered SEGOB to rescind the May 27, 2009 Resolution and to issue a new resolution consistent with its January 31, 2013 Order— the Sixteenth District Judge only ordered SEGOB to rescind all subsequent resolutions that resulted from and hence that were legally dependent upon the May 27, 2009 Resolution.[571] It did not also order SEGOB to issue new resolutions resolving the corresponding requests made by E-Games that led to the resolutions. This action by the Sixteenth District Judge to not allow or require SEGOB to issue new resolutions answering the initial requests made by E-Games, improperly limited E-Games' rights to challenge the resulting administrative action that should have ensured had SEGOB responded to the now-dangling and unresponded to administrative requests. For this reason, the August 26, 2013 Order had the effect of depriving E-Games and Claimants of any appellate recourse against SEGOB's rescission of all subsequent resolutions involving E-Games.[572]

211. Rather than substantively rebut Claimants' arguments, Mexico attempts to legitimize the Sixteenth District Judge's actions by resorting to unfounded, speculative assumptions as to what SEGOB's response would have been if the Sixteenth District Judge had ordered it to issue new

[570] Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Aug. 26, 2013), **C-23**; First Omar Guerrero Report, **CER-2**, ¶ 190; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 58; Third Gordon Burr Statement, **CWS-50**, ¶ 119; Third Erin Burr Statement, **CWS-51**, ¶ 127.

[571] Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Aug. 26, 2013), **C-23**.

[572] Paulsson at 134, **CL-177**.

resolutions responding to E-Games' request.[573] Mexico claims that it "likely" would have been futile to require that SEGOB respond to E-Games' petitions because SEGOB would "probably" have denied E-Games' requests because E-Games' permit petition filed on February 22, 2011 was based on the May 27, 2009 Resolution (among other resolutions).[574] This response is patently insufficient. Mexico cannot step in the shoes of the administrative gaming agency to say it would have been futile to require it to respond to administrative requests that legally are required to be answered. The point remains that Claimants' rights were grossly violated here because Judge Gallardo's order did not require the gaming agency to resolve the administrative requests that now have gone unanswered.

212. In any event, less than 24 hours after it was notified of the Sixteenth District Judge's August 26, 2013 Order, SEGOB issued a 12-page resolution rescinding seven additional resolutions, including, among others, the November 16, 2012 Resolution granting E-Games and Claimants the independent casino permit.[575] Mexico argues that it is not astonishing, suspicious, or unusual that it was able to research and prepare this 12-page memorandum rescinding the November 16, 2012 Resolution, amongst others, in 24 hours.[576]

213. Mexico explains that there was a very significant incentive for SEGOB to comply in due time with the *Amparo* judgment because the new *Amparo* Law provided for a more severe mechanism to prevent non-compliance with judgments by the responsible authorities, including financial and criminal sanctions for official in contempt.[577] As a result, according to José Raúl

[573] Counter-Memorial, ¶ 264.

[574] Counter-Memorial, ¶ 264.

[575] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 59; First Omar Guerrero Report, **CER-2**, ¶¶ 162, 191, 312; SEGOB Resolution (Aug. 28, 2013), **C-289**.

[576] Counter-Memorial, ¶ 284.

[577] Counter-Memorial, ¶ 285.

Landgrave Fuente ("**Mr. Landgrave**"), General Director of Constitutional Proceedings at SEGOB, once SEGOB notified the Sixteenth District Court of its compliance with the *Amparo* judgment on July 24, 2013, he recommended, given the short amount of time they would have to comply with the court order, that SEGOB prepare for the potential scenario that E-Mex were to challenge SEGOB's compliance with the *Amparo* judgment.[578]

214. The reality is that SEGOB's issuance of the August 28, 2013 Resolution within **only 24 hours** after learning of the August 26, 2013 Order is on its face highly irregular and unusual, as confirmed by Mr. González, former Deputy Director General of SEGOB's Games and Raffles Division.[579] Moreover, and as will be explained further below, the lack of reasoning in the August 28, 2013 Resolution and the lack of supporting documents underlying the Resolution is highly suspicious and reinforces Claimants' narrative that the revocation of the November 16, 2012 Resolution was arbitrary, politically motivated, and intentionally targeted to revoke the E-Games Independent Permit. As noted above, this plan had been hatched at the start of the Peña Nieto administration as evidenced by the comments Ms. Salas made in January 2013 calling the E-Games Independent Permit "illegal" and the Internal Memorandum the Claimants have cited astonishingly admitting that the Claimants' gaming permit was revoked because of some unspecified irregularity in its issuance, ***not because Judge Gallardo's order required it***.

215. First, SEGOB indicated that it had resolved to rescind the resolutions it listed in its August 28, 2013 Resolution after conducting a search of its records.[580]

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[578] Counter-Memorial, ¶ 285; Witness Statement of Mr. José Raúl Landgrave Fuentes ("Fuentes Statement"), **RWS-2**, ¶¶ 20-22.

[579] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 164-170.

[580] SEGOB Resolution (Aug. 28, 2013), **C-289**; Second Ezequiel González Matus Report, **CER-6**, ¶¶ 165, 167.

216. Second, after conducting this search, SEGOB would have had to identify, with precision, the administrative acts that it considered had to be rescinded in light of the Sixteenth District Judge's August 26, 2013 Order.[581]

217. Third, to offer valid and adequate grounds (*fundar y motivar*) for its August 28, 2013 Resolution, SEGOB had to explain (*razonar*) why each of the seven resolutions had to be rescinded.[582]

218. It is clear, then, that to issue its August 28, 2013 Resolution, SEGOB had to follow a logical and legal process which could only have been carried out with the precision necessary to comply with the August 26, 2013 Order once SEGOB was notified of the Sixteenth District Judge's order.[583] Therefore, Mexico's argument that SEGOB was able to do all of this and prepare and issue its resolution within 24 hours after it was notified of the judge's order is implausible. SEGOB's actions cannot be explained other than by improper political influence, corruption, and foul play.[584]

219. After Mexico's unavailing attempt to provide an explanation for SEGOB's irregular behavior in issuing its August 28, 2013 Resolution, Mexico attempts to rebut Claimants' claim that a few days after E-Mex filed its motion challenging SEGOB's compliance with the *Amparo* judgment, Mr. Francisco Salazar, Mr. Rojas Cardona's lawyer, approached Mr. Burr and informed him that "they controlled" the Sixteenth District Judge and had sufficient influence within SEGOB

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581 Second Ezequiel González Matus Report, **CER-6**, ¶ 168.

582 Second Ezequiel González Matus Report, **CER-6**, ¶ 169.

583 Second Ezequiel González Matus Report, **CER-6**, ¶ 170.

584 First Black Cube Statement, **CWS-57**, ¶ 49; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶¶ 54-59, 99-101; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 78; Third Gordon Burr Statement, **CWS-50**, ¶¶ 116-123.

to achieve the revocation of E-Games' permit.[585] Mexico does so by pointing to statements from Mr. Landgrave and Ms. Salas claiming that E-Mex did not influence their, or SEGOB's, actions in the *Amparo* 1668/2011 proceeding.[586]

220. This argument by Mexico is smoke and mirrors. Claimants are not arguing that E-Mex influenced SEGOB's actions. Rather, they are arguing, with strong evidence, that E-Mex claimed that it controlled the *amparo* judge and apparently did do so given that judge's highly irregular rulings that benefited E-Mex. As to SEGOB, Claimants have proven that this agency seized upon the ruling made by the *amparo* judge to further its political agenda to drive Claimants out of business in large part to favor the Hank family, who have undoubtedly benefited handsomely by having their fiercest competitor—i.e., Claimants—removed from the casino sector.

221. Mexico also completely ignores Claimants' arguments regarding SEGOB's unlawful (i) introduction of the November 16, 2012 Resolution in the enforcement stage of the *Amparo* 1668/2011 proceeding, and (ii) revocation of E-Games' permit by failing to follow the mechanism provided in the law for the legal revocation of a permit.

222. As Claimants explained in detail in the Memorial, SEGOB's actions can only be explained in the context of the PRI's political agenda to reverse, without precedent or legal basis, the granting of Claimants' November 16, 2012 permit by the PAN administration. SEGOB's actions resulted in the improper introduction and revocation of the November 16, 2012 Resolution into the *Amparo* 1668/2011 proceeding; which, coupled with the Sixteenth District Judge and the Collegiate Tribunal's egregious and unlawful conduct, resulted in the Claimants and E-Games being

[585] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶¶ 56, 85; Third Gordon Burr Statement, **CWS-50**, ¶ 118; Third Erin Burr Statement, **CWS-51**, ¶ 126.

[586] Counter-Memorial, ¶ 286; Fuentes Statement, **RWS-2**, ¶ 25; Salas Statement, **RWS-1**, ¶ 26.

unlawfully deprived of the rights that, as an independent permit holder, they acquired through the November 16, 2012 Resolution.[587]

223. Claimants will not burden the Tribunal with a full restatement of that explanation here, but respectfully request that the Tribunal refer to such explanation in Claimants' Memorial.[588] Simply put:

224. there is clear evidence that in its August 28, 2013 Resolution rescinding the November 16, 2012 Resolution, SEGOB employed a reasoning that departed from the order it received from the Sixteenth District Judge in his August 26, 2013 Order, and, importantly, that squarely contradicted the language and reasoning employed by SEGOB when it issued the November 16, 2012 Resolution.[589] As Claimants explained in the Memorial and above,[590] in its August 28, 2013 Resolution, SEGOB reasoned that each of the subsequent resolutions to the May 27, 2009 Resolution were based on the principle of acquired rights, which SEGOB argued had been ruled unconstitutional by the *Amparo* judge, despite this clearly not having been what the Sixteenth District Judge concluded in his January 31, 2013 Order, nor what he ordered SEGOB to do in his August 26, 2013 Order.[591] Moreover, in the November 16, 2012 Resolution, SEGOB expressly concluded that the E-Games' Independent Permit was unrelated to and separate from the May 27, 2009 Resolution, and that SEGOB's decision to grant E-Games its permit was based on E-Games' full compliance with all requirements contained in the Gaming Regulation for the issuance of a

[587] First Omar Guerrero Report, **CER-2**, ¶ 24(f).

[588] Memorial, ¶¶ 358-374.

[589] Memorial, ¶¶ 358-368.

[590] Memorial, ¶¶ 361-362.

[591] Memorial, ¶¶ 361-362; First Ezequiel González Matus Report, **CER-3**, ¶¶ 160(f), 163(f); SEGOB Resolution (Aug. 28, 2013), **C-289**.

new permit.[592] In August 2013, the PRI-controlled SEGOB was arbitrarily ignoring and contradicting what the same executive agency had decided only eight months earlier.

225. SEGOB revoked the E-Games' Independent Permit in clear contravention of Mexican administrative law because it failed to follow any of the three legal means provided for in Mexican law for the revocation of an administrative act, none of which contemplate the revocation of an administrative act in the enforcement stage of an *amparo* proceeding.[593]

226. Mexico does not even attempt to provide an explanation for SEGOB's clearly irregular, unlawful, and politically motivated behavior. The Tribunal should thus reject Mexico's unavailing and post-hoc attempts to justify SEGOB's clearly unlawful actions.

(e) The Incidente de Inejecución 82/2013

227. As explained above, on October 14, 2013, Judge Gallardo ruled that SEGOB exceeded its authority in fulfilling its January 31, 2013 Order.[594] As a result of this determination, Judge Gallardo initiated another type of enforcement proceeding (known in Mexico as an *incidente de inejecución*) against SEGOB and sent the proceeding to the Collegiate Tribunal, where *Incidente de Inejecución* 82/2013 was registered.[595] In the Memorial, Claimants explained that instead of initiating an *incidente de inejecución*, there were two more appropriate and straightforward ways for Judge Gallardo to have resolved his finding that SEGOB had improperly executed his *Amparo* judgment.[596] As explained in detail in the Memorial,[597] the two options available to the Sixteenth

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[592] First Ezequiel González Matus Report, **CER-3**, ¶ 73.

[593] Memorial, ¶¶ 369-374.

[594] *See* Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), **C-24**; First Omar Guerrero Expert Report, **CER-2**, ¶ 261; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 51.

[595] First Omar Guerrero Report, **CER-2**, ¶¶ 164, 191.

[596] Memorial, ¶¶ 330-334; First Omar Guerrero Report, **CER-2**, ¶¶ 263-284.

[597] Memorial, ¶¶ 331-333.

District Judge were (i) to issue an order specifying the scope of the constitutional protection (*amparo*) afforded and require SEGOB to comply with the *Amparo* judgment; and (ii) to initiate what is known in Mexico as an *incidente de aclaración oficiosa,* a motion directed at specifying, defining, or clarifying the terms of fulfillment of a judgment.[598] He did neither.

228. In response to Claimants' allegations, Mexico indicates that the fact that there were other options available in addition to the *incidente de inejecución* does not mean that the Sixteenth District Judge's analysis and decision to initiate the *incidente de inejecución* was improper from a legal standpoint.[599] However, Mexico does not rebut Claimants' arguments that the two other options available to the Sixteenth District Judge (Judge Gallardo) would have been more efficient than initiating the *incidente de inejecución* and would also have resulted in a better administration of justice.[600]

229. As Claimants have explained, what resulted from Judge Gallardo's circuitous and inefficient route of initiating the *incidente de inejecución* was a highly unusual and improper February 19, 2014 Order by the Collegiate Tribunal confirming SEGOB's rescission of E-Games' November 16, 2012 permit and rejecting the Sixteenth District Judge's interpretation of his own *Amparo* judgment.[601]

5. Judicial Irregularities in the *Amparo* 1668/2011 Proceedings Before the Mexican Supreme Court

230. On March 31, 2014, E-Games filed a *recurso de inconformidad* (motion for reconsideration) before the Mexican Supreme Court (the "**Supreme Court**"), challenging: (1) the Collegiate Tribunal's February 19, 2014 Order resolving *Incidente de Inejecución* 82/2013; and

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[598] First Omar Guerrero Report, **CER-2**, ¶ 264.

[599] Counter-Memorial, ¶ 289.

[600] First Omar Guerrero Report, **CER-2**, ¶¶ 267-284; Second Omar Guerrero Report, **CER-5**, ¶ 113.

[601] Order of the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (Feb. 19, 2014), **C-290**.

(2) the Sixteenth District Judge's March 10, 2014 Order accepting SEGOB's rescission of all resolutions issued in favor of E-Games after the May 27, 2009 Resolution, including the November 16, 2012 Resolution.[602]

231. On May 6, 2014, the Supreme Court admitted and agreed to hear E-Games' *recurso de inconformidad*.[603] However, on September 3, 2014, after accepting E-Games' appeal and substantively considering the case for months, the Supreme Court suddenly dismissed the action on procedural grounds and sent it back *to the same Collegiate Tribunal that issued the February 19, 2014 Order that was being appealed to resolve whether its own order was improper*.[604] This was very disconcerting for four main reasons.

232. First, because the Supreme Court had performed an initial review of whether to accept or dismiss E-Games' *recurso de inconformidad* when it was first filed and had already decided to hear the case on the merits.[605]

233. Second, because the clerk (known in Mexico as the *proyectista*) to whom Justice Alberto Pérez Dayán ("**Justice Pérez Dayán**")—the judge who was appointed to E-Games' *recurso de inconformidad*—assigned to the case, Ms. Irma Gómez ("**Ms. Gómez**"), had met frequently over the course of four months with Claimants' Mexican counsel, Mr. Gutiérrez, to discuss the substance and merits of the issues raised by Claimants in their appeal.[606]

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[602] First Omar Guerrero Report, **CER-2**, ¶¶ 286; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 65; E-Games *Recurso de Inconformidad* (Mar. 31, 2014), **C-296**.

[603] *See* Order of the *Suprema Corte de Justicia de la Nación* (May 6, 2014), **C-25**; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 96.

[604] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 101; First Omar Guerrero Expert Report, **CER-2**, ¶ 288; Mexican Supreme Court Order (Sept. 3, 2014), **C-26**.

[605] Fourth Julio Gutiérrez Statement, **CWS-52**¶ 101.

[606] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 98.

234. Third, because only one week before the Supreme Court would have ruled on the merits of E-Games' *recurso de inconformidad*, Mr. Gutiérrez—who was accompanied by the founding partner of his firm, Mr. Ricardo Ríos Ferrer ("**Mr. Ríos Ferrer**")—met with Justice Pérez Dayán.[607] In the waiting room for Justice Pérez Dayán's chambers, Mr. Gutiérrez and Mr. Ríos Ferrer crossed paths with President Peña Nieto's head lawyer, Humberto Castillejos ("**Mr. Castillejos**"), who was there waiting to meet with Justice Pérez Dayán.[608] While in the waiting room, Mr. Gutiérrez and Mr. Ríos Ferrer overheard Mr. Castillejos ask another lawyer who was there with him for E-Games' *recurso de inconformidad* case file.[609] This happened right before Mr. Castillejos walked into Justice Pérez Dayán's chambers.[610] Interestingly, Justice Pérez Dayán had been recently appointed Justice of the Supreme Court at the proposal of the Peña Nieto administration and Mr. Castillejos.[611] Mr. Gutiérrez and Mr. Ríos Ferrer met with Justice Pérez Dayán immediately after Mr. Castillejos. Very strangely, during the meeting with Messrs. Gutiérrez and Ríos Ferrer, Justice Pérez Dayán appeared unusually nervous and barely discussed the *recurso de inconformidad* with them, which was very different than the various prior interactions that Mr. Gutiérrez had with Justice Pérez Dayán over the prior months in relation to the case.[612] Ms. Gómez, who had also been discussing the substance of the *recurso de inconformidad* with Mr. Gutiérrez for moths, also appeared to be very nervous, and refused to

[607] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 99.

[608] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 99.

[609] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 100.

[610] Fourth Julio Gutiérrez Statement, **CWS-52** ¶ 100.

[611] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 97.

[612] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 100; Third Gordon Burr Statement, **CWS-50**, ¶ 122; Third Erin Burr Statement, **CWS-51**, ¶ 132.

discuss the case with Mr. Gutiérrez again.[613] This about-face on the part of Justice Pérez Dayán and Ms. Gómez was highly unusual and suspicious.

235. Fourth, as discussed below, because the Supreme Court not only dismissed the action on procedural grounds, it *returned E-Games' appeal to the same Collegiate Tribunal* that had issued the February 19, 2014 Order that was being appealed to determine whether the Collegiate Tribunal's order was improper, *thereby effectively depriving Claimants of their appeal rights and denying it access to justice*.

236. Not coincidentally, one week after Mr. Castillejos' meeting with Justice Pérez Dayán, the Supreme Court reversed course and resolved to not hear E-Games' case on the merits. The Supreme Court's formalistic argument for dismissing the case was that a *recurso de inconformidad* does not proceed against a judgment issued in an *incidente de inejecución*.[614] Instead of ruling on the merits of E-Games' petition (after agreeing to hear the merits and considering and analyzing the merits of E-Games' petition for four months), the Supreme Court remanded the case to the same Collegiate Tribunal that had issued the decision that was the subject of E-Games' appeal to the Supreme Court.[615] In other words, the Supreme Court ordered the Collegiate Tribunal to review its own February 19, 2014 Order, in which it had previously ruled that *Incidente de Inejecución* 82/2013 was unsubstantiated and that SEGOB had not exceeded its authority in fulfilling the *Amparo* judgement by rescinding the November 16, 2012 Resolution which granted the E-Games Independent Permit. It is not the normal procedure for the Supreme Court to decide to hear a case, and then after months of considering it on the merits, to dismiss it on procedural

[613] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 100.

[614] Mexican Supreme Court Order (Sept. 3, 2014), **C-26**.

[615] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 101; First Omar Guerrero Report, **CER-2**, ¶ 288; Mexican Supreme Court Order (Sept. 3, 2014), **C-26**.

grounds.[616] Also, as will be explained in further detail below, it is a significant procedural and substantive violation for the same court to review and rule on the propriety of its prior decisions, as this results in the court essentially becoming the judge of its own acts.[617]

237. On January 29, 2015, unsurprisingly, the Collegiate Tribunal upheld its prior decision that rescinded the November 16, 2012 Resolution.[618] It determined, once again (as it had already decided when it first reviewed the Sixteenth District Judge's *recurso de inejecución*), that the November 16, 2012 Resolution was derived from and was a direct consequence of the May 27, 2009 Resolution, which the Sixteenth District Judge had ruled unconstitutional. As a result, the Collegiate Tribunal upheld the Sixteenth District Judge's March 10, 2014 Order affirming SEGOB's August 28, 2013 Resolution rescinding *all* administrative resolutions issued to E-Games, including the November 16, 2012 Resolution.[619]

238. As Claimants explained in the Memorial, the unavailability of any other legal recourse against a judgment resolving an *incidente de inejecución*, combined with the Supreme Court's unusual and suspicious decision to remand the case to the same Collegiate Tribunal, effectively and practically denied E-Games an appeal of this ruling, and constituted a denial of justice, a violation of Mexican law, and of basic principles of justice, including the American Convention on Human Rights.[620]

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[616] Fourth Julio Gutiérrez Statement, **CWS-52**¶ 101.

[617] Second Omar Guerrero Report, **CER-5**, ¶ 165.

[618] Order of the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (Jan. 29, 2015), **C-297**.

[619] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 103; First Omar Guerrero Expert Report, **CER-2**, ¶¶ 290, 314; Order of the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (Jan. 29, 2015), **C-297**.

[620] Mexican Supreme Court Order (Sep. 3, 2014), **C-26**; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 101; First Omar Guerrero Report, **CER-2**, ¶¶ 292-299; Article 25 of the American Convention on Human Rights, **CL-76**.

239. Mexico presents three unavailing arguments in response to Claimants' assertions regarding the irregularities in the proceedings before the Supreme Court.

240. First, Mexico alleges that the Supreme Court remanding the case to the Collegiate Tribunal does not constitute a denial of justice because the Supreme Court has found that the *amparo* proceeding is compatible with Article 25 of the American Convention on Human Rights.[621] This is a deflection by Mexico and misses the point. Claimants' argument is that the unavailability of any other legal recourse against a judgment resolving an *incidente de inejecución*, combined with the Supreme Court's decision to remand the case to the same Collegiate Tribunal that had previously ruled on the case, effectively and practically deprived E-Games of an appeal of the Collegiate Tribunal's February 19, 2014 Order. That the same collegiate court resolved the *recurso de inconformidad* against an order issued by the Sixteenth District Court as a result of the Collegiate Tribunal's ruling, is an important procedural violation. This effectively eliminates the opportunity to appeal the decision confirming the fulfillment of the *amparo* judgment because the appeal was heard and resolved by the same collegiate court that already ruled on the matter in the *incidente de inejecución*.[622] In other words, the Collegiate Court becomes the judge of its own acts.[623] That is a denial of justice under international whatever Mexican procedure says about that.

241. Second, Mexico claims that the explanation as to why the Supreme Court declined to hear Claimants' case on the merits is simple: Claimants failed to offer sufficient legal arguments to justify the "exceptional" nature of their *recurso de inconformidad*.[624] This is incorrect, and Mexico is aware of this, which is why it does not cite to any language in the Supreme Court's resolution

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621 Counter-Memorial, ¶ 295.

622 Second Omar Guerrero Report, **CER-5**, ¶ 165.

623 Second Omar Guerrero Report, **CER-5**, ¶ 165.

624 Counter-Memorial, ¶ 295.

to support its claim.[625] The truth is that the Supreme Court dismissed Claimants' appeal on the grounds that a *recurso de inconformidad* does not proceed against judgments issued in an *incidente de inejecución* because a judgment issued in an *incidente de inejecución* is not one of the scenarios contemplated under Article 201 of the *Amparo* Law for filing a *recurso de inconformidad*.[626]

242. Third, Mexico claims that it is implausible that Mr. Castillejos could have influenced the Supreme Court's decision because (i) neither Mr. Landgrave nor his office were ever contacted, received instructions, or requests for information from Mr. Castillejos regarding the case; and (ii) Mr. Castillejos is responsible for handling legal matters of the highest importance arising directly from the President's actions, and the Claimants' Casinos are neither a matter of priority or relevant to the day-to-day activities of the President or his Legal Counsel.[627] Mexico also asserts that Claimants do not offer any evidence of Mr. Castillejos' supposed intervention in Claimants' case.[628]

243. First, responding to Mexico's incredulous argument that this issue was not of sufficient importance to reach the radar of the then president of Mexico, the facts and evidence disprove that. Claimants won't rehash all of that here, but suffice it to say that President Peña Nieto, who had been heavily supported in his presidential campaign by the Hank family, had to pay them back for

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[625] Counter-Memorial, ¶ 295.

[626] Article 201 of the Ley de Amparo provides that: The *recurso de inconformidad* proceeds against the judgement that: I. Deems the amparo judgment to have been fulfilled, in the terms of article 196 of this Law; II. Declares that there is a material or legal impossibility to comply with the same or orders the definitive closing of the matter; III. Declares moot or unfounded the complaint of repetition of the challenged act; or IV. Declares the complaint unfounded or inadmissible for non-compliance with the general declaratory judgment of unconstitutionality ("*El recurso de inconformidad procede contra la resolución que: I. Tenga por cumplida la ejecutoria de amparo, en los términos del artículo 196 de esta Ley; II. Declare que existe imposibilidad material o jurídica para cumplir la misma u ordene el archivo definitivo del asunto; III. Declare sin materia o infundada la denuncia de repetición del acto reclamado; o IV. Declare infundada o improcedente la denuncia por incumplimiento de la declaratoria general de inconstitucionalidad*"); Abrogated *Amparo* Law, Article 201, **CL-75**; First Omar Guerrero Report, **CER-2**, ¶ 292.

[627] Counter-Memorial, ¶ 297.

[628] Counter-Memorial, ¶ 297.

this support. Getting rid of Claimants as competitors in the casino industry did just that. The evidence garnered by Black Cube and offered in this case by Claimants proves that.[629]

244. Second, Mexico's narrative is contradicted by Mr. Gutiérrez's testimony. Mr. Gutiérrez and Mr. Ríos Ferrer personally witnessed Mr. Castillejos in Justice Pérez Dayán's waiting room and heard him ask another lawyer for E-Games' case file pertaining to the *recurso de inconformidad* and days later, Claimants' appeal was dismissed on formalistic procedural grounds.[630] Mexico, however, does not present any evidence (because it cannot) to prove that the reason behind Mr. Castillejos' visit to Justice Pérez Dayán was something other than to exert improper influence over the Supreme Court on E-Games' matter.[631] Not surprisingly, Mexico completely ignores Claimants' argument that Justice Pérez Dayán's son was working for Mr. Castillejos at the very time that he was deciding Claimant's case, including when he decided to dismiss Claimants' case on procedural grounds.[632]

245. It is evident that Mexico's new PRI administration interfered to influence the fate of Claimants' gaming permit and gaming business, and Mexico's attempts to rebut Claimants' arguments and evidence to this effect are unavailing.

6. The Revocation of the November 16, 2012 Resolution in the *Amparo* 1668/2011 Proceeding Was Contrary To the Second District Judge's Determination in the *Amparo* 1151/2012 Proceeding and To E-Mex's Procedural Conduct in This Proceeding

246. On December 18, 2012, E-Mex initiated the *Amparo* 1151/2012 proceeding ("**Amparo 1151/2012**" or the "**Second *Amparo* proceeding**") to challenge various actions taken by SEGOB

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[629] First Black Cube Statement, **CWS-57**, ¶¶ 40-48, 51-53; Black Cube Recordings, **C-399**; Black Cube Recordings Transcripts, **Appendix B**.

[630] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶¶ 99-100.

[631] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 121.

[632] Fourth Julio Gutiérrez Statement, **CWS-52** ¶ 101; *Presumen Conflicto de Interés en Ministerio* (Feb. 8, 2017). Retrieved from https://www.heraldo.mx/presumen-conflicto-de-interes-en-ministro/, **C-365**.

in relation to its permit.[633] *Amparo* 1151/2012 was assigned to the Second District Judge on Administrative Matters for the State of Nuevo León (*Juez Segundo de Distrito en Materia Administrativa en el Estado de Nuevo León*) ("**Second District Judge**" or "***Juez Segundo***").[634] On March 19, 2013 E-Mex sought to amend its request for *amparo* in the *Amparo* 1151/2012 proceeding to include, among others, SEGOB's November 16, 2012 Resolution, seeking to have the Second District Judge find this resolution unconstitutional (the "**Amendment**").[635] On March 20, 2013, the Second District Judge admitted the Amendment (the "**March 20, 2013 Order**"),[636] and on March 5, 2013, E-Games appealed the Second District Judge's March 20, 2013 Order through *Recurso de Queja* 30/2013.[637] *Recurso de Queja* 30/2013 was assigned to the First Collegiate Tribunal on Administrative Matters in the Fourth District ("**First Collegiate Tribunal**" or "***Primer Tribunal Colegiado***").[638] In *Recurso de Queja* 30/2013, E-Games argued that E-Mex had learned of the November 16, 2012 Resolution in advance of March 1, 2013, contrary to what E-Mex stated in the Amendment, and as a result, E-Mex's extemporaneous filing of the Amendment was inadmissible (*improcedente*) and should have been dismissed by the Second District Judge.[639] On October 17, 2013, the First Collegiate Tribunal agreed with E-Games, finding that the Amendment was inadmissible because it was filed extemporaneously, and therefore, under Mexican law, the November 16, 2012 Resolution constituted an implicitly

[633] E-Mex Request for Amparo (Dec. 18, 2012), **C-273**; First Omar Guerrero Report, **CER-2**, ¶ 300.

[634] First Omar Guerrero Report, **CER-2**, ¶ 300.

[635] First Omar Guerrero Report, **CER-2**, ¶ 302; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 51; E-Mex Amendment (Mar. 19, 2013), **C-292**.

[636] First Omar Guerrero Report, **CER-2**, ¶ 302; Order of the Second District Judge accepting to process the filing of E-Mex's Amendment (Mar. 20, 2013), **C-293**.

[637] First Omar Guerrero Report, **CER-2**, ¶ 303; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 51; E-Games brief in *Recurso de Queja 30/2013* (Mar. 5, 2013), **C-294**.

[638] First Omar Guerrero Report, **CER-2**, ¶ 303.

[639] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 51.

consented act (*acto consentido tácitamente*) by E-Mex, which could not be afforded *amparo* protection (the "**October 17, 2013 Order**").[640]

247. Claimants will not burden the Tribunal with a full restatement of the explanation as to why (i) the Second District Judge's determination in the *Amparo* 1151/2012 proceeding that E-Mex's Amendment was inadmissible, and (ii) E-Mex's procedural conduct in *Amparo* 1151/2012, the Sixteenth District Judge and the Collegiate Tribunal's resolutions ordering the rescission of the November 16, 2012 Resolution in *Amparo* 1668/2011 violated Mexican law, basic principles of due process and natural justice, and constituted a gross miscarriage of justice, but respectfully request that the Tribunal refer to such explanation in Claimants' Memorial.[641] In sum:

248. the First Collegiate Tribunal's October 17, 2013 Order constituted a final ruling with *res judicata* effects in the *Amparo* 1151/2012 proceeding,[642] and, therefore, under Mexican law, as a result of such order, E-Mex exhausted its means to challenge the November 16, 2012 Resolution via an *amparo*.[643] As a result, it was unlawful to afford E-Mex another opportunity to challenge the November 16, 2012 Resolution by means of an *amparo* in the *Amparo* 1668/2011 proceeding.[644]

249. the Sixteenth District Judge (Judge Gallardo) and the Collegiate Tribunal were both well aware of the *Amparo* 1151/2012 proceeding, and more importantly, knew that the November 16,

[640] First Omar Guerrero Report, **CER-2**, ¶¶ 303; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 51; Order of the *Primer Tribunal Colegiado en Materia Administrativa del Cuarto Circuito* (Oct. 17, 2013), **C-295**.

[641] Memorial, ¶¶ 335-348.

[642] First Omar Guerrero Report, **CER-2**, ¶¶ 305-307, 318, 321.

[643] First Omar Guerrero Report, **CER-2**, ¶ 323.

[644] First Omar Guerrero Report, **CER-2**, ¶ 320; Abrogated *Amparo* Law, Article 193, **CL-75**.

2012 Resolution had been unsuccessfully challenged by E-Mex in the *Amparo* 1151/2012 proceeding;[645]

250. the Sixteenth District Judge (Judge Gallardo) and the Collegiate Tribunal should have found that because E-Mex took blatantly contradictory positions with respect to the November 16, 2012 Resolution in the *Amparo* 1151/2012 and in the *Amparo* 1668/2011 proceedings, by virtue of the principle of estoppel, it was not possible to leave the November 16, 2012 Resolution without effects as a result of the *Amparo* 1668/2011 proceeding.[646] The Sixteenth District Judge and the Collegiate Tribunal's failure to detect that the November 16, 2012 Resolution could not be revoked by virtue of the principle of estoppel constituted a gross miscarriage of justice.

251. Mexico claims that the rulings in *Amparo* 1151/2012 were not binding in *Amparo* 1668/2011.[647] Mexico's conclusion is demonstrably inaccurate.

252. First, Mexico argues that the First Collegiate Tribunal's determination in *Amparo* 1151/2012 is limited to a specific case, and as such, arguments and evidence presented by the parties cannot be automatically applied to another proceeding, even if the two proceedings share some similarities.[648] This is incorrect. Mexican *Amparo* Law provides that "implicitly consented acts" are those against which an *amparo* proceeding is not filed in a timely manner.[649] The November 16, 2012 Resolution became an "implicitly consented act" as a result of *Amparo* 1151/2012 because the First Collegiate Tribunal determined that E-Mex's Amendment was filed extemporaneously. The First Collegiate Tribunal found that this was the case because E-Mex

[645] First Omar Guerrero Report, **CER-2**, ¶ 328.

[646] First Omar Guerrero Report, **CER-2**, ¶ 336.

[647] Counter-Memorial, ¶¶ 299-307.

[648] Counter-Memorial, ¶ 302.

[649] Memorial, ¶¶ 339-340; First Omar Guerrero Report, **CER-2**, ¶ 316; Abrogated *Amparo* Law, Article 73, Section XII, **CL-75**.

learned of the November 16, 2012 Resolution on February 8, 2013.[650] This is important because, under the *Amparo* Law, (i) it is undeniably improper to rescind an act that has previously been implicitly consented to, especially where that implied consent is *res judicata* for the party seeking to invalidate the administrative act;[651] and (ii) an "implicitly consented act" is not subject to further challenge in an *amparo* proceeding.[652] Therefore, contrary to what Mexico argues, the First Collegiate Tribunal's determination in *Amparo* 1151/2012 was not limited to that specific case because the November 16, 2012 Resolution was an "implicitly consented act" that could no longer be challenged in any *amparo* proceeding.[653] Notably, Mexico does not even attempt to provide a substantive answer to Claimants' arguments that the November 16, 2012 Resolution was an implicitly consented act, and therefore, it could not be challenged in *Amparo* 1668/2011.[654]

253. Second, Mexico claims that one ruling by a collegiate court cannot be binding on another collegiate court because there is no hierarchy between the two courts.[655] Mexico relies on Article 193 of the Abrogated *Amparo* Law to support its argument.[656] However, this article is irrelevant and inapplicable to the case at issue.[657] Article 193 of the Abrogated *Amparo* Law refers to the mandatory nature of jurisprudence.[658] It states that jurisprudence established by a collegiate court is not mandatory for other collegiate courts, as they have the same hierarchy.[659] However,

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650 First Omar Guerrero Report, **CER-2**, ¶ 316; Order of the *Primer Tribunal Colegiado en Materia Administrativa del Cuarto Circuito* (Oct. 17, 2013), **C-295**.

651 First Omar Guerrero Report, **CER-2**, ¶ 324.

652 Second Omar Guerrero Report, **CER-5**, ¶¶ 177-178.

653 Second Omar Guerrero Report, **CER-5**, ¶¶ 177-178.

654 Second Omar Guerrero Report, **CER-5**, ¶ 180.

655 Counter-Memorial, ¶ 303.

656 Counter-Memorial, ¶ 304; Abrogated *Amparo* Law, Article 193, **CL-75**.

657 Second Omar Guerrero Report, **CER-5**, ¶¶ 185-187.

658 Second Omar Guerrero Report, **CER-5**, ¶ 186.

659 Second Omar Guerrero Report, **CER-5**, ¶ 186.

Claimants' arguments do not refer to the enforceability of collegiate court jurisprudence.[660] Claimants' argument involves the effects of a collegiate court's ruling with *res judicata* effects in one *amparo* proceeding, in a parallel *amparo* proceeding.[661] While a collegiate court is not required to follow jurisprudence established by another collegiate court, it is required to respect the procedural firmness (*firmeza procesal*) of prior rulings on the same issue.[662] Therefore, the Collegiate Tribunal was required to—but did not— take into consideration in *Amparo* 1668/2011 the First Collegiate Tribunal's October 17, 2013 Order because this decision constituted a final ruling with *res judicata* effects in *Amparo* 1151/2012 on the same issue being considered by the Collegiate Tribunal in *Amparo* 1668/2011.[663]

254. Third, Mexico asserts that the Sixteenth District Judge was not required to follow the criteria adopted by the First Collegiate Tribunal, and was instead only bound by the Collegiate Tribunal's February 19, 2014 decision in *Incidente de Inejecución* 82/2013.[664] Relatedly, Mexico claims that the Sixteenth District Judge could not question or deviate from the Collegiate Tribunal's ruling in *Incidente de Inejecución* 82/2013.[665] Once again, Mexico's argument is a diversion and completely misses the point.

255. As Claimants explained in the Memorial, both Judge Gallardo and the Collegiate Tribunal were obligated to examine *ex officio* due fulfillment (*debido cumplimiento*) of the *Amparo* judgment.[666] This was particularly important with respect to the Collegiate Tribunal. If the

[660] Second Omar Guerrero Report, **CER-5**, ¶ 187.

[661] Second Omar Guerrero Report, **CER-5**, ¶ 187.

[662] Second Omar Guerrero Report, **CER-5**, ¶ 188.

[663] Second Omar Guerrero Report, **CER-5**, ¶ 187.

[664] Counter-Memorial, ¶ 304.

[665] Counter-Memorial, ¶ 304.

[666] Memorial, ¶¶ 341-344; First Omar Guerrero Report, **CER-2**, ¶ 327.

Collegiate Tribunal had examined *ex officio* due fulfillment of the January 31, 2013 Order, and had taken into consideration the First Collegiate Tribunal's October 17, 2013 Order, it would have found that enforcement of the *Amparo* judgment in the *Amparo* 1668/2011 proceeding could not result in the rescission of the November 16, 2012 Resolution because E-Mex implicitly consented to the November 16, 2012 Resolution in *Amparo* 1151/2012. Under Mexican law, E-Mex's prior implicit consent to the November 16, 2012 Resolution meant that E-Mex could not attack the validity of the November 16, 2012 resolution a second time.[667] Mexico also fails to address Claimants' arguments relating to the *amparo* judges being required by law to *ex officio* examine compliance with *amparo* judgments,[668] including the evidence provided by Claimants proving that while the First Collegiate Tribunal's October 17, 2013 Order was not part of the *Amparo* 1668/2011 case file, it was uploaded to the Integrated System for Case Files (*Sistema Integral de Seguimiento de Expedientes*, "**SISE**") on October 24, 2013 and that thus the relevant judge's here had access to this order.[669] Mexico declines to address Claimants' arguments on this point.[670] Mexico does not refute that the Sixteenth District Judge and the Collegiate Tribunal should have taken into account the determinations in *Amparo* 1151/2012 when deciding on the fulfillment of the *Amparo* 1668/2011 judgment.[671] Simply noting that the Sixteenth District Judge had to abide by the Collegiate Tribunal's decision in *Incidente de Inejecución* 82/2013 represents an incomplete

[667] First Omar Guerrero Report, **CER-2**, ¶¶ 332, 334. As stated above, the First Collegiate Tribunal determined that E-Mex became aware of the November 16, 2012 Resolution on February 8, 2013.

[668] First Omar Guerrero Report, **CER--2**, ¶ 324; Abrogated *Amparo* Law, Article 214, **CL-75**.

[669] First Omar Guerrero Report, **CER-2**, ¶ 331.

[670] Second Omar Guerrero Report, **CER-5**, ¶ 197.

[671] Second Omar Guerrero Report, **CER-5**, ¶ 198.

analysis of the case at issue,[672] and therefore, an unavailing attempt to object to Claimants' well-evidenced arguments.

256. Fourth, Mexico argues that SEGOB (i) could not deviate from the Sixteenth District Judge and Collegiate Tribunal's orders because doing so could have resulted in severe penalties for SEGOB's Director General or his removal from office; and (ii) SEGOB could not perform an analysis on the impact of *Amparo* 1151/2012 in *Amparo* 1668/2011 because this would have implied SEGOB assuming the role of a judge resolving the proceeding, when its role is limited to complying with the orders issued by the courts.[673] This is incorrect. As Claimants explained in the Memorial, when on August 26, 2013 the Sixteenth District Judge (Judge Gallardo) ordered SEGOB to rescind the resolutions that were directly, legally flowing from the May 27, 2009 Resolution, if SEGOB believed that this required that it rescind the November 16, 2012 Resolution in the *Amparo* 1668/2011 proceeding, SEGOB was required by law to inform the Sixteenth District Judge that it was impossible for SEGOB to comply with this mandate because it had already been determined in the *Amparo* 1151/2012 proceeding that the November 16, 2012 Resolution could not be afforded *amparo* protection, and therefore, compliance with the judgment was impossible.[674]

257. Contrary to Mexico's arguments, this does not mean that SEGOB would be assuming the role of a judge or resolving the proceeding.[675] Under Article 196 of the *Amparo* Law, the court determines whether or not it is impossible to comply with the *Amparo* judgment.[676] SEGOB was

[672] Second Omar Guerrero Report, **CER-5**, ¶ 198.

[673] Counter-Memorial, ¶ 305.

[674] Memorial, ¶¶ 375-379; First Omar Guerrero Report, **CER-2**, ¶ 360.

[675] Second Omar Guerrero Report, **CER-5**, ¶ 203.

[676] Second Omar Guerrero Report, **CER-5**, ¶ 203; Abrogated *Amparo* Law, Article 196, **CL-75**.

not required to issue a decision, but rather simply to inform the Sixteenth District Judge that it could not comply with the *Amparo* judgment in the *Amparo* 1668/2011 proceeding in the manner requested by the judge.[677] Moreover, the sanctions indicated by Mexico for non-compliance are applicable only when there is non-compliance with a final judgment (*ejecutoria*) without justified reasons, but not when it is established that it is impossible to comply with the judgment, as this represents a justified reason for non-compliance.[678]

258. It also is quite interesting that Mexico is citing concerns about SEGOB being sanctioned for departing from Judge Gallardo's orders when the record establishes that *this is precisely what SEGOB did when it invalidated the November 16, 2012 Resolution granting the E-Games Independent Permit*. SEGOB certainly did not seem very worried about being sanctioned when Judge Gallardo explicitly told it that it had exceeded his authority by invalidating the November 16, 2012 Resolution and it then nonetheless ignored the judge's directive and faced the possibility of sanctions before the Collegiate Tribunal. One would suppose that SEGOB was not very worried about that if, as Claimants have proven, there was a political fix that also permeated the judiciary.

259. *Lastly*, Mexico claims that the principle of estoppel cannot be applied to determine whether a resolution is susceptible of being challenged through an *amparo* proceeding because this would be equivalent to a judge evaluating the Claimants' (in this case, E-Mex) "strategy and ascribing it a consequence based on an unproven (alleged) intention, merely by attempting to defend its interests through available legal mechanisms."[679] Mexico, in essence, implies that the principle of estoppel is some sort of penalty or punishment for a party who attempts to initiate two related

[677] Second Omar Guerrero Report, **CER-5**, ¶ 203.

[678] Second Omar Guerrero Report, **CER-5**, ¶ 204.

[679] Counter-Memorial, ¶¶ 306-307.

actions.[680] This is incorrect. The principle of estoppel establishes that a party may not attempt to initiate an action that is contradictory to its prior actions.[681] This does not mean that the party is being "punished," but simply that certain statements or actions taken in a first instance generated trust in another party in good faith, and such good faith would be violated if it were deemed admissible to admit and analyze a later contradictory claim.[682] The principle of estoppel also advances the important principle of judicial finality.

260. In this case, as described above, it is clear that E-Mex adopted contradictory positions in *Amparo* 1151/2012 and *Amparo* 1668/2011. Therefore, as Claimants explained in detail in the Memorial, by virtue of the principle of estoppel, the Sixteenth District Judge (Judge Gallardo) and the Collegiate Tribunal should have held that the *Amparo* 1668/2011 proceeding could not result in the rescission of the November 16, 2012 Resolution.[683]

7. The Tribunal Should Draw an Adverse Inference Based Upon Mexico's Failure To Produce Documents Related to the Mexican Executive Branch and E-Mex's Interference with the *Amparo* 1668/2011 Proceeding

261. In the document request phase of these proceedings, the Claimants requested from Mexico various documents relating to the Mexican executive branch and E-Mex's interference with the *Amparo* 1668/2011 proceeding. As explained above, in Procedural Order No. 10, the Tribunal declined to rule on the numerous requests for which Mexico simply claimed that it had not identified any documents that would be responsive to the specific request, and invited the Claimants to request that the Tribunal draw adverse inferences arising from Respondent's non-

[680] Second Omar Guerrero Report, **CER-5**, ¶ 218.

[681] Second Omar Guerrero Report, **CER-5**, ¶ 218.

[682] Second Omar Guerrero Report, **CER-5**, ¶ 218.

[683] Memorial, ¶¶ 345-348; First Omar Guerrero Report, **CER-2**, ¶ 336; Second Omar Guerrero Report, **CER-5**, ¶ 223.

production of documents.[684] In this context, the Claimants expressly request that the Tribunal draw adverse inferences arising from Mexico's gross failure to produce any documents relating to the Mexican executive branch and E-Mex's interference with the *Amparo* 1668/2011 proceeding. In the document exchange phase of the case, the Claimants' requested that Mexico produce the following documents:

- **Request 28:** Any document related to or prepared in connection with any requests or communications by officials from the executive branch of the Mexican government to and/or with any judges and/or judicial officials regarding the Amparo 1668/2011 proceeding and/or E-Games' permit, including without limitation, copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (oficios), emails or messages sent via Whatsapp, text message, iMessage, WeChat, Signal Messenger, Telegram, or any other cloud-based messaging service, and other documents reflecting such requests or communications, prepared between January 1, 2012 and March 31, 2015.

- **Request 29:** Any document related to or prepared in connection with Mr. Landgrave's July 24, 2013 recommendation to the Games and Raffles Division that it prepare for any possible consequences of the Sixteenth District Judge ordering that SEGOB rescind any resolutions deriving from the May 27, 2009 Resolution, including without limitation, copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (oficios), and other documents prepared by, without limitation, the Ministry of Economy, Mr. Landgrave, and/or SEGOB, between January 1, 2013 and December 31, 2013.

- **Request 30:** Any document related to or prepared in connection with the Sixteenth District Judge's August 26, 2013 Order and SEGOB's August 28, 2013 Resolution, including without limitation copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (oficios), and any other document prepared by, without limitation, the Ministry of Economy, Ms. González Salas, Mr. Landgrave, and Mr. García Hernández, and/or SEGOB, between January 1, 2013 and December 31, 2013.

[684] Procedural Order No. 10 (Mar. 26, 2021), ¶ 8 ("Where a requesting party has challenged a representation by the requested party that it has conducted a reasonable and proportionate search for documents responsive to a request, that will be a matter for submissions (including as to whether adverse inferences should be drawn against the requested party) in pre-hearing pleadings and at the hearing.").

- **Request 32:** Any document related to or prepared in connection with any possibility that SEGOB employees could face personal liability for failing to comply with the Sixteenth District Judge's October 14, 2013 Ruling, including without limitation copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (oficios), and any other document prepared by, without limitation, the Ministry of Economy, Ms. González Salas, Mr. Landgrave, and Mr. García Hernández, and/or SEGOB, between January 1, 2013 and December 31, 2013.

- **Request 33:** Any document related to or prepared in connection with, or reflecting an analysis of the Incidente de Inejecución 82/2013, including without limitation copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (oficios), and any other document prepared by, without limitation, the Ministry of Economy, Ms. González Salas, Mr. Landgrave, and Mr. García Hernández, and/or SEGOB, between January 1, 2013 and December 31, 2013.

- **Request 34:** Any document related to or prepared in connection with any requests or communications by Mr. Humberto Castillejos (or anyone who reported to him) to and/or with SEGOB officials, or vice versa, in connection with the Amparo 1668/2011 proceeding and/or E-Games' permit, including without limitation, copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (oficios), emails or messages sent via Whatsapp, text message, iMessage, WeChat, Signal Messenger, Telegram, or any other cloud-based messaging service, and other documents prepared by, without limitation, the Ministry of Economy, Mr. Landgrave, and/or SEGOB, between January 1, 2013 and December 31, 2015.

- **Request 35:** Any document related to or prepared in connection with Mexico's decision to transfer Judge José Luis Caballero from the Seventh Collegiate Tribunal to a different court and/or Mexico's subsequent decision to replace Judge Caballero with an interim clerk, including without limitation, copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (oficios) regarding the transfer of Judge Caballero and/or his replacement with an interim clerk, prepared between September 1, 2014 and March 31, 2015.

- **Request 36:** Any document related to or prepared in connection with any requests or communications by Mr. Humberto Castillejos, or any other legal advisors of President Peña Nieto, to and/or with Justice Alberto Pérez Dayán, or vice versa, in connection with the *Amparo* 1668/2011 proceeding and/or E-Games' permit, including without limitation, copies of internal or

external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (*oficios*), emails or messages sent via Whatsapp, text message, iMessage, WeChat, Signal Messenger, Telegram, or any other cloud-based messaging service, and other documents reflecting such requests or communications, prepared between April 1, 2014 and January 31, 2015.

- **Request 37:** Any document related to or prepared in connection with any meetings that Justice Alberto Pérez Dayán held with officials from the executive branch, including without limitation Mr. Humberto Castillejos and SEGOB officials, in connection with the *Amparo* 1668/2011 proceeding, including but not limited to copies of correspondence, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (*oficios*), and any other document prepared prior to, during, and after the meetings, prepared between April 1, 2014 and January 31, 2015.

- **Request 38:** Any document related to or prepared in connection with any requests or communications by E- Mex or its representatives, including without limitation Mr. Francisco Salazar, to and/or with judicial officials, including without limitation the Sixteenth District Judge, regarding the *Amparo* 1668/2011 proceeding and/or E-Games' permit holder status, including without limitation, copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (*oficios*), emails or messages sent via Whatsapp, text message, iMessage, WeChat, Signal Messenger, Telegram, or any other cloud-based messaging service, and other documents reflecting such requests or communications, prepared between January 1, 2013 and March 31, 2015.

- **Request 39:** Any document related to or prepared in connection with any requests or communications by E- Mex or its representatives, including without limitation Mr. Francisco Salazar, to and/or with SEGOB officials, regarding the *Amparo* 1668/2011 proceeding and/or E-Games' permit holder status, including without limitation, copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (*oficios*), emails or messages sent via Whatsapp, text message, iMessage, WeChat, Signal Messenger, Telegram, or any other cloud-based messaging service, and other documents reflecting such requests or communications, prepared between January 1, 2013 and March 31, 2015.

262. These documents are relevant and material to Claimants' arguments that there was improper interference on the part of the executive branch of the Mexican government or E-Mex in the *Amparo* 1668/2011 proceedings to orchestrate a pre-ordained and politically dictated

outcome that would benefit President Peña Nieto's political allies at the expense of Claimants and E-Games. These documents are also relevant and material to Claimants' arguments that SEGOB's revocation of E-Games' permit was related to improper influences exerted over SEGOB by President Peña Nieto's administration to further the president's desire to pay back the Hank family for its support. In response to these requests, Mexico stated that it had not identified any documents that would be responsive to these requests. As Claimants stated in their Redfern, Respondent's failure to identify any documents is implausible and disingenuous.

263. For example, Mexico's assertion regarding the lack of requests or communications between officials from the executive branch of the Mexican government to and/or with any judges and/or judicial officials regarding the *Amparo* 1668/2011 proceeding essentially means that there was not a single communication or exchange of requests between members of the executive branch of the Mexican government regarding the *Amparo* 1668/2011 proceeding, or between members of the executive branch and Mexican judges and/or judicial officials regarding the *Amparo* 1668/2011 proceeding and/or E-Games' permit. This is simply not believable as Claimants have produced evidence of coordination between the executive branch and the judicial branch in connection with *Amparo* 1668/2011.[685]

264. Mexico also claims that it was unable to identify any documents related to or prepared in connection with Mr. Landgrave's July 24, 2013 recommendation to the Games and Raffles Division that it prepare for any possible consequences of the Sixteenth District Judge (Judge Gallardo) ordering that SEGOB rescind any resolutions deriving from the May 27, 2009 Resolution. This is also implausible, particularly because Mexico argues that the reason why

[685] First Black Cube Statement, **CWS-57**, ¶ 49; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶¶ 54-59, 99-101; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 127-129, 154; Third Gordon Burr Statement, **CWS-50**, ¶¶ 116-123.

SEGOB issued its August 28, 2013 resolution less than 24 hours after it was notified of the Sixteenth District Judge's August 26, 2013 Order—timing which the Claimants have noted is highly suspicious and unusual—was because Mr. Landgrave had, as a result of the new *Amparo* Law, instructed that the Games and Raffles Division prepare for any possible consequences of the Sixteenth District Judge ordering that SEGOB rescind any resolutions deriving from the May 27, 2009 Resolution. Mexico on the one hand claims that Mr. Landgrave issued an instruction within SEGOB to the effect that it prepare for a potential order from Judge Gallardo, but on the other hand claims that it was unable to identify any documents pertaining to such instruction. Mexico does not produce even Mr. Landgrave's instruction (or any other related documents reflecting an analysis of the E-Games Independent Permit, but somehow over seven years later, Mr. Landgrave is able to recall that he issued an instruction to this effect.[686] This is simply not credible. Mexico wants the Tribunal to believe that there was absolutely no communications and/or work product prepared in response to Mr. Landgrave's instruction to the Games and Raffles Division and that there were no drafts of SEGOB's August 28, 2013 Resolution prior to it being notified of the District Judge's August 26, 2013 Order. Moreover, Mexico would have the Tribunal believe that Ms. Salas and SEGOB generated no documents and/or correspondence (not a single piece of paper) related to the *amparo* proceedings involving E-Games. This is inconsistent with how actions are carried out in government and therefore, implausible.

265. As a result of Respondent's failure to identify any documents in response to the aforementioned requests, Claimants request that the Tribunal draw an adverse inference that there was improper executive interference in the *amparo* proceedings that disadvantaged Claimants and

[686] Fuentes Statement, **RWS-2**, ¶ 18-25.

ultimately, and without appropriate due process, resulted in the illegal revocation of E-Games' permit.

M. The Suspensions and Closures of the Casinos Were Improper and Not in Accordance with Mexican Law

266. As explained in the Memorial on the Merits, on April 24, 2014, SEGOB illegally closed down all of Claimants' Casinos through the use of excessive police force and other illegal and irregular tactics, and notwithstanding that E-Games had filed its *recursos de inconformidad* to the Supreme Court and that Claimants' appeal proceedings were still pending.[687]

267. Mexico, however, now contends in its Counter-Memorial that "SEGOB exercised its authority in accordance with the law and that Claimants always had access to legal remedies to challenge the Respondent's actions and defend its interests."[688] More specifically, Mexico argues that: (1) in order for SEGOB to perform its supervisory and control activities, the Federal Gaming Law, in particular its Article 10, orders federal and state authorities, including police, to provide support to SEGOB when enforcing the Federal Gaming Law;[689] (2) at all times it complied with the Mexican law formalities under the Federal Gaming Law and the Gaming Regulation regarding an inspection order and a certificate of inspection;[690] and (3) since the Motion for Reconsideration did not suspend the effects of the revocation of E-Games' permit and the temporary precautionary measure, revoked on September 22, 2014, determined that the revocation of the E-Games permit became effective on March 10, 2014, SEGOB was not barred from exercising its inspection powers

[687] Memorial, ¶¶ 380–412.

[688] Counter-Memorial, ¶ 308.

[689] Counter-Memorial, ¶¶ 309–314.

[690] Counter-Memorial, ¶¶ 315–324.

or from closing the Casinos.[691] All of Mexico's arguments are incorrect and contrary to Mexican law.

1. Mexican Law Sets Forth Limitations and Requirements for SEGOB's Use of Police Force to Enforce the Federal Gaming Law

268. In essence, Mexico argues that it carried out the inspections in accordance with applicable statutes because it was "common practice" to have the presence of police force in an inspection and because Inspection Reports[692] confirmed that extraordinary police force was necessary in this case.[693] Neither contention is true.

269. Mexico clearly misconstrues Article 10 of the Federal Gaming Law, which allows the presence of police force to provide support to SEGOB when enforcing the Federal Gaming Law. As Mr. González explains, the Judicial Power has set forth limitations to the use of police force, meaning that SEGOB does not have unrestricted access to the use of police force in its enforcement of the Federal Gaming Law.[694] Moreover, Mr. González explains that courts have set forth criteria for determining when the use of police force is warranted in a particular case.[695] Specifically, authorities like SEGOB have to determine whether the use of police force is reasonable and proportional to the case at hand.[696] Mexican courts have reiterated these criteria, even confirming that the use of police force should disrupt at a minimum the sphere of peoples' rights.[697]

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691 Counter-Memorial, ¶¶ 325–341.

692 Certificate of Inspection Mexico City Casino (Apr. 24, 2014), **C-300**; Certificate of Inspection Cuernavaca Casino (Apr. 24, 2014), **C-301**; Certificate of Inspection Puebla Casino (Apr. 24, 2014), **C-302**; Certificate of Inspection Naucalpan Casino (Apr. 24, 2014), **C-303**; Certificate of Inspection Villahermosa Casino (Apr. 24, 2014), **C-304**.

693 Counter-Memorial, ¶¶ 319–320.

694 Second Ezequiel González Matus Report, **CER-6**, ¶¶ 208-209.

695 Second Ezequiel González Matus Report, **CER-6**, ¶ 210.

696 Second Ezequiel González Matus Report, **CER-6**, ¶ 211.

697 Second Ezequiel González Matus Report, **CER-6**, ¶ 212.

(a) There was nothing ordinary or common about the inspections in April 2014

270. As Mr. González concludes, there is no common practice in the use of the police force to carry out SEGOB inspections, particularly if the use of the police force departs from the criteria set forth by the Judicial Power and is as disruptive as the ones SEGOB performed on April 24, 2014.[698] This is likewise confirmed by Claimants' witnesses, Messrs. Patricio Chávez, Héctor Ruiz, and Alfredo Galván.[699] As Messrs. Chávez, Ruiz and Galván explain, all of them had previously participated in SEGOB inspections at Claimants' Casinos, but never had SEGOB showed up with such excessive police force as it did on April 24, 2014.[700] Therefore, there was nothing ordinary or common about the inspections on April 24, 2014.[701]

271. In Mr. Chávez's experience, he participated in three prior SEGOB inspections.[702] In all these inspections there was little to no presence of police force.[703] There was just one occasion in 2011 in the Naucalpan Casino where SEGOB appeared with 4 – 6 police officers, but at no time did that inspection remotely resemble the aggressive, military style raid that occurred in April 2014.[704] Messrs. Ruiz and Galván also reported similar experiences in their respective Casinos. For example, Mr. Ruiz recalls at least 4 - 5 previous inspections where there was no presence of

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[698] Second Ezequiel González Matus Report, **CER-6**, ¶ 211.

[699] Second Witness Statement of Patricio Gerardo Chávez Nuño ("Second Patricio Chávez Statement"), **CWS-66** ¶¶ 6-10; Second Witness Statement of Héctor Ruiz ("Second Héctor Ruiz Statement"), **CWS-67** ¶¶ 6-11; Second Witness Statement of Alfredo Galván Menesses ("Second Alfredo Galván Statement"), **CWS-68** ¶¶ 8-10.

[700] Second Patricio Chávez Statement, **CWS-66**, ¶ 5; Second Héctor Ruiz Statement, **CWS-67**, ¶ 6; Second Alfredo Galván Statement, **CWS-68**, ¶ 5.

[701] Second Patricio Chávez Statement, **CWS-66**, ¶ 10; Second Héctor Ruiz Statement, **CWS-67**, ¶ 11; Second Alfredo Galván Statement, **CWS-68**, ¶ 9.

[702] Second Patricio Chávez Statement, **CWS-66**, ¶¶ 7–9.

[703] Second Patricio Chávez Statement, **CWS-66**, ¶¶ 7–9.

[704] Second Patricio Chávez Statement, **CWS-66**, ¶ 9.

police force,[705] while Mr. Galván recalls at least three inspections with no presence of police force.[706]

272. Moreover, as Mr. Chávez explains, the excessive presence of police force had such a visceral impact on him that it was more than evident that SEGOB's intention in the April 2014 inspection was to close down the Naucalpan Casino, and not to conduct a routine inspection.[707] Mr. Chávez was able to confirm this when he started to receive calls from other Casinos where SEGOB had arrived with excessive police force as well.[708] All of this was also confirmed by Messrs. Ruiz and Galván.[709] It was clear that SEGOB's intention on April 24, 2014 was to shut down the Casinos with aggressive and unnecessary force.

273. Mr. Chávez also explains that there were other irregular actions from SEGOB on April 24, 2014 that departed from previous standard inspections. For example, SEGOB officials were openly hostile and aggressive with him and others from the very beginning of the inspection and had no intention of reviewing the documents or conducting an inspection at all.[710] SEGOB officials then prohibited Mr. Chávez from having any contact with Claimants' legal representative, even prohibiting him from using his phone.[711] In addition, SEGOB officials threatened to arrest and detain several employees, including Mr. Chávez.[712] Lastly, Mr. Chávez recalls that the customers were clearly scared and threatened by the way they were escorted out of the premises,

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[705] Second Héctor Ruiz Statement, **CWS-67**, ¶¶ 7–10.

[706] Second Alfredo Galván Statement, **CWS-68**, ¶¶ 6–7.

[707] Second Patricio Chávez Statement, **CWS-66**, ¶ 11.

[708] Second Patricio Chávez Statement, **CWS-66**, ¶ 12.

[709] Second Héctor Ruiz Statement, **CWS-67**, ¶¶ 11–12; Second Alfredo Galván Statement, **CWS-68**, ¶¶ 9–10.

[710] Second Patricio Chávez Statement, **CWS-66**, ¶¶ 14–15.

[711] Second Patricio Chávez Statement, **CWS-66**, ¶ 16.

[712] Second Patricio Chávez Statement, **CWS-66**, ¶ 18.

thus confirming that SEGOB was openly hostile and aggressive towards them as well.[713] Both Messrs. Ruiz and Galván also reported similar issues in their respective casinos.[714] None of these irregularities had occurred in *any* of the prior inspections at the Casinos, confirming that the April 2014 inspections were anything but routine.

274. Lastly, Mr. Ruiz explains that Mexico's witness' (Mr. García Hernández) analysis[715] of what occurred in the Villahermosa Casino is completely unsupported by any evidence on the record, particularly since Mr. García Hernández was not even present during the April 24, 2014 inspection.[716] Mexico argues through Mr. García, who was not present in the Villahermosa casino, that if SEGOB determines to close down an establishment at the end of an inspection, then it proceeds to shut down all power to the establishment and then formally close the establishment.[717] However, this is not what happened at the Villahermosa casino. As Mr. Ruiz explains, at the very *beginning* of the inspection he was ordered by SEGOB officials to shut down all security cameras.[718] The inspection then proceeded as explained in the First Héctor Ruiz Statement,[719] notably that SEGOB personnel, aided by Mexican federal police dressed in special operations SWAT gear and toting long guns, (i) entered the Casinos and immediately blocked all entrances and exits, eventually allowing customers to leave but in some instances restricting employees to management's offices; (ii) prevented the individuals attending to SEGOB's inspection proceedings and the Casino employees from contacting attorneys; and (iii) *refused to provide a copy of the*

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[713] Second Patricio Chávez Statement, **CWS-66**, ¶ 17.

[714] Second Héctor Ruiz Statement, **CWS-67**, ¶ 13; Second Alfredo Galván Statement, **CWS-68**, ¶ 7.

[715] Counter-Memorial, ¶ 323.

[716] Second Héctor Ruiz Statement, **CWS-67**, ¶¶ 14–16.

[717] Counter-Memorial, ¶ 323.

[718] Second Héctor Ruiz Statement, **CWS-67**, ¶ 15.

[719] First Witness Statement of Héctor Ruiz ("First Héctor Ruiz Statement"), **CWS-55**, ¶ 13.

closure orders to management.[720] As a result, the inspection ultimately ended in the casino being formally closed down and all power turned off.[721] In light of the above, Mr. Ruiz confirmed that Mr. García Hernández's testimony is not only inaccurate, but it is unsupported by any evidence,[722] and therefore, it should be disregarded by this Tribunal.

275. As if the above was not enough, documentary evidence from SEGOB undoubtedly confirms that SEGOB visited the Casinos that day to shut them down completely as a result of a resolution from SEGOB in the *Amparo* 1668/2011 proceeding, and not to carry out a routine inspection as they now try to allege in their Counter-Memorial.[723] More specifically, the verification orders issued by SEGOB on or about April 23, 2014, expressly instructed SEGOB officials "*to proceed with the closures accordingly*," given that, according to SEGOB, the E-Games' Independent Permit was revoked as a result of SEGOB's August 28, 2013 Order.[724] Indeed, and as Mr. Gutiérrez explains, these verification orders prove that on April 24, 2014, SEGOB officials arrived with police force with clear instructions to close down Claimants' Casinos in a coordinated fashion along with the closure of E-Mex's casinos.[725]

276. To add insult to injury, another internal document from SEGOB further buttresses the point that SEGOB clearly planned and organized the closure of Claimants' Casinos on April 24, 2014.[726] This internal document, found nestled away in an administrative proceedings case file related to

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[720] First Héctor Ruiz Statement, **CWS-55**, ¶¶ 10–24.

[721] First Héctor Ruiz Statement, **CWS-55**, ¶ 23.

[722] Second Héctor Ruiz Statement, **CWS-67**, ¶ 16.

[723] Counter-Memorial, ¶¶ 315–316.

[724] SEGOB Verification Orders instructing SEGOB Officials to Close Down Claimants' Casinos (Apr. 23, 2014), **C-402** ("*proceder a la clausura correspondiente*"); Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 106.

[725] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 106.

[726] SEGOB Internal Document: Steps to Follow by SEGOB Officials for Closing Down Claimants' Casinos, Case File AJP-0067-2014-VII, San Jerónimo, Mexico City Casino, **C-403**; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 107.

the closure of the Mexico City casino, demonstrates unequivocally that SEGOB had prepared precise instructions for SEGOB officials to follow during the so-called inspections on April 24, 2014. These instructions consisted of the following: (1) use police force to prevent any person or document to enter the establishments; (2) ask the floor manager or whomever is in charge in the Casino that day to identify himself and then ask him to nominate two witnesses; and (3) the floor manager may only provide SEGOB with physical documents in his possession at the time of the inspection, and may not request any documents by email or mail.[727] Moreover, this internal document also provided specific language for SEGOB officials to use in carrying out the closure of the Casinos.[728] Specifically, the internal document instructs SEGOB officials to say the following:

> oficio DGAJS/SCEVF/P-06/2005/BIS has ceased to have effects in favor of **E-Games (refer to this as a resolution [*oficio*], not a permit**), so the appropriate course of action is suspend immediately all activities and close down the establishment (…).[729] (English translation of Spanish original).

277. In light of the above, SEGOB instructed its officials to refer to the E-Games Independent Permit only as a Resolution (*oficio*) and not a permit. Moreover, it is also evident that SEGOB officials arrived on April 24, 2014, with clear instructions from SEGOB to shut down Claimants' Casinos, regardless of any documents, justifications or evidence that E-Games may have put forward.[730] Accordingly, there was nothing ordinary about the inspections that day, and Mexico

[727] SEGOB Internal Document: Steps to Follow by SEGOB Officials for Closing Down Claimants' Casinos, Case File AJP-0067-2014-VII, San Jerónimo, Mexico City Casino, **C-403**; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 107.

[728] SEGOB Internal Document: Steps to Follow by SEGOB Officials for Closing Down Claimants' Casinos, Case File AJP-0067-2014-VII, San Jerónimo, Mexico City Casino, **C-403**; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 108.

[729] SEGOB Internal Document: Steps to Follow by SEGOB Officials for Closing Down Claimants' Casinos, Case File AJP-0067-2014-VII, San Jerónimo, Mexico City Casino, **C-403** ("*oficio DGAJS/SCEVF/P-06/2005-BIS, a favor de* ***Exciting Games (referirse a este como oficio, no como permiso)****, por lo que lo procede es la suspension inmediata de las actividades y la clausura del establecimiento*."); Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 108.

[730] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 109.

unquestionably carried out the closures in an illegal and non-transparent manner without affording Claimants any due process, either before or following the closures.

(b) Mexico provides no evidence showing why it was necessary to use police force in the April 2014 inspections

278. As Mr. González explains, Mexico's argument that the Inspection Orders showed evidence of why it was necessary to use police force in the April 2014 inspections is not only incorrect as a matter of Mexican law, but there is no evidence at all supporting the use of police force in any the Inspection Orders.

279. Mr. González confirms that there are no documents, neither the certificate of inspection or closure orders, containing any reasoning or motivation for the use of police force, let alone pursuant to the criteria set forth by Mexican courts that require it to be reasonable and proportional to the case at hand.[731] As Mr. González explains, with respect to the closing down of an establishment, SEGOB had an obligation to demonstrate with information and reasoning that the use of police force was reasonable and proportionate, so as to comply with Articles 14 and 16 of the Constitution.[732]

280. Accordingly, under Mexican law, it is necessary to provide information supporting the use of police force in an inspection or closure of an establishment.[733] This is required for several reasons. First, the closure of an establishment is an act that has a definitive impact over a person's property rights.[734] Second, a closure also curtails a person's possession of its property.[735] As a result, it is imperative for any inspection or closure order to comply with all formalities and

[731] Second Ezequiel González Matus Report, **CER-6**, ¶ 213.

[732] Second Ezequiel González Matus Report, **CER-6**, ¶ 212.

[733] Second Ezequiel González Matus Report, **CER-6**, ¶ 212.

[734] Second Ezequiel González Matus Report, **CER-6**, ¶ 185.

[735] Second Ezequiel González Matus Report, **CER-6**, ¶ 186.

requirements for the use of police force, particularly if the use of police force will be used to deprive a person of its property rights. SEGOB, in violation of the Claimants' rights, clearly did not comply with any of the formalities under Mexican law in the April 2014 inspections.

2. Mexican Law Requires SEGOB To Comply with Specific Requirements and Formalities Regarding Inspection Orders and Certificates of Inspection, With Which it Failed to Comply

281. Mexico argues that the inspections of Claimants' Casinos were ordered and executed in accordance with the Federal Gaming Law and the Gaming Regulation.[736] According to Mexico, this means that both the inspection orders and certificates of inspection handed at the end of the closure of the Casinos fully complied with Mexican law.[737] None of this is correct.

282. First, in its Counter-Memorial, Mexico concedes that SEGOB issued six Inspection Orders on April 23, 2014, that did 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."[738] Mexico thus argues that "from the location of the establishments and the reference to the Permitholder-BIS Oficio [November 16, 2012 Resolution], there is no doubt that the Inspection Orders were directed towards the E-Games casinos and not the E-Mex casinos."[739] Mexico's Inspection Orders, however, are in breach of Mexican law.

283. Mexican law requires SEGOB to comply with specific requirements and formalities to conduct an inspection which could potentially lead to the closure of an establishment.[740]

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[736] Counter-Memorial, ¶¶ 315–324.

[737] Counter-Memorial, ¶¶ 315–324.

[738] Counter-Memorial, ¶ 315 ("*Las órdenes no hacen referencia al nombre de la empresa a la que pertenecen los establecimientos, sólo indican la dirección en la que deben de presentarse los inspectores comisionados para realizar la inspección.*").

[739] Counter-Memorial, ¶¶ 316, 321–322 ("*Además, el contenido de las órdenes permite concluir fácilmente que se refieren a los Casinos de E-Games porque señalan el domicilio en donde se localizaban sus establecimientos.*").

[740] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 185-193.

Specifically, SEGOB's Inspection Orders should have clearly specified the name of the company to which the establishments belong.[741] As Mr. González explains, the requirement for SEGOB to provide the name of the company on an inspection order is clearly established in Article 145 of the Gaming Regulation.[742] Yet, as Mexico conceded in its Counter-Memorial, it did not provide the name of the company on the inspection orders for Claimants' Casinos.

284. This is of particular importance when one considers the Mexican law requirements and formalities for closing an establishment. Mr. González explains that the act of closing down of an establishment is divided into two components: an inspection order and the actual inspection.[743] It is only during the inspection itself where it is possible to close down an establishment.[744] Because of the potential closure of an establishment during an inspection, it is imperative that the inspection order comply with the requirements set forth in Article 63 of *Ley Federal de Procedimiento Administrativo* ("**Federal Law of Administrative Procedures**") and Article 145 of the Gaming Regulation, which as mentioned above requires SEGOB to clearly identify the name of the company to which the establishments belong.[745]

285. However, as already explained, Mexico did not comply with this crucial requirement that it appropriately identify the name of the company it planned to inspect/close down. As explained in the Memorial on the Merits, Messrs. Chávez, Ruiz and Galván all confirmed that the inspection or closure orders, *which SEGOB officials refused to produce during the closures*, were directed at

[741] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 187, 189.

[742] Second Ezequiel González Matus Report, **CER-6**, ¶ 189; Gaming Regulation, Article 145, **CL-72**.

[743] Second Ezequiel González Matus Report, **CER-6**, ¶ 175.

[744] Second Ezequiel González Matus Report, **CER-6**, ¶ 175.

[745] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 177-179; Federal Administrative Procedure Law, Article 63, **R-064**.

E-Mex, not E-Games.[746] All SEGOB officials, however, ignored Messrs. Chávez, Ruiz, and Galván's remarks explaining that the inspection orders were directed at the wrong company, thus confirming that SEGOB only had authorization to close down E-Mex's casinos, not E-Games' Casinos, and despite this, SEGOB proceeded to illegally close down Claimants' Casinos no matter what.[747]

286. Mexican law also requires that a certificate of inspection comply with certain requirements. As Mr. González explains, Article 68 of the Federal Law of Administrative Procedures provides rules for conducting an inspection, such as: (1) the inspector has to provide proper credentials; (2) the inspector has to provide the person in charge of the establishment with a copy of the inspection order; (3) the inspector must provide a certificate of inspection in the presence of two witnesses.[748] And the certificate of inspection has to provide a list of information, including the date and time the inspection ended.[749]

287. Notwithstanding these clear requirements, the certificates of inspection addressed at E-Games contain serious deficiencies that further prove that Mexico did not comply with the Federal Gaming Law and the Gaming Regulation. As Mr. González explains, the certificates of inspection contain the following deficiencies: (1) the certificates of inspection do not indicate the date and time when the inspection ended; (2) the certificates of inspection do not indicate whether the inspection order was shown to the person in charge of the establishment; (3) the certificates of

[746] Memorial, ¶¶ 390–392.

[747] Memorial, ¶¶ 390–392.

[748] Second Ezequiel González Matus Report, **CER-6**, ¶ 181.

[749] Second Ezequiel González Matus Report, **CER-6**, ¶ 182.

inspection do not include the name of the person in charge of the establishment as well as the name of the two witnesses.[750]

288. In light of all the above, SEGOB did not comply with the specific and detailed requirements under Mexican law for either the inspection orders or the certificates of inspection, as required by the Federal Gaming Law, the Gaming Regulation, and the Federal Law of Administrative Procedures.

3. SEGOB Was Precluded from Closing the Casinos in April 2014 Due to Pending Appeals and An Injunction Precluding Alteration of the Status Quo Pending Resolution of the Appeals

289. As previously explained in the Memorial on the Merits, Claimants demonstrated that SEGOB was precluded from closing the Casinos because the alleged main reason for the closure, that is, the lack of a permit for the operation of the establishments, was still *sub judice* in the *Amparo* 1668/2011 (E-Games' appeal was still pending before the Supreme Court) at the time that SEGOB closed Claimants' Casinos.[751] It was also precluded from closing the Casinos because on September 2, 2013, Claimants 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.[752]

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[750] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 228-232.

[751] Memorial, ¶ 380; Second Ezequiel González Matus Report, **CER-6**, ¶¶ 194-202; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 119.

[752] Memorial, ¶ 381; Second Ezequiel González Matus Report, **CER-6**, ¶¶ 203-206; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 122.

(a) The Injunction Explicitly Prevented SEGOB From Acting Against E-Games Pending a Final Resolution in the Amparo 1668/2011 Proceeding

290. As previously mentioned, on September 2, 2013, E-Games obtained an injunction that remained in effect until September 22, 2014.[753] While the injunction was in effect, SEGOB was explicitly prevented from acting against E-Games pending a final resolution in the *Amparo* 1668/2011 proceeding.[754]

291. According to Mexico, it had no obligation to abide by the injunction obtained on September 2, 2013, because that injunction was subsequently revoked on September 22, 2014 (that is, five months after the illegal closure of the Casinos).[755] Mexico's argument is absurd. It is suggesting that SEGOB could disregard a valid judicial order because it ultimately was revoked, even though the order was in effect at the time SEGOB disregarded it. If SEGOB somehow knew in April 2014 that the injunction would be revoked in the future, it could not simply ignore the injunction while it was in effect and even so, this would not erase the illegality of SEGOB's April 24, 2014 closure of the Casinos. This argument is odd and unavailing.

292. The sequence of events confirms that Mexico clearly disregarded the injunction and took actions that breached the injunction over and over again.[756] SEGOB requested a revocation of the injunction from the Second Regional Chamber on May 14, 2014 (nearly a month after the closure of the Casinos).[757] SEGOB reported to the Second Regional Chamber that it had revoked the May

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[753] Injunctive Relief (Sept. 2, 2013), **C-299**; *Resolución del 22 de septiembre de 2014 de Segunda Sala Regional Hidalgo-México del Tribunal Federal de Justicia Fiscal y Administrativa en el expediente* 4635/13-11-02-3-OT, **R-061**; Memorial, ¶ 381.

[754] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 124; Second Ezequiel González Matus Report, **CER-6**, ¶ 206; Injunctive Relief (Sept. 2, 2013), **C-299**.

[755] Counter-Memorial, ¶ 326.

[756] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 125-130.

[757] Second Ezequiel González Matus Report, **CER-6**, ¶ 205; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 125, 127; *Oficio* UGAJ/DGC/433/2014, *del 14 de mayo de 2014*, **R-063**; *Resolución del 22 de septiembre de 2014 de Segunda*

27, 2009 Resolution and its consequences, including the November 16, 2012 Resolution in compliance with the *Amparo* 1668/2011 judgment, and therefore, the injunction should be revoked.[758] However, as Mr. Gutiérrez explains, SEGOB's request to lift the injunction not only occurred *after* the illegal closure of the Casinos, but E-Games' request for an injunction was precisely based upon SEGOB's purported revocation of the E-Games Independent Permit through SEGOB's August 28, 2013 Resolution in the *Amparo* 1668/2011 proceedings.[759] Therefore, the injunction specifically prevented SEGOB from taking any further action against E-Games or the E-Games Independent Permit pending the resolution of *Amparo* 1668/2011, which was still pending before the Supreme Court at the time of the closures.

293. Mr. Gutiérrez then explains that SEGOB attempted to justify its compliance with the injunction on June 10, 2014, when it informed the Second Regional Chamber that its powers to inspect the operation of the E-Games Casinos was not limited and, therefore, its actions in closing the Casinos were carried out in compliance with the verification, oversight, and surveillance powers established in the Federal Gaming Law and the Gaming Regulation.[760] Despite this weak explanation, SEGOB's actions were in a clear breach of the then-pending injunction obtained on September 2, 2013 because it explicitly prevented SEGOB from taking any action against E-Games pending the final resolution of the *Amparo* 1668/2011 proceeding.[761] Notwithstanding the above, Mr. Gutiérrez explains that SEGOB was able to exert undue influence on the Mexican court

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Sala Regional Hidalgo-México del Tribunal Federal de Justicia Fiscal y Administrativa en el expediente 4635/13-11-02-3-OT, **R-061**; Counter-Memorial, ¶ 335.

[758] *Oficio* UGAJ/DGC/433/2014, *del 14 de mayo de 2014*, **R-063**; Counter-Memorial, ¶ 335.

[759] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 127.

[760] Counter-Memorial, ¶ 336.

[761] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 129-130; Second Ezequiel González Matus Report, **CER-6**, ¶ 206; Injunctive Relief (Sept. 2, 2013), **C-299**.

dealing with the injunction, thereby obtaining a retroactive revocation of the injunction that would rubber stamp SEGOB's actions in breach of the injunction.[762] This is but another example of the illegal political influence exerted in the judicial proceedings at issue in this matter.

294. Mexico also argues that the injunction did not prohibit its closure of the Casinos because the injunction did not have unlimited reach and depended on the November 16, 2012 Resolution remaining in effect. According to Mexico, once the E-Games Independent Permit was revoked as a result of the *Amparo* 1668/2011 judgment, the injunction was vacated.[763] This is simply not true. The language of the injunction itself barred any actions related to the November 16, 2012 Resolution (granting the E-Games Independent Permit) pending the final resolution of the *Amparo* 1668/2011.[764] As of the date of the closures of the Casinos, the *Amparo* 1668/2011 was still pending before the Supreme Court.[765] Therefore, when SEGOB closed the Casinos, the November 16, 2012 Resolution was still valid, because the Supreme Court was still reviewing and considering its validity.[766]

295. Likewise, SEGOB's actions rendered moot the complaint filed by E-Games on May 9, 2014, arguing that the closure of the Casinos violated the injunction.[767] Mexico here argues that "if the Claimants are certain that the injunction prevented SEGOB from closing its casinos, they should have challenged SEGOB's petition on May 14, 2014 to revoke the injunction."[768] Mr.

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[762] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 125-128.

[763] Counter-Memorial, ¶ 339.

[764] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 203-204; Injunctive Relief (Sept. 2, 2013), **C-299**; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 123.

[765] Second Ezequiel González Matus Report, **CER-6**, ¶ 206; Injunctive Relief (Sept. 2, 2013), **C-299**; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 119.

[766] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 119.

[767] Counter-Memorial, ¶ 340.

[768] Counter-Memorial, ¶ 341.

Gutiérrez explains, however, that SEGOB's breach of the injunction rendered the injunction meaningless, including E-Games' May 9, 2014 complaint, because E-Games would no longer be able to re-open the Casinos as the closure made that a *fait accompli*.[769] Therefore, the Claimants' efforts shifted to the re-opening of the Casinos, not to challenging SEGOB's violation of the injunction.[770]

296. Claimants have proven that when SEGOB illegally closed the Casinos, the injunction was in full effect, meaning that SEGOB disregarded the Mexican court's rulings and breached the injunction when it effectuated the closures.[771]

(b) The Séptimo Tribunal Colegiado Admitted the Recurso de Inconformidad (Motion for Reconsideration) before the April 2014 Inspections, so SEGOB Was Prevented from Closing the Casinos

297. Mexico argues that E-Games' *recurso de inconformidad* (motion for reconsideration) had not yet been admitted when the inspections took place because it was only admitted by the Supreme Court on May 6, 2014. As a result, Mexico argues Claimants cannot allege that they were protected by the appeal to the Supreme Court, even though they filed the *recurso de inconformidad* on March 13, 2014. This is not correct.

298. As Mr. Gutiérrez explains, the motion for reconsideration (*Recurso de Inconformidad* 5/2014) was in fact admitted by the *Séptimo Tribunal Colegiado* on April 22, 2014, that is 2 days *before* the April 24, 2014 inspections and closures of the Casinos.[772] Mexico here confuses the appeal proceedings, and refers instead to the *recurso de inconformidad* submitted to the Supreme

[769] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 130.

[770] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 130.

[771] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 108; Second Ezequiel González Matus Report, **CER-6**, ¶¶ 203-206; Injunctive Relief (Sept. 2, 2013), **C-299**.

[772] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 115.

Court (*Recurso de Inconformidad* 406/2014), which was, in fact, admitted on May 6, 2014.[773] The relevant *recurso de inconformidad* was the one that was admitted to the *Séptimo Tribunal Colegiado* on April 22, 2014 (*Recurso de Inconformidad* 5/2014). Moreover, as of April 3, 2014, the fact that E-Games had filed *Recurso de Inconformidad* 5/2014 and *Recurso de Inconformidad* 406/2014 had been published in the SISE, an online database providing access to resolutions issued by judges in Mexico.[774] As a result, as early as April 3, 2014, SEGOB knew or should have known that E-Games had filed the *Recurso de Inconformidad* 5/2014 and *Recurso de Inconformidad* 406/2014 and therefore, that the validity of the November 16, 2012 Resolution granting the E-Games Independent Permit was still under consideration in the *Amparo* 1668/2011 proceedings.[775] Contrary to Mexico's allegations, Claimants were in fact protected by the appeal because the *Recurso de Inconformidad* 5/2014 was admitted by the *Séptimo Tribunal Colegiado before* the April 2014 closures. Mexico's argument that the Supreme Court later admitted the *Recurso de Inconformidad* 406/2014 *after* the April 24, 2014 closures is therefore irrelevant.

299. Moreover, it is important to note that the justifications SEGOB relied upon to close down the Casinos, that is that E-Games did not have a valid permit because its permit had been revoked, was precisely the matter under review by the Collegiate Tribunal and the Supreme Court as a result of *Recurso de Inconformidad* 5/2014 and *Recurso de Inconformidad* 406/2014, respectively.[776] Accordingly, SEGOB proceeded with the closure of the Casinos when the Mexican courts had not yet ruled on the precise issue that SEGOB relied upon for closing down the Casinos. In light of the above, Claimants were protected by the pending *Recursos de Inconformidad* before the

[773] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 115.

[774] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 118.

[775] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 118.

[776] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 189-191.

Collegiate Tribunal and the Supreme Court and SEGOB was thus legally prevented from taking any action against E-Games or the Casinos, but it did so anyway.

4. The Tribunal Should Draw an Adverse Inference Based upon Mexico's Failure To Produce Any Documents

300. Lastly, the Tribunal should draw an adverse inference based upon Mexico's failure to produce any documents related to Claimants' document requests regarding the closure of the Casinos in April 2014. Specifically, Mexico failed to produce any documents related to the decision to post the notification of the suspension or the follow up notification of suspension on SEGOB's website,[777] documents related to SEGOB's determination that Claimants' Casinos were operating without a valid permit and any correspondence from SEGOB to E-Games related to the same,[778] and documents related to SEGOB's orders that the Federal Police be present at the so-called inspection visit to Claimants' Casinos on April 24, 2014.[779] In this regard, Claimants requested:

- **Request 24:** Any document related to or prepared in connection with SEGOB's February 25, 2013 Notification of Suspension of E-Games' permit published on SEGOB's website, including without limitation copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (oficios) and other documents discussing (a) the legal validity of E-Games' permit and/or (b) rulings in the Amparo 1668/2011 proceeding, prepared between December 1, 2012 and February 25, 2013.

- **Request 25:** Any document related to or prepared in connection with SEGOB's February 28, 2013 follow up Notification of Suspension of E-Games' permit published on SEGOB's website, including without limitation copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (oficios) and other documents discussing (a) the legal validity of E-Games' permit, (b) rulings in the Amparo 1668/2011 proceeding, and/or (c) the relationship between E-

[777] Procedural Order No. 10 (Mar. 26, 2021), Annex I.

[778] Procedural Order No. 10 (Mar. 26, 2021), Annex I.

[779] Procedural Order No. 10 (Mar. 26, 2021), Annex I.

Games' and E-Mex's permits, prepared between December 1, 2012 and February 28, 2013.

- **Request 41:** Any document related to or prepared in connection with SEGOB's determination that Claimants' Casinos were operating without a valid permit and any correspondence from SEGOB to E-Games related to the same, including but not limited to the preparation and filing by SEGOB of a complaint for the crime of illegal gambling (denuncia por el delito de apuestas ilegales), including without limitation, copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (oficios), and other documents prepared by, without limitation, the Ministry of Economy, and/or SEGOB, between January 1, 2013 and December 31, 2015.

- **Request 42:** Any document related to or prepared in connection with SEGOB's orders that the Federal Police be present at the so-called inspection visit to Claimants' Casinos on April 24, 2014, including without limitation, copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (oficios), and other documents prepared by, without limitation, the Ministry of Economy, Mr. García Hernández, and/or SEGOB, between January 1, 2013 and December 31, 2014.

301. In response to each of these requests, Mexico stated that it "has not identified any documents that would be responsive to this request."[780] It strains understanding that Mexico was unable to locate even one document in response to these requests, particularly given Mexico's claims that the April 2014 inspections were ordered and conducted in compliance with Mexican law and that it was common practice to use police force in SEGOB's enforcement of the Federal Gaming Law. It is more than reasonable to believe that various documents would have been created for any one of these requests. In light of this, and of Mexico's failure to rebut Claimants' allegations regarding the illegal closure of the Casinos in breach of the Federal Gaming Law, the Gaming Regulation and the Federal Law of Administrative Procedures, the Tribunal should draw adverse inferences and conclude that Mexico's failure to produce documents and substantively

[780] Procedural Order No. 10 (Mar. 26, 2021), Annex I.

address Claimants' allegations are evidence that Mexico deliberately set out to illegally close the Casinos in April 2014 by any means possible and in an orchestrated fashion. It did so with an excessive and unnecessary use of police of force and violating judicial orders which precluding it from doing so.

302. Likewise, and related to Mexico's actions to arbitrarily close down Claimants' Casinos, the Tribunal should draw an adverse inference based upon Mexico's failure to produce any documents related to Claimants' document request regarding Mexico's closure of E-Games' Mexico City Casino on June 19, 2013. Specifically, Claimants requested:

> - **Request 57:** Any documents related to, prepared in connection with, or reflecting the basis for and/or an analysis of, the seizure of Claimants' gaming machines and/or the temporary closure of any of Claimants' Casinos, including, but not limited to the Secretaria de Proteccion Civil de la Ciudad de México's closure of E-Games' Mexico City Casino on June 19, 2013, including, without limitation, any correspondence between the officials from the Mexican government, including but not limited to, the Secretaria de Proteccion Civil de la Ciudad de México, the Mexican Tax Administration Service (SAT), and any of E-Games' competitors or their agents, prepared between August 1, 2011 and July 31, 2013.[781]

303. While the Tribunal ordered Mexico to produce documents related to this request, Mexico did not produce a single document. It strains understanding that Mexico was unable to locate even one document in response to this request, particularly given Mexico's claims that the pre-emptive closure in June 2013 was based on safety/civil protection violations related to a particular wiring for the slot machines.[782] It is more than reasonable to believe that documents would have been created for this request, particularly in light of the alleged infraction. In light of this, and of Mexico's failure to rebut Claimants' allegations regarding the discriminatory and illegal pre-emptive closure of the Mexico City Casino in June 2013, the Tribunal should draw adverse

[781] Procedural Order No. 10 (Mar. 26, 2021), Annex I.

[782] Counter-Memorial, ¶ 197.

inferences and conclude that Mexico's failure to produce documents and substantively address Claimants' allegations are evidence of Mexico's discriminatory and arbitrary measures against Claimants. This even more so in light of the fact that Claimants have produced evidence of this discriminatory behavior, which not only refers to the fact that none of Claimants' competitors with similar wiring were closed down because of the same infraction, but also because there is reason to believe that Mexico closed down the Mexico City Casino because "a competitor bribed someone within the local government to close Kash DF [the Mexico City Casino] and to keep us closed. In fact, when we attempted to provide paperwork to demonstrate compliance with the pretextual basis for closure, the local government would not accept it."[783]

N. The Closure Administrative Review Proceedings Initiated Against E-Games Were Procedurally Flawed

304. In their Memorial, Claimants demonstrated how Mexico failed to provide them with basic procedural rights afforded and protected under Mexico's constitution and the Federal Law of Administrative Procedures in the course of the administrative proceedings that SEGOB commenced following the Mexican authorities' 2014 inspection visits and provisional closures of the Casinos ("**Closure Administrative Review Proceedings**").[784] Among the improper measures that SEGOB took against Claimants in these proceedings were: violations of statute of limitations provisions and injunctions from Mexican courts; manifest disregard of notice requirements; and abuse of power by deliberately impeding the production of evidence to which Claimants were legally entitled.[785]

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[783] Email from E. Burr re: B-Mex/B-Mex II/Palmas South: Update (Aug. 7, 2013), **C-422**.

[784] Memorial, ¶¶ 406-407; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 87.

[785] Memorial, ¶ 403.

305. Mexico has no real response to this and does not even acknowledge or attempt to defend its numerous violations of Claimants' procedural rights. And that is because, as Claimants explained in their Memorial and will explain in more detail below, the Closure Administrative Review Proceedings were highly flawed and violated Mexican law and Claimants' rights as a result.[786]

306. Mexico's constitution enshrines due process rights and procedural guarantees.[787] More specifically, due process in Mexico is understood as: "a procedural guarantee that must be present in all types of proceedings, not only in criminal proceedings, but also in civil, administrative or any other type of proceedings,"[788] and requires each legal proceeding be reasonably tailored to its purpose under the law and proportional to its potential adverse effects.[789] In this case, Mexico used its constitutional and administrative legal framework to illegally discriminate against Claimants and to undermine their constitutionally guaranteed due process rights.

307. Mexico's violations of Claimants' due process rights in the Closure Administrative Review Proceedings generally fell into three categories: 1) procedural irregularities, illegalities, and violations of E-Games' procedural rights in the proceedings themselves; 2) the improper dismissal of E-Games' *recurso de revisión* without consideration of E-Games' key arguments; and 3) the

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[786] Memorial, ¶¶ 406-407; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 87.

[787] Constitution of Mexico, Article 17, **CL-77** ("Provided that it does not affect the equality between the parties, due process or other rights in trials or proceedings followed in the form of a trial are not affected, the authorities shall privilege the resolution of the dispute over procedural formalities." **Spanish Original**: "*Siempre que no se afecte la igualdad entre las partes, el debido proceso u otros derechos en los juicios o procedimientos seguidos en forma de juicio, las autoridades deberán privilegiar la solución del conflicto sobre los formalismos procedimentales.*").

[788] SEGOB's Website Excerpt What is due process? (*Qué es el debido proceso*) (Dec. 1, 2016), **C-404** ("Due process is a procedural guarantee that must be present in all kinds of processes, not only those of a criminal nature, but also civil, administrative or any other." **Spanish Original**: "*El debido proceso es una garantía procesal que debe estar presente en toda clase de procesos, no sólo en aquellos de orden penal, sino de tipo civil, administrativo o de cualquier otro.*").

[789] Constitution of Mexico, Articles 16, 17, **CL-77**; Federal Law of Administrative Procedure, Articles 3, 13, **R-064**.

illegitimate refusal to provide Claimants with access to the Closure Administrative Review case files.

1. Mexico Violated Claimants' Rights in the Closure Administrative Review Proceedings

308. Mexico's violations of Claimants' rights in these proceedings removes any doubt that the closure of the Casinos was improper, arbitrary, and politically motivated.

309. First, Mexico violated Claimants' procedural rights in this first phase of the proceedings—which, as explained, began on April 24, 2014—by failing to afford E-Games the opportunity to be heard with respect to SEGOB's actions in shuttering the Casinos as required under the law.[790]

310. SEGOB failed to issue a resolution regarding the first phase of the proceedings within the prescribed time after the closure of the Casinos, as it was required to do.[791] Specifically, in accordance with Article 68 of the Administrative Procedures Law, after the closures and the Verification Orders, SEGOB had five days in which to make observations and offer evidence regarding the closures.[792] It did not do so.

311. Then, pursuant to Article 32 of the Federal Law of Administrative Procedures, SEGOB was required to notify Claimants of the initiation of the Closure Administrative Review Proceedings within 10 days of SEGOB offering evidence regarding the closures.[793] It did not do so.

312. Second, Mexico violated Claimants' procedural rights in belatedly initiating the second phase of the Closure Administrate Review Proceedings. Mexico incorrectly argues in its Counter-

[790] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 109-110.

[791] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 87.

[792] Federal Law of Administrative Procedure, Article 28, **R-064**; Second Ezequiel González Matus Report, **CER-6**, ¶ 220.

[793] Federal Law of Administrative Procedure, Article 32, **R-064**; Second Ezequiel González Matus Report, **CER-6**, ¶ 221.

Memorial that the first phase of the Closure Administrative Review Proceedings only commenced on July 7, 2014.[794] This, however, is incorrect. In accordance with Article 32 of the Federal Administrative Procedures Law, the Closure Administrative Review Proceedings began when SEGOB ordered the inspection visits to Claimants' Casinos as well as the provisional closures of the Casinos on April 24, 2014.[795]

313. After it was supposed to have notified E-Games in accordance with Article 32 of the Federal Law of Administrative Procedures, SEGOB would have had 30 days from when it notified the Claimants to begin the second phase of the Closure Administrative Review Proceedings.[796] Without initiating and completing this second phase in keeping with Mexican law, Mexico could not have lawfully closed the casinos. It did not do so. As Mr. González explains, the period for Mexico to initiate the second phase of the Closure Administrate Review Proceedings expired on June 30, 2014.[797] Thus, on July 8, 2014, E-Games filed a writ under Article 60 of the Federal Law of Administrative Procedures requesting that SEGOB declare the Closure Administrative Review Proceedings as well as the provisional closures of Claimants' Casinos expired.[798] SEGOB denied E-Games' July 8 request in a July 18, 2014 Resolution, asserting that on July 7, 2014 (*the day before* E-Games filed the writ with SEGOB), SEGOB had issued a Resolution belatedly initiating the second phase of the Closure Administrative Review Proceedings.[799] Not only did E-Games not receive notice of SEGOB's July 7, 2014 Resolution, but SEGOB intentionally delayed issuing

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[794] Counter-Memorial, ¶ 353.

[795] Memorial, ¶¶ 380-412; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶¶ 68-72; Second Ezequiel González Matus Report, **CER-6**, ¶ 206; Federal Law of Administrative Procedure, Article 32, **R-064**.

[796] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 87; Second Ezequiel González Matus Report, **CER-6**, ¶ 224.

[797] Second Ezequiel González Matus Report, **CER-6**, ¶ 227.

[798] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 87.

[799] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶¶ 87-88.

it because it wanted to see how the Supreme Court would rule on E-Games' pending appeal, the *Recurso de Inconformidad* 406/2012.[800] On information and belief, SEGOB's July 7, 2014 Resolution was backdated and written only after it received E-Games' July 8, 2014 submission in order to try to preserve SEGOB's rights in the Closure Administrative Review Proceeding, after it realized that it had failed to meet relevant deadlines in Claimants' case.

314. SEGOB's delay in issuing a resolution to initiate the second phase of the Closure Administrative Review Proceedings was not only unjustified, but also irregular and illegal, even under Mexico's version of the facts. Taking at face value Mexico's assertion that it initiated the second phase of the proceedings on July 7, 2014, that was *still* outside the 30-day period prescribed by the Federal Law of Administrative Procedures.[801] In failing to issue the required resolution within 30 days, SEGOB acted irregularly and improperly in arbitrarily ignoring its own laws and the procedural rights that should have been afforded to E-Games in the Closure Administrative Review Proceedings.[802]

315. Mexico fails to explain its failures to abide by deadlines prescribed by its own law. Instead, Mexico criticizes Claimants' citation in their writ to SEGOB to Article 60 of the Federal Law of Administrative Procedures to explain that the Closure Administrative Review Proceedings should have been deemed commenced on April 24, 2014[803] and argues that the Federal Law of Administrative Procedures is not applicable in this case.[804] Mexico is incorrect. As Mr. González explains, Article 60 of the Federal Law of Administrative Procedures does not distinguish among

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[800] Memorial, ¶ 409; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 131, 134.

[801] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 131-132; Second Ezequiel González Matus Report, **CER-6**, ¶¶ 215, 224.

[802] Memorial, ¶ 409.

[803] Counter-Memorial, ¶ 352.

[804] Counter-Memorial, ¶ 352.

the different types of administrative proceedings; the Federal law of Administrative Procedures applies to all types of administrative actions, including both sanction and verification proceedings.[805] The provision of the Federal Law of Administrative Procedures that sets out the scope of its application makes is clear that it applies to all administrative proceedings involving all agencies of the Federal government (with very limited exceptions that do not apply here).[806] Thus, in accordance with the Federal Law of Administrative Procedures, SEGOB arbitrarily disregarded the appropriate statute of limitations period under Mexican law to the detriment of the Claimants.[807]

316. Mexico also fails to counter Claimants' showing that SEGOB intentionally delayed issuing the July 7 and July 18 Resolutions to initiate the second phase of the Closure Administrative Review Proceedings because it was awaiting the Supreme Court's ruling on E-Games' pending

[805] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 132.

[806] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 132; Federal Law of Administrative Procedure, Article 60, **R-064** ("The provisions of this law are of public order and interest, and shall apply to the acts, procedures and resolutions of the centralized Federal Public Administration, without prejudice to the provisions of the International Treaties to which Mexico is a party.").

The present ordinance shall also apply to the decentralized agencies of the federal parastatal public administration with respect to their acts of authority, to the services that the state provides on an exclusive basis, and to the contracts that Mexico is a party to. exclusively, and to contracts that private parties may only enter into with it.

This ordinance will not be applicable to fiscal matters, responsibilities of public servants, agrarian and labor justice, nor to the Public Ministry in the exercise of its constitutional functions. In relation to matters of economic competition, unfair international trade and financial practices, only Title Three A will be applicable to them.

For the purposes of this Law, only tax matters are excluded in the case of contributions and accessories derived directly therefrom." **Spanish Original**: "*En los procedimientos iniciados a instancia del interesado, cuando se produzca su paralización por causas imputables al mismo, la Administración Pública Federal le advertirá que, transcurridos tres meses, se producirá la caducidad del mismo. Expirado dicho plazo sin que el interesado requerido realice las actividades necesarias para reanudar la tramitación, la Administración Pública Federal acordará el archivo de las actuaciones, notificándoselo al interesado. Contra la resolución que declare la caducidad procederá el recurso previsto en la presente Ley. La caducidad no producirá por sí misma la prescripción de las acciones del particular, de la Administración Pública Federal, pero los procedimientos caducados no interrumpen ni suspenden el plazo de prescripción. Cuando se trate de procedimientos iniciados de oficio se entenderán caducados, y se procederá al archivo de las actuaciones, a solicitud de parte interesada o de oficio, en el plazo de 30 días contados a partir de la expiración del plazo para dictar resolución*.").

[807] Second Ezequiel González Matus Report, **CER-6**, ¶ 227.

appeal before the Mexican Supreme Court, the *Recurso de Inconformidad* 406/2012.[808] In other words, Claimants have established that SEGOB wanted to wait and see how the Supreme Court ruled on E-Games' case, so that it could preserve another avenue—the Closure Administrative Review Proceedings—through which to ensure the permanent closure of E-Games' Casinos in the event that the Supreme Court ruled in E-Games' favor.

317. In addition, on various instances from September 2014 to February 2015, E-Games requested that SEGOB resolve the Closure Administrative Review Proceedings, as there were no further procedural actions pending.[809] However, SEGOB intentionally extended the Closure Administrative Review Proceedings in order to exert pressure on E-Games to drop its legal actions, thereby preserving yet another avenue to ensure E-Games' demise.[810] First, it was only on February 26, 2015, after the *Recurso de Inconformidad* No. 5/2014 was resolved before the Collegiate Tribunal, that SEGOB issued the decisions concluding the Administrative Closure Proceedings.[811] In practical terms, SEGOB could have resolved the Closure Administrative Review Proceedings far earlier and in a more expeditious manner but manipulated them to suit its goal of ensuring the permanent closure of Claimants' Casinos.[812] SEGOB also refused to allow the delivery of the Casino premises to the owners as long as E-Games was pursuing legal actions

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[808] Memorial, ¶ 409; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 131, 134.

[809] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 120; SEGOB Resolution Concluding the Closure Administrative Procedure for the Mexico City Casino, Case File AJP-0067-2014-VII, San Jerónimo, Mexico City Casino, pp. 6-7 (Feb. 26, 2015), **C-405**.

[810] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 120-121; SEGOB Decision Concluding the Closure Administrative Procedure for the Mexico City Casino, Case File AJP-0067-2014-VII, San Jerónimo, Mexico City Casino, pp. 48-50 (Feb. 26, 2015), **C-405**; SEGOB Writ Regarding Resolution of *Recurso of Inconfirmidad* 5/2014, Case File AJP-0067-2014-VII, San Jerónimo, Mexico City Casino, pp. 48-50 (Feb. 19, 2015), **C-406**.

[811] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 120; *See*, SEGOB Resolution Concluding the Closure Administrative Procedure for the Mexico City Casino, Case File AJP-0067-2014-VII, San Jerónimo, Mexico City Casino, pp. 48-50 (Feb. 26, 2015), **C-405**.

[812] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 121.

related to the unlawful closures.[813] Moreover, the record also shows that SEGOB intentionally delayed lifting the closure seals from the Casinos until the *Recurso de Inconformidad* No. 5/2014 was resolved as yet another way to exert pressure on E-Games to desist from its ongoing actions before the Mexican courts.[814]

318. Further demonstrating the irregularity in SEGOB's untimely July 7, 2014 resolution was its statement, made then for the first time, that E-Games had been operating slot machines that accepted coins or cash in violation of Mexican law. That assertion, however, was a complete fabrication. As explained, the Casinos were cashless, none had slot machines that accepted coins or cash, and customers loaded money onto a card to play the games.[815] Mexico did not offer then and has not offered since a single piece of evidence proving the contrary. Its accusation that Claimants had impermissible slot machines that accepted coins or cash in their Casinos was, therefore, nothing more than a pretextual fabrication to justify the illegal closures and another tactic designed to ensure E-Games' demise if the Supreme Court did not rule in Mexico's favor.[816] Notably, as Mr. Gutiérrez explains, the existence of impermissible slot machines is not mentioned in the 2014 Inspection and Verification Orders.[817] Moreover, Claimants introduced evidence that their Casinos did not have this type of slot machines in the Closure Administrative Proceedings, but SEGOB unjustifiably rejected its admission.[818] Specifically, Claimants offered an expert who

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[813] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 121.

[814] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 121; SEGOB Decision Concluding the Closure Administrative Procedure for the Mexico City Casino, Case File AJP-0067-2014-VII, San Jerónimo, Mexico City Casino, pp. 48-50 (Feb. 26, 2015), **C-405**; SEGOB Writ Regarding Resolution of *Recurso of Inconfirmidad* 5/2014, Case File AJP-0067-2014-VII, San Jerónimo, Mexico City Casino, pp. 48-50 (Feb. 19, 2015), **C-406**.

[815] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 88; Fourth Gordon Burr Statement, **CWS-59**, ¶ 89; Fourth Erin Burr Statement, **CWS-60**, ¶ 131.

[816] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 131-134.

[817] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 131, 133.

[818] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 88; Memorial, ¶¶ 408-410; Second Ezequiel González Matus Report, **CER-6**, ¶ 172; SEGOB Resolution Regarding the Admissibility of Evidence in the Closure Administrative

could inspect the facilities to confirm that there were no slot machines.[819] SEGOB rejected this evidence because it said the evidence would only serve to prove the manner of operation of the machines, and not that there were slot machines inside the establishment at the time of the inspection.[820] Mexico's argument in its Counter-Memorial that E-Games had requested authorization to install slot machines that accepted coins or cash was also incorrect.[821] Claimants' Casinos had the types of machines that SEGOB had authorized under the E-Games Independent Permit and only those machines. SEGOB often inspected the locations and their machines, and never took issue with the types of machines being used in Claimants' Casinos, including on April 24, 2014.[822]

319. Putting all of Mexico's gamesmanship, administrative irregularities, and violations of Claimants' procedural rights into context, there is no doubt that the closure of the Casinos was improper, arbitrary, and politically motivated. Mexico fails to establish otherwise or even attempt to rebut Claimants' proof with credible evidence of its own.

2. Mexican Authorities Unlawfully Dismissed Claimants' *Recurso de Revisión* By Failing to Consider the Arguments Therein

320. As Claimants explained in their Memorial, on May 16, 2014, E-Games filed a *recurso de revision* against SEGOB's six inspection visit orders and the six verification orders commanding

Procedure for the Mexico City Casino, Case File AJP-0067-2014-VII, San Jerónimo, Mexico City Casino, pp. 13-14 (Oct. 9, 2014), **C-407**.

[819] SEGOB Decision Regarding the Admissibility of Evidence in the Closure Administrative Procedure for the Mexico City Casino, Case File AJP-0067-2014-VII, San Jerónimo, Mexico City Casino, pp. 13-14 (Oct. 9, 2014), **C-407**.

[820] SEGOB Decision Regarding the Admissibility of Evidence in the Closure Administrative Procedure for the Mexico City Casino, Case File AJP-0067-2014-VII, San Jerónimo, Mexico City Casino, pp. 13-14 (Oct. 9, 2014), **C-407**; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 134.

[821] Counter-Memorial, ¶ 354.

[822] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 134.

the closure of the Casinos (the "**2014 Inspection and Verification Orders**").[823] In the *recurso de revisión*, E-Games argued that the provisional closure of the Casinos did not follow the prescribed procedure under Mexican administrative law, because E-Games' *Recurso de Inconformidad* No. 406/2012 was still pending before the Supreme Court when the 2014 Inspection and Verification Orders were issued and executed, and that SEGOB had closed the Casinos despite the existence of a judicial injunction that prevented the closures.[824] Therefore, in accordance with Mexican law, the Inspection and Verification Orders had to be nullified because they violated an injunction and resulted in the closure of the Casinos before the ongoing legal proceeding was formally resolved.[825] However, the Undersecretary of the Interior (*Subsecretario de Gobierno*), SEGOB's superior, improperly dismissed E-Games' *Recurso de Revisión* on June 5, 2014 via Resolution SG/200/0072/2014.[826] The dismissal itself did not address E-Games' argument that the closure of the Casinos was improper because of E-Games' pending appeal to the Supreme Court, nor did it address the pending injunction.[827]

321. Mexico has no real response to any of this. Mexico instead argues that Claimants had other opportunities to defend themselves during these proceedings, and that SEGOB's dismissal of E-Games' *recurso de revisión* was issued in accordance with Mexican procedural law, as SEGOB stated the legal and factual grounds as well as the reasoning (*actos definitivos*) for its decision.[828]

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[823] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 85.

[824] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶¶ 85-86.

[825] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 85.

[826] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 86.

[827] Memorial, ¶ 405.

[828] Counter-Memorial, ¶ 344 ("they are procedural acts ... that only serve to illustrate and provide all the necessary data for a final decision to be made, then with them you cannot end the administrative procedure." **Spanish Original**: "*son actos de trámite… que sólo sirven para ilustrar y aportar todos los datos necesarios para que recaiga una decisión final, luego entonces con ellos no se puede poner fin al procedimiento administrativo*.").

322. Mexico is wrong. Mexico chooses to ignore—just as SEGOB did during the administrative proceeding—that the key argument of E-Games' r*ecurso de revisión* against the 2014 Inspection and Verification Orders was that E-Games' appeal (*recurso de inconformidad*) was *sub judice* before the Mexican Supreme Court when the r*ecurso de revisión* was issued.[829] Under Article 8 of the Federal Administrative Procedures Law, the E-Games Independent Permit was a valid administrative act until its invalidity was declared by the relevant administrative or judicial authority.[830] As of April 24, 2014, the *recurso de inconformidad* was still pending before the Supreme Court and had not been resolved, and there had been no final determination regarding the status of E-Games' Independent Permit.[831] Therefore, as of April 24, 2014, the E-Games Independent Permit was still valid.[832]

323. Mexico also ignores (again, just as SEGOB did) Claimants' argument that E-Games had obtained an injunction expressly preventing SEGOB from closing the Casinos while the *recurso de inconformidad* was pending before the Supreme Court.[833] E-Games sought this injunction from the Second Regional Administrative Court of Hidalgo on August 23, 2013, and the injunction was granted on October 4, 2013.[834] The injunction specifically prevented SEGOB from carrying out any act to impede E-Games' rights under the E-Games Independent Permit while the *recurso de inconformidad* was pending before the Supreme Court.[835] SEGOB illegally closed the Casinos

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[829] Memorial, ¶¶ 404-405, Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 85.

[830] Federal Law of Administrative Procedure, Article 8, **R-064**; Second Ezequiel González Matus Report, **CER-6**, ¶ 201.

[831] Second Ezequiel González Matus Report, **CER-6**, ¶ 206.

[832] Second Ezequiel González Matus Report, **CER-6**, ¶ 206.

[833] Memorial, ¶¶ 404-405, Fourth Julio Gutiérrez Statement, **CWS-52**, ¶¶ 85-86; Injunctive Relief (Sept. 2, 2013), **C-299**.

[834] Second Ezequiel González Matus Report, **CER-6**, ¶ 203.

[835] Injunctive Relief (Sept. 2, 2013), **C-299**; Second Ezequiel González Matus Report, **CER-6**, ¶ 204.

despite this injunction. It was not until May 14, 2014 (after the closures of the Casinos) that SEGOB made a request to the Second Regional Administrative Court of Hidalgo to lift the injunction pertaining to E-Games, but the injunction was not revoked until September 22, 2014.[836] In other words, on April 24, 2014, when the Casinos were closed, the injunction preventing SEGOB from interfering with E-Games' Casino operations was in force, and it was not officially lifted until almost four months later.[837]

324. As Claimants' experts and witnesses confirm, pursuant to Mexican law, in dismissing E-Games' r*ecurso de revisión,* SEGOB simply did not consider relevant Mexican law or E-Games' main arguments: that the pending resolution of E-Games' *Recurso de Inconformidad* No. 406/2012 before the Supreme Court and the injunction that E-Games obtained which prevented SEGOB from acting against E-Games while the *recurso de inconformidad* was pending before the Supreme Court.[838] For that reason, Mexico's dismissal of E-Games' *Recurso de Revisión* was plainly unlawful and blatantly improper because the Federal Administrative Procedures Law requires the authority resolving a *recurso de revisión* to review and analyze each and every claim asserted by the petitioner.[839] Specifically, article 92 states:

> The resolution of the appeal shall be based on law and shall examine each and every one of the arguments asserted by the appellant, and the authority shall have the power to invoke notorious facts; however, when one of the arguments is sufficient to invalidate the validity of the challenged act, the examination of said point shall be

[836] Second Ezequiel González Matus Report, **CER-6**, ¶ 206; *Oficio* UGAJ/DGC/433/2014, *del 14 de mayo de 2014*, **R-063**; *Resolución del 22 de septiembre de 2014 de Segunda Sala Regional Hidalgo-México del Tribunal Federal de Justicia Fiscal y Administrativa en el expediente* 4635/13-11-02-3-OT, **R-061**.

[837] Second Ezequiel González Matus Report, **CER-6**, ¶ 206; *Resolución del 22 de septiembre de 2014 de Segunda Sala Regional Hidalgo-México del Tribunal Federal de Justicia Fiscal y Administrativa en el expediente* 4635/13-11-02-3-OT, **R-061**.

[838] Second Ezequiel González Matus Report, **CER-6**, ¶ 173; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 119, 122-124.

[839] Federal Law of Administrative Procedure, Article 92, **R-064**.

sufficient.[840] (emphasis added) (English translation of Spanish original).

325. Here, Mexico failed to decide E-Games' *Recurso de Revisión en derecho* (as a matter of law) by completely disregarding two key components of the analysis: whether the pending status of *Recurso de Inconformidad No. 406/2012* before the Supreme Court required SEGOB to maintain the *status quo* of Claimants' Casinos (and keep the premises open) to avoid irreparable damage to Claimants—as argued by E-Games in its *Recurso de Revision*——and whether the existence of the injunction barred SEGOB from closing the Casinos when it did.[841] Mexico simply has no legal or legitimate basis to justify SEGOB's dismissal of E-Games' r*ecurso de revisión*, and its corresponding violation of Claimants' due process and procedural rights.

3. Mexico Has Improperly Denied the Claimants' Access to the Case Files of the Administrative Closure Proceedings

326. As Mr. Gutiérrez has explained, SEGOB is required by law to provide E-Games copies of the case files since it is an interested party to the administrative proceedings.[842] Despite having requested from SEGOB copies of the case files for the Closure Administrative Review Proceedings on numerous occasions over a number of years, SEGOB had denied Claimants access to them.[843]

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[840] Federal Law of Administrative Procedure, Article 92, **R-064** ("*La resolución del recurso se fundará en derecho y examinará todos y cada uno de los agravios hechos valer por el recurrente teniendo la autoridad la facultad de invocar hechos notorios; pero, cuando uno de los agravios sea suficiente para desvirtuar la validez del acto impugnado bastará con el examen de dicho punto. La autoridad, en beneficio del recurrente, podrá corregir los errores que advierta en la cita de los preceptos que se consideren violados y examinar en su conjunto los agravios, así como los demás razonamientos del recurrente, a fin de resolver la cuestión efectivamente planteada, pero sin cambiar los hechos expuestos en el recurso. Igualmente, deberá dejar sin efectos legales los actos administrativos cuando advierta una ilegalidad manifiesta y los agravios sean insuficientes, pero deberá fundar cuidadosamente los motivos por los que consideró ilegal el acto y precisar el alcance en la resolución.*").

[841] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶¶ 85-86.

[842] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 92.

[843] Memorial, ¶¶ 424-427.

In fact, Mexico steadfastly refused to produce the files to Claimants the Tribunal ordered it to do so in these proceedings.[844]

327. Mexico now argues that copies of the files were made available to E-Games but were never picked up.[845] To support its allegation, Mexico submits a resolution issued by SEGOB on December 21, 2017, showing that since E-Games paid "the government fees in full," the requested copies were made available to Julio Gutiérrez, on behalf of E-Games, but were never collected.[846]

328. Mexico is wrong. As Mr. Gutiérrez explains, while E-Games paid more than MX $ 93,000.00 (over USD $4,500) in fees to obtain the copies, it is not true that Claimants neglected to collect them.[847] In fact, between February 2018 and February 2020 (after the December 21, 2017 resolution Mexico cites),[848] Mr. Gutiérrez and other members of his law firm, visited SEGOB's offices to obtain the copies of the case files on numerous occasions.[849] On these visits, neither Mr. Gutiérrez, nor the other members of his office were permitted to obtain a copy of the registry book or take photographs of the book *despite* having paid all the fees demanded.[850]

329. Accordingly, Mexico fails to rebut or explain its failure to provide Claimants with the case files of the Administrative Review Closure Proceedings. Mexico's failure to do so is yet another example of Mexico's improper, harassing, and discriminatory conduct towards the Claimants.

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844 Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 140-142.

845 Counter-Memorial, ¶¶ 365-367.

846 Counter-Memorial, ¶¶ 366; SEGOB Resolution DGJS/DGAAD/0129/2017 (Dec. 21, 2017), **R-098**.

847 Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 141.

848 SEGOB Resolution DGJS/DGAAD/0129/2017 (Dec. 21, 2017), **R-098**.

849 Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 140.

850 Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 142.

O. SEGOB's Removal of the Seals and Delivery of Legal Possession of the Properties to Third Parties were Improper

330. As Claimants explained in their Memorial, on April 24, 2014, Mexico unlawfully closed Claimants' Casinos and placed closure seals on the entrances, which prevented anyone from entering the premises.[851] Subsequently, in 2017, Mexico arbitrarily and improperly lifted the closure seals on all of the Casinos, without notifying Claimants (the "**Arbitrary Lifting of the Seals**"), although it was required to do so under Mexican law.[852]

331. After improperly lifting the seals, Mexico then incorrectly gave legal possession of the premises to individuals or companies other than E-Games.[853] As a result, Claimants suffered significant denials of due process, were unable to protect their property located inside the Casinos, and ultimately, were unable to obtain relief or mitigate Mexico's arbitrary measures.

332. Mexico's response in its Counter-Memorial rings hollow. Mexico argues that (i) SEGOB lifted the seals and returned legal possession of the properties to their owners to comply with judicial orders; and (ii) Claimants were defendants in several legal proceedings involving the Juegos Companies and E-Games, and therefore, they were aware (or should have been aware) of the legal actions related to the lifting of the seals.[854] Thus, according to Mexico, Claimants were "passive and negligent in defending their interests."[855] Mexico's argument is an attempt to mischaracterize SEGOB as lacking any political motivation or towards E-Games and to improperly divert blame to Claimants when it properly rests on Mexico's shoulders. Further,

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[851] Memorial, ¶¶ 380-382.

[852] Memorial, ¶¶ 413-423; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 108; First Witness Statement of Alejandro Vargas ("First Alejandro Vargas Statement"), **CWS-58**, ¶ 4; Second Ezequiel González Matus Report, **CER-6**, ¶¶ 236-239.

[853] Memorial, ¶¶ 413-423; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 108.

[854] Counter-Memorial, ¶ 368.

[855] Counter-Memorial, ¶ 369.

Mexico alleges that, at least in one of the Casino locations, Claimants themselves were responsible for the breaking of the closure seals, equating Claimants—or people associated with them—to criminals.[856] All of these arguments are inaccurate, distort the facts, and distract from SEGOB's animus towards Claimants' and E-Games in arbitrarily lifting the seals and from Mexico's responsibility for the harm it caused Claimants.

1. At Four of the Casinos, SEGOB Acted Sua Sponte to Lift the and Not In Compliance With Any Court Order

333. Mexico's arguments not only blame Claimants for Mexico's own wrongful conduct, but also suffer from an overarching factual inaccuracy: SEGOB *did not* simply lift the seals in compliance with a judicial order, as the court records described below demonstrate. Quite simply, no courts ordered that the seals be lifted at the Naucalpan, Cuernavaca, or Mexico City Casinos. In Villahermosa, while there was an initial order from a court to lift the seals, SEGOB itself appealed this order on the basis that the judge did not have authority to order that the seals be lifted; and the lifting order was overruled as a result.[857] Only at the Puebla Casino did a court ultimately order SEGOB to lift the seals.[858] The relevant court records show the following:

Naucalpan Casino:

1. Court	Fifth Civil Court of First Instance of Tlalnepantla for Naucalpan
2. Case Number	457/2015
3. Parties	Jovita Guadalupe Rodríguez Deciga, et al *vs* Juegos de video y Entretenimiento de México S. de R.L. de C.V., Juegos de video y Entretenimiento del Sureste S. de R.L. de C.V. (fiadora solidaria)

[856] Counter-Memorial, ¶¶ 372-375.

[857] Second Ezequiel González Matus Report, **CER-6**, ¶ 233.

[858] Second Ezequiel González Matus Report, **CER-6**, ¶ 233.

4. Date of the Judgement	334. September 22, 2015
5. Order to SEGOB to lift closure seals and deliver the property	335. There was no order from the Judge to SEGOB to lift the seals.[859]

336.

Cuernavaca Casino:

6. Court	7. Third Judge for Civil and Commercial Matters for the State of Morelos
8. Case Number	56/2016
9. Parties	Inmobiliaria Esmeralda de Morelos S.A. de C.V. *vs* Juegos y Videos de México S. de R.L. de C.V.
10. Date of the Judgement	February 17, 2017
11. Order to SEGOB to lift closure	12. There was no order from the Judge to SEGOB to lift the seals.[860]

[859] Decision issued by the Fifth Civil Court of First Instance of Tlalnepantla for Naucalpan 457/2015 (Nov. 18, 2015), **C-408**; Second Ezequiel González Matus Report, **CER-6**, ¶ 233.

[860] Decision 56/2016 issued by the Second Civil Court on Commercial Matters for the State of Morelos (Feb. 17, 2017), pp. 64-68, **C-409**; Second Ezequiel González Matus Report, **CER-6**, ¶ 233.

seals and deliver the property	

Mexico City Casino:

13. Court	41st Court for Civil Matters for the Superior Court for Mexico City
14. Case Number	439/2015
15. Parties	Del Bosque Corporación S.A. de C.V. *vs* Juegos de video y entretenimiento del D.F., S. de R.L. de C.V.
16. Date of the Judgement	17. April 27, 2017
18. Order to SEGOB to lift closure seals and deliver the property	19. There was no order from the Judge to SEGOB to lift the seals.[861]

Villahermosa Casino:

20. Court	Third Civil Judge of first instance for the State of Tabasco
21. Case Number:	370/2015

[861] Decision 439/2015 issued by the Forty-first Court for Civil Matters for the Superior Court for Mexico City (May 2, 2017), pp. 11-13, **C-410**; Second Ezequiel González Matus Report, **CER-6**, ¶ 233.

22. Parties	Promotora Tabasco S.A. de C.V. *vs* Juegos de Video y Entretenimiento del Sureste S. de R.L. de C.V.
23. Date of the Judgement	24. November 15, 2018
25. Order to SEGOB to lift closure seals and deliver the property	26. While the court initially ordered the lifting of the seals, SEGOB challenged this order stating that the court did not have the authority to lift the seals. As a result, the order to lift the seals was revoked by the Second Civil Chamber of the Superior Court of Justice of the State of Tabasco. [862]

Puebla Casino:

27. Court	28. Fourth Court for Civil Matters for the Judicial district of Puebla
29. Case Number	760/2015/4C
30. Parties	Operadora PRISSA, S.A. de C.V. *vs* Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V. y Antonio Moreno Quijano
31. Date of the Judgement	32. August 16, 2016

[862] Decision 370/2015 issued by the Third Civil Judge of First Instance for the State of Tabasco (Nov. 15, 2018), p. 20, **C-411**; Decision 357/2019 issued by the Second Civil Judge of First Instance for the State of Tabasco (July 2, 2019), pp. 42-46, **C-412**; Second Ezequiel González Matus Report, **CER-6**, ¶ 233.

33. Order to SEGOB to lift closure seals and deliver the property	337. There was no order from the Civil Judge to SEGOB to lift the seals.[863] 338. An order to lift the closure seals was issued later as a result of an amparo lawsuit filed by Scotiabank Inverlat S.A .[864]

339. As these records show, for all of the Casinos but Puebla, SEGOB acted *sua sponte* to lift the seals, and there is no evidence that the judges who resolved these disputes *ordered* SEGOB to lift the closure seals and return the properties to the landlords.[865] The reality is that SEGOB improperly and without instructions from the relevant courts acted to lift the seals on Claimants' Casinos and permitted the return of the premises to third parties unrelated to the Claimants. Compounding Mexico's false assertion is the fact that under Mexican law, in the absence of a court order instructing SEGOB to lift the seals, SEGOB should generally not act *sua sponte* to lift the seals.[866] Thus, SEGOB's Arbitrary Lifting of the Seals represented further intentional and politically motivated interference with the Claimants' Casinos in an attempt to destroy their investments.

340. Mexico's anemic defenses of its actions in removing the seals fail, as described below.

[863] Decision 760/2015/4C issued by the Fourth Court for Civil Matters for the Judicial District of Puebla (Aug. 16, 2016), **C-413**; Second Ezequiel González Matus Report, **CER-6**, ¶ 233.

[864] SEGOB Resolution No. DGJS/DGARV/3546/2017 for the Puebla Casino (July 5, 2017), **C-414**; Second Ezequiel González Matus Report, **CER-6**, ¶ 233.

[865] Second Ezequiel González Matus Report, **CER-6**, ¶ 234.

[866] Second Ezequiel González Matus Report, **CER-6**, ¶ 236, 237.

2. The Removal of the Seals in Naucalpan

341. As described in Claimants' Memorial, Mexico's improper removal of the closure seals and return of the premises where the Naucalpan Casino operated followed a fire that consumed the facility in May 2017.[867] SEGOB did not notify the Claimants that the seals had been lifted, despite the valuable assets housed in the premises, including Claimants' gaming machines.[868]

342. In its Counter-Memorial, Mexico first accuses Claimants (or people acting on their behalf) of breaking the closure seals and removing the equipment in the Naucalpan Casino, but offers no evidence to support its allegation.[869] As Claimants explain in detail below, no one associated with the Claimants was involved in lifting the seals from the Casinos or improperly removing machines from the facilities.[870] In fact, doing so would have undermined Claimants' efforts to negotiate with the Mexican government either to *reopen* the facilities or to be allowed to *sell the assets* to a third party. As Claimants have proven, the Mexican government ultimately blocked both avenues.[871]

343. The above notwithstanding, Claimants understand that Mr. Alfredo Moreno Quijano ("**Mr. Moreno Quijano**"), without the Claimants' permission or authorization, improperly removed machines from the Naucalpan Casino.[872] After the fire that destroyed the Naucalpan Casino, Mr. Burr and Mr. Gutiérrez spoke with the attorney for the landlord of the premises who told them that Mr. Moreno Quijano and Mr. Miguel Noriega, a Mexican attorney who represented Mr. Chow, had been pressuring the landlord to permit them to remove the machines from the premises before

867 Memorial, ¶ 415.

868 Memorial, ¶¶ 415-416; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 108.

869 Counter-Memorial, ¶¶ 372-375.

870 Fourth Erin Burr Statement, **CWS-60**, ¶ 136; Fourth Gordon Burr Statement, **CWS-59**, ¶ 94.

871 Fourth Erin Burr Statement, **CWS-60**, ¶ 88; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 58-61.

872 Fourth Erin Burr Statement, **CWS-60**, ¶136; Fourth Gordon Burr Statement, **CWS-59**, ¶ 94.

the fire.[873] As will be explained further below, this unauthorized removal of gaming machines was yet another attempt by Mr. Moreno Quijano to try to derail the Claimants' NAFTA efforts, sow disagreement among the Claimant group, and profit from Mexico's unlawful and discriminatory treatment of Claimants. Mr. Moreno Quijano, thus, was not acting on behalf of the Claimants or on their instructions, but in fact against the Claimants' interests and for his own personal gain.

344. By attempting to shift the blame onto Claimants, Mexico is attempting to obscure that the Naucalpan Casino (like the other Casinos) was under SEGOB's custody, and that SEGOB permitted third parties to break the closure seals, enter the Casino and improperly remove Claimants' machines.[874] Mexico cannot deny that it was at the very least negligent in failing to effectively protect the premises that it had closed and placed under its control.[875] Thus, far from supporting Mexico's version of events, that Mr. Moreno Quijano was able to extract Claimants' valuable property from their Casinos underscores the defenseless position that Mexico's illegal conduct put Claimants in.

345. Moreover, the "court order" that Mexico claims SEGOB relied upon to lift the seals at the Naucalpan Casino nowhere ordered it to do so.[876] Contrary to Mexico's assertions, the administrative files of the closure of the Naucalpan Casino reveal that the Fifth Court informed SEGOB about the closure order and requested information regarding the reasons behind the closure, but the court did not order the seals to be lifted.[877] In fact, the court order does not even

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[873] Fourth Gordon Burr Statement, **CWS-59**, ¶ 94; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 165, 169.

[874] Memorial, ¶¶ 416-418; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 108.

[875] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 138.

[876] Decision issued by the Fifth Civil Court of First Instance of Tlalnepantla for Naucalpan 457/2015 (Sept. 22, 2015), **C-415**.

[877] Decision issued by the Fifth Civil Court of First Instance of Tlalnepantla for Naucalpan 457/2015 (Nov. 18, 2015), **C-408**; Second Ezequiel González Matus Report, **CER-6**, ¶ 233.

mention lifting the seals.[878] In addition, as discussed further below, SEGOB improperly failed to notify Claimants of the lifting of the closure seals.[879] As such, contrary to Mexico's arguments and to Mexican law, SEGOB improperly lifted the seals on the Naucalpan Casino without any court order requiring it to do so and without notifying E-Games.

3. The Removal of the Seals in Mexico City, Cuernavaca, Villahermosa, and Puebla

346. As explained above, the courts also did not order the lifting of the seals in Mexico City or Cuernavaca.

347. The Mexico City Casino: With respect to the Forty-First Court's decision, it is completely silent regarding the lifting of the closure seals for the Mexico City Casino.[880] The court only ordered the termination of the lease agreement and the subsequent delivery of the premises to the owners but did not order the lifting of the seals.[881] Thus, SEGOB lifted the seals *sua sponte*.[882]

348. The Cuernavaca Casino: Similarly, in Cuernavaca, contrary to Mexico's assertions, the court did not order SEGOB to lift the seals.[883]

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[878] Decision issued by the Fifth Civil Court of First Instance of Tlalnepantla for Naucalpan 457/2015 (Nov. 18, 2015), **C-408**; Second Ezequiel González Matus Report, **CER-6**, ¶ 233-235.

[879] Second Ezequiel González Matus Report, **CER-6**, ¶ 236, 237.

[880] Decision 439/2015 issued by the Forty-first Court for Civil Matters for the Superior Court for Mexico City (May 2, 2017), pp. 11-13, **C-410**; Second Ezequiel González Matus Report, **CER-6**, ¶ 233.

[881] Decision 439/2015 issued by the Forty-first Court for Civil Matters for the Superior Court for Mexico City (May 2, 2017), pp. 11-13, **C-410**.

[882] SEGOB Resolution No. AJD/0206/15-Vlll (July 3, 2017), p. 2, **R-076** ("From the above transcription, it is clear that [Del Bosque] essentially requests the following from this authority: Order the lifting of the closure, on the grounds that it has the legitimate interest to request the cessation of the state of closure and **the consequent lifting of seals**, being the legitimate owners of the establishment…"). (emphasis added). **Spanish Original**: "*De la anterior transcripción, se desprende que [Del Bosque] solicita a esta autoridad esencialmente lo siguiente: Ordene el levantamiento de clausura, con motivo de que cuenta con el interés legítimo para solicitar el cese del estado de clausura **y el consecuente levantamiento de sellos**, al ser las legítimas propietarias del establecimiento…*"). (emphasis added).

[883] Decision 56/2016 issued by the Second Civil Court on Commercial Matters for the State of Morelos (Feb. 17, 2017), pp. 64-68, **C-409**; Second Ezequiel González Matus Report, **CER-6**, ¶ 233-235.

349. The Villahermosa Casino: The Third Court *initially* ordered SEGOB to remove the closure seals,[884] but this order was soon after revoked by a superior court at SEGOB's very own request, because, according to SEGOB, the court had no authority to remove the closure seals.[885]

350. The Puebla Casino: There was no order from the civil judge to SEGOB to lift the seals,[886] but an administrative judge later ordered the lifting of the seals as a result of an *amparo* proceeding.[887]

351. Thus, Mexico's argument that SEGOB lifted all the seals pursuant to court orders is incorrect. SEGOB lifted the seals *sua sponte*, under its own discretion, and failed to notify E-Games of those actions in violation of Mexican law and Claimants' due process and property rights.

4. SEGOB Did Not Notify E-Games that It Was Lifting the Seals, In Breach of Its Obligations Under Mexican Law

352. Under Mexico's Federal Administrative Procedures Law, SEGOB was required to notify E-Games of the legal proceedings that resulted in the arbitrary lifting of the seals, as E-Games had a legal interest in the outcome.[888] But SEGOB completely failed to notify E-Games and thereby violated the law and Claimants' substantive and procedural rights.

353. Mexico argues that Claimants somehow evaded service from the owners of the premises or the judicial authorities. Claimants, however, did no such thing, and Mexico's victim-blaming

[884] Decision 370/2015 issued by the Third Civil Judge of First Instance for the State of Tabasco (Nov. 15, 2018), p. 20, **C-411**; Second Ezequiel González Matus Report, **CER-6**, ¶ 233-235.

[885] Decision 357/2019 issued by the Second Civil Judge of First Instance for the State of Tabasco (July 2, 2019), pp. 42-46, **C-412**; Second Ezequiel González Matus Report, **CER-6**, ¶ 233-235.

[886] Decision 760/2015/4C issued by the Fourth Court for Civil Matters for the Judicial District of Puebla (Aug. 16, 2016), **C-413**; Second Ezequiel González Matus Report, **CER-6**, ¶ 233-235.

[887] SEGOB Resolution No. DGJS/DGARV/3546/2017 for the Puebla Casino (July 5, 2017), **C-414**; Second Ezequiel González Matus Report, **CER-6**, ¶ 233-235.

[888] Federal Administrative Procedure Law, Article 16 (III), **R-064**; Second Ezequiel González Matus Report, **CER-6**, ¶ 237.

is doubly false. First, Mexico ignores that, by the time SEGOB lifted the seals, *it had closed all of Claimants' Casinos* —including their main offices in Naucalpan—and thus deprived them of an address in Mexico for notification or service purposes.[889] Accordingly, as a result of Mexico's unlawful closures, the owners of the premises of the Villahermosa, Cuernavaca, Puebla, and Mexico City establishments were not able to serve the Claimants in these proceedings and proceeded in the lawsuits without Claimants' participation.[890] Second, SEGOB also failed to notify Mr. Gutiérrez, Claimants' Mexican counsel, about *any* of the proceedings, despite that SEGOB knew that Mr. Gutiérrez was counsel of record for E-Games.[891] It was only in the case of the Mexico City Casino, that the *landlords* of the property notified Mr. Gutiérrez of the proceedings.[892] SEGOB, however, completely failed to notify the Claimants of any of the proceedings, as it was obligated to do under Mexican law.[893]

354. Mexico alleges the seals in the Villahermosa Casino were lifted in the presence of E-Games (represented by Mexican lawyer Sebastián Humberto Zavala González).[894] Mr. Chow requested that Mr. Zavala González appear on behalf of E-Games in this proceeding, but as the Tribunal is aware, Mr. Chow was never acting in the best interests or on behalf of the Claimants.[895]

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889 Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 135-137.

890 Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 137.

891 E-Games Request for Copies, Case File AJP/0063/14-VI (Feb. 20, 2018), **C-416**; E-Games Request for Copies, Case File AJP/0064/14-VI (Feb. 20, 2018), **C-417**; E-Games Request for Copies, Case File AJP/0065/14-VI (Feb. 20, 2018)E-Games Request for Copies Case File AJP/0065/14-VI (Feb. 20, 2018), **C-418**; E-Games Request for Copies, Case File AJP/0066/14-VI (Feb. 20, 2018), **C-419**; E-Games Request for Copies, Case File AJP/0067/14-VI (Feb. 20, 2018), **C-420**; E-Games Request for Copies, Case File AJP/0068/14-VI (Feb. 20, 2018), **C-421**; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 139.

892 Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 136-137.

893 Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 137.

894 Counter-Memorial, ¶ 380.

895 Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 136.

355. Mexico also argues that Claimants were negligent in addressing matters that arose after its illegal closures of the Casinos. This is false and another example of Mexico's attempt to shift is own blame onto Claimants. The owners of the Casino premises only initiated these legal proceedings months after the Casinos had been closed.[896] Claimants continued paying the rent on the premises for several months after the April 2014 closures, hoping that the Casinos would soon reopen as they understood that SEGOB had made a mistake in shuttering them.[897] Claimants could not afford to continue paying rent indefinitely for the Casinos after SEGOB had illegally closed them.[898] As Claimants have explained and explain further herein, they engaged in various efforts, including trying to meet with SEGOB, in order to understand why their Casinos had been closed and to try to promptly reopen them.[899] The Claimants also sought to work with third parties to try to mitigate damages and sell their assets, but SEGOB was unequivocal that it would not permit the Casinos to reopen and made sure that there were no other mitigation avenues available to Claimants.[900] Claimants only stopped paying rent after Mexico had rendered them destitute by failing to redress their grievances for months and leaving the Casinos shuttered and their capital and resources depleted.[901]

356. In sum, by improperly lifting the seals without notifying Claimants and returning legal possession of the premises to individuals or companies other than E-Games, SEGOB improperly

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[896] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 184(iii).

[897] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 135.

[898] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 135.

[899] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 96-100; Fourth Erin Burr Statement, **CWS-60**, ¶ ; Fourth Gordon Burr Statement, **CWS-59**, ¶ 58.

[900] Fourth Erin Burr Statement, **CWS-60**, ¶ 88; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 60; Second Neil Ayervais Statement, **CWS-61**, ¶¶ 64, 66.

[901] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 135; Fourth Erin Burr Statement, **CWS-60**, ¶ 130; Fourth Gordon Burr Statement, **CWS-59**, ¶ 61.

deprived Claimants of the ability to regain possession of the establishments and recover their property and valuable assets therein, all in breach of Mexican law and fundamental principles of due process.[902] It did so without any order from the courts permitting it to do so, except in the case of the Puebla Casino. Mexico took these improper actions in the context of SEGOB's ongoing refusal to negotiate with Claimants to reopen the Casinos or permit the sale of their assets, after SEGOB had unlawfully closed the Casinos. SEGOB's politically motivated and intentional lifting of the seals thus illegally deprived Claimants of their due process and property rights.

P. The 2014 Permit Applications Were Not Flawed

357. Mexico argues that its refusal to grant a new gaming permit to E-Games after E-Games had submitted valid applications was proper because: (1) E-Games could not operate casinos because they had been closed down for operating without a valid permit; and (2) E-Games' new permit applications included certain deficiencies regarding its investment plan and its certificates of good standing from the relevant municipalities.[903] Mexico then argues that E-Games had legal remedies at its disposal and an opportunity to appeal SEGOB's decision, but it did not pursue these remedies or the appeal.[904] Mexico finally argues that E-Games' situation is different from Mexican-owned companies that received permits around that same time, notably Megasport and Pur Umazal Tov.[905] As explained below, Mexico's arguments are not only unavailing, but further underscore its discriminatory application of the Gaming Regulation to deny E-Games' requests for new permits, while allowing Mexican-owned companies to start operating casinos under similar circumstances.

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[902] Memorial, ¶¶ 413-423.

[903] Counter-Memorial, ¶¶ 394-402.

[904] Counter-Memorial, ¶ 402.

[905] Counter-Memorial, ¶¶ 403–408.

358. Mexico's reasoning regarding E-Games' supposed impediment to open the Casinos under new permits because their Casino locations were closed down as of April 24, 2014 has no basis under Mexican law and defies common sense.[906] Under Mexican law, as Mr. González explains, a resolution from SEGOB granting the new permits would have been the proper administrative act.[907] Granting the new permits would have allowed for E-Games' continued lawful operation of the casinos that SEGOB improperly closed down.[908] Indeed, as Mr. González explains, "the new permit would have functioned as the administrative act of approval to carry out precisely the same activity that was closed down previously by the same authority."[909] As a result, the new permit would have allowed E-Games to operate the Casinos just as it had done before SEGOB had closed them down.[910]

359. Mexico does not deny this or even addresses it in its Counter-Memorial. It did not address this issue because it knows that SEGOB's granting of the requested permits would have eliminated the alleged reasons for the closures and, as a result, would have directly undermined the principal basis Mexico now puts forward for denying the new permit applications.[911]

360. Faced with this untenable position, Mexico had no other choice but to argue, notably without any evidence or legal reasoning at all, that E-Games had "a legal factual impediment for 'legal possession'" of its casino locations because the Casinos were closed.[912] Mexico's argument,

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[906] Second Ezequiel González Matus Report, **CER-6**, ¶ 242.

[907] Second Ezequiel González Matus Report, **CER-6**, ¶ 242.

[908] Second Ezequiel González Matus Report, **CER-6**, ¶ 243.

[909] Second Ezequiel González Matus Report, **CER-6**, ¶ 243 ("*Esto es importante si se considera que el permiso hubiera sido el acto administrativo de aprobación para realizar justamente la misma actividad que en su momento fue materia de la clausura por la misma autoridad*".).

[910] Second Ezequiel González Matus Report, **CER-6**, ¶ 242.

[911] Second Ezequiel González Matus Report, **CER-6**, ¶ 243.

[912] Counter-Memorial, ¶ 400.

however, fails for several reasons. First, Mexico does not point to any legal authority in support of this unsubstantiated legal impediment.[913] Second, as Mr. González explains, the very nature and logic behind a permit suggests that if a casino is closed down for whatever reason (including lack or invalidity of a permit), that status can be overturned so as to allow a casino to operate if the relevant authority (here, the SEGOB Games and Raffles Division) grants a new permit.[914] And third, and more importantly, Claimants in their Memorial provided proof of the "legal basis" for E-Games' rightful possession of the real property on which the Casinos were located, specifically providing copies of the sub-lease agreements establishing E-Games' legal right to possess the real property on which the Casinos operated (and where they should have resumed operations).[915] Claimants even provided proof that SEGOB did not dispute Claimants' legal right to possess the property at the time. There was no legal impediment, therefore, and Mexico's arguments to the contrary are as pretextual as they are unsupported by the facts and law.[916]

361. Notwithstanding the above, Mexico still argues that whether Claimants' Casinos were opened or closed at the time of Claimants' application for new permits was nonetheless relevant because, under the Gaming Regulation, the existence of a legal impediment to the requirement of "legal possession" required that the Claimants' application for a new permit be denied.[917] Mr. González explains, however, that under Mexican law, when an authority like SEGOB closes down an establishment, but at the same time it has the authority to issue a new permit which would allow

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[913] Second Ezequiel González Matus Report, **CER-6**, ¶ 245.

[914] Second Ezequiel González Matus Report, **CER-6**, ¶ 245.

[915] Memorial, ¶ 440.

[916] SEGOB Resolution No. DGJS/2738/2014 (Aug. 5, 2014), **C-27**; SEGOB Resolution No. DGJS/2739/2014 (Aug. 15, 2014), **C-28**; SEGOB Resolution No. DGJS/2740/2014 (Aug. 15, 2014), **C-29**; SEGOB Resolution No. DGJS/2741/2014 (Aug. 15, 2014), **C-30**; SEGOB Resolution No. DGJS/2742/2014 (Aug. 15, 2014), **C-31**; SEGOB Resolution No. DGJS/2743/2014 (Aug. 15, 2014), **C-32**; SEGOB Resolution No. DGJS/2744/2014 (Aug. 15, 2014), **C-33**.

[917] Counter-Memorial, ¶ 400.

that same establishment to open and operate again, this is a reasonable and legally valid action for SEGOB.[918] This is because granting the new permit has the effect of cancelling out the reason for the closures (the supposed lack of the permit).[919] SEGOB could have (and should have) allowed Claimants to open the Casinos by issuing the new permits which would have cured any issues related to the closures of the facilities.[920]

362. Mexico simply could not and did not provide any evidence in its Counter-Memorial to dispute Claimants' evidence proving their legal possession of the Casinos. Nor does Mexico provide any indication that SEGOB disputed this issue contemporaneous with the denial of the new permit applications. Instead, Mexico simply argues, without any legal support or reasoning whatsoever, that E-Games could not use the Casino locations—and that SEGOB could not grant the new permits—just because SEGOB had closed them down.[921] This justification is clearly insufficient for denying E-Games' new permit applications, particularly when this alleged legal impediment has no basis under Mexican law.

363. Equally untenable is Mexico's argument regarding alleged deficiencies in E-Games' new permit applications.[922] As Mr. González explains, Mexico completely sidestepped the procedure set forth in Article 17-A of the Federal Administrative Procedures Law.[923]

364. As Mr. González explains, Article 17-A required SEGOB not only to inform E-Games of any alleged deficiencies in its new permit applications (in this case, those regarding the investment

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[918] Second Ezequiel González Matus Report, **CER-6**, ¶ 246.

[919] Second Ezequiel González Matus Report, **CER-6**, ¶ 246.

[920] Second Ezequiel González Matus Report, **CER-6**, ¶ 246.

[921] Counter-Memorial, ¶ 394.

[922] Counter-Memorial, ¶¶ 395-399.

[923] Second Ezequiel González Matus Report, **CER-6**, ¶ 250; Federal Administrative Procedure Law, Article 17-A, **R-064**.

plan and the certificates of good standing), but also to follow certain parameters set forth by Mexican courts for affording E-Games an opportunity to cure the deficiencies.[924] Specifically, Mexico had to notify E-Games of the alleged deficiencies and provide it with a specific deadline to cure them.[925] Only after being afforded the right to cure any deficiencies, would Claimants have had the right, but not the obligation, to appeal SEGOB's decision.[926]

365. Mexico, however, did no such thing and instead decided to deny outright E-Games' new permit applications based on the alleged technical deficiencies that it never notified or allowed E-Games to cure. Since Mexico did not follow the proper procedure under the Federal Law of Administrative Procedures, Mexico's argument that Claimants had legal remedies at their disposal and an opportunity to appeal SEGOB's decision[927] fails precisely because Mexico did not afford E-Games with the proper legal remedy under Article 17-A of the Federal Law of Administrative Procedures.[928]

366. That Mexico granted permits to Mexican companies that did not have open, operating facilities at the time they requested and obtained the permits—as was the case of Megasport and Pur Umazal Tov—further underscores the pretextual nature of Mexico's arguments here. Mexico's attempt to distinguish between E-Games' situation and those of Megasport and Pur Umazal Tov based on the fact that those companies had closed their casinos before SEGOB

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[924] Second Ezequiel González Matus Report, **CER-6**, ¶ 250-251; Digital Registry: 163619 Instance: Collegiate Circuit Courts, Ninth Epoch Subject(s): Administrative, Thesis: I.7o.A.736 A, Source: Judicial Weekly of the Federation and its Gazette. Volume XXXII, October 2010, page 3079, Type: Isolated, **CL-258**.

[925] Second Ezequiel González Matus Report, **CER-6**, ¶ 251.

[926] Second Ezequiel González Matus Report, **CER-6**, ¶ 251.

[927] Counter-Memorial, ¶ 402.

[928] Second Ezequiel González Matus Report, **CER-6**, ¶ 252; Federal Administrative Procedure Law, Article 17-A, **R-064**.

shuttered them fails.[929] Besides not making any sense, this argument also finds no support under Mexican law.[930] As previously explained, during the Peña Nieto administration, SEGOB granted casino permits to Mexican companies that did not have an open and operating facility, and in particular did so for Megasport and Pur Umazal Tov. As Mr. González explains, Mexico's distinction without a difference misses the point, because it is the *permit* which allows an establishment to open and operate; meaning that if SEGOB grants a new permit, it is allowing that establishment to open and operate again, regardless of whether that establishment decided to close down its operations prior to SEGOB's closure.[931] If SEGOB had granted Claimants' new permit applications, that new permits would have allowed the Casinos to reopen, even if under the authorization of new permits.[932]

367. Moreover, the fact that Mexico cannot point to a single legal authority in support of its artificial distinction is quite telling. It is also telling that Mexico cannot point to any part in SEGOB's denial of E-Games' permit application or Megasport's resolution to support this supposed distinction that Megasport's circumstances were distinct because it voluntarily shut down its casinos.[933] Lastly, Mexico's silence with respect to Claimants' other example of Mexico's discriminatory behavior regarding the granting of casino permits to companies with no

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[929] Counter-Memorial, ¶¶ 394-402.

[930] Gaming Regulation, Article 22, **CL-72**; SEGOB Resolution No. DGJS/2738/2014 (Aug. 5, 2014), **C-27**; SEGOB Resolution No. DGJS/2739/2014 (Aug. 15, 2014), **C-28**; SEGOB Resolution No. DGJS/2740/2014 (Aug. 15, 2014), **C-29**; SEGOB Resolution No. DGJS/2741/2014 (Aug. 15, 2014), **C-30**; SEGOB Resolution No. DGJS/2742/2014 (Aug. 15, 2014), **C-31**; SEGOB Resolution No. DGJS/2743/2014 (Aug. 15, 2014), **C-32**; SEGOB Resolution No. DGJS/2744/2014 (Aug. 15, 2014), **C-33**.

[931] Second Ezequiel González Matus Report, **CER-6**, ¶ 246.

[932] Second Ezequiel González Matus Report, **CER-6**, ¶ 246.

[933] SEGOB Resolution No. DGJS/2738/2014 (Aug. 5, 2014), **C-27**; SEGOB Resolution No. DGJS/2739/2014 (Aug. 15, 2014), **C-28**; SEGOB Resolution No. DGJS/2740/2014 (Aug. 15, 2014), **C-29**; SEGOB Resolution No. DGJS/2741/2014 (Aug. 15, 2014), **C-30**; SEGOB Resolution No. DGJS/2742/2014 (Aug. 15, 2014), **C-31**; SEGOB Resolution No. DGJS/2743/2014 (Aug. 15, 2014), **C-32**; SEGOB Resolution No. DGJS/2744/2014 (Aug. 15, 2014), **C-33**.

open and operating casinos at the time the requests were made, Discos y Producciones Premier, speaks volumes.[934] As a result, Mexico's attempt to distinguish Megasport and Pur Umazal Tov's situation from that of E-Games, based on an irrelevant and baseless distinction as the fact that Megasport (and Pur Umazal Tov) had shut its doors *before* SEGOB ordered its closure, falls flat and confirms Mexico's discriminatory behavior against E-Games.

Q. Mexico Interfered with Claimants' Efforts to Sell Their Casino Assets

368. In its Counter-Memorial, Mexico denies any responsibility for Claimants' inability to sell the Casinos and/or their assets.[935] Mexico states that it had no intention to block or interfere with the sale of Claimants' Casinos, and once again, in an attempt to evade responsibility for its actions, inaccurately blames the Claimants for their inability to sell the Casinos.[936] Mexico relies on Ms. Salas' witness statement and on out-of-context statements contained in the Taylor Declaration to support its unavailing arguments to this effect. Mexico's misleading arguments should be dismissed, as they are directly contradicted by the facts, as well as the testimony of numerous percipient witnesses.

369. After Mexico illegally closed the Casinos on April 24, 2014, Claimants, through Mr. Burr, approached a number 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, in attempt to try to mitigate the damages that Mexico caused.[937] Specifically, as Claimants explained in detail in the Memorial, Mr. Burr approached: (i) Televisa, through its representatives José Antonio García ("**Mr. García**"), the VP of Corporate Administration at

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[934] Memorial, ¶ 445.

[935] Counter-Memorial, ¶¶ 409-418.

[936] Counter-Memorial, ¶¶ 409-418.

[937] Memorial, ¶¶ 428-436; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 82; Third Gordon Burr Statement, **CWS-50**, ¶¶ 109-115; Third Erin Burr Statement, **CWS-51**, ¶¶ 119-121.

Televisa, and Kevin Rosenberg ("**Mr. Rosenberg**"), the Director of Business Development at Televisa; (ii) Mr. Juan Cortina Gallardo ("**Mr. Cortina**"), a prominent Mexican businessman who also had casinos in Mexico; (iii) José Benjamin Chow del Campo ("**Mr. Chow**") and Luc Pelchat ("**Mr. Pelchat**"), both with significant involvement in the Mexican casino industry and who affirmed that they had high level contacts within SEGOB who would help reopen the Casinos; and (iv) CODERE, a Spanish multinational group in the gaming industry that operates more than 140 casinos in Europe and Latin America, including in Mexico, as well as other Mexican casino companies such as Prensa.[938]

370. However, as Claimants also explained in detail in the Memorial, SEGOB expressly rebuffed and hindered all of Claimants' efforts.[939] Each and every potential partner and purchaser that Claimants contacted expressed interest in partnering with Claimants to try to reopen the Casinos, and/or to purchase Claimants' Casino assets.[940] However, every single time that these potential partners and purchasers contacted SEGOB expressing an interest in reopening Claimants' Casinos, SEGOB expressly stated that it would not allow the Casinos to be reopened, thereby forcing the interested companies and individuals to abandon their negotiations with Claimants.[941] In fact, multiple Directors of the Games and Raffles Division went as far as to explicitly state that they would not allow the Casinos to reopen as long as the U.S. shareholders remained involved in the management of the Casinos or the Juegos Companies.[942]

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938 Third Gordon Burr Statement, **CWS-50**, ¶¶ 109-115.

939 Third Gordon Burr Statement, **CWS-50**, ¶ 114; Third Erin Burr Statement, **CWS-51**, ¶¶ 119-121.

940 Third Gordon Burr Statement, **CWS-50**, ¶¶ 109-115; Third Erin Burr Statement, **CWS-51**, ¶¶ 119-121.

941 Third Gordon Burr Statement, **CWS-50**, ¶¶ 109-115; Third Erin Burr Statement, **CWS-51**, ¶¶ 119-121.

942 Third Gordon Burr Statement, **CWS-50**, ¶ 114; Third Erin Burr Statement, **CWS-51**, ¶ 121; Luc Pelchat Statement, **CWS-4**, ¶ 9; Benjamin Chow Statement, **CWS-11**, ¶ 25.

371. In her witness statement, Ms. Salas acknowledges having met with Mr. García and with Mr. Cortina.[943] However, Ms. Salas claims that in her conversations with both Mr. García and with Mr. Cortina, she simply explained to them that the casinos could not legally reopen because they had been shut down for operating without a valid permit.[944] Mexico claims that this demonstrates that SEGOB had no intention to block or interfere in the sale of Claimants' Casinos.[945] However, Mexico's version of the facts is incorrect. Mr. Burr has confirmed that Mr. García not only ominously told him *before* April 2014 that the Mexican government would shutter Claimants' Casinos, but also that Mr. García and Mr. Cortina told him during post-2014 negotiations that Ms. Salas would not permit the Casinos to reopen. Mr. Chow and Mr. Pelchat also unequivocally reaffirmed this point to Mr. Burr.[946]

372. Mexico also claims, based upon a gross distortion of the facts, that the Televisa deal was not real, and that it failed because of disagreements and misunderstandings among the Claimant group.[947] To support these statements, Mexico relies on an email from Mr. Burr to another Claimant stating that (i) Mr. Conley claimed that the Televisa deal "was never real," and (ii) "[m]isinformation and complete breakdown in transparency during transactions with Benjamin, Alfredo, and then Televisa led to great mistrust on our side."[948] Both statements are simply false. Mr. Conley was not involved in Claimants' initial 2013/2014 negotiations with Televisa that occurred just before and immediately after the illegal Casino closures.[949] Mr. Conley was only

[943] Salas Statement, **RWS-1**, ¶¶ 22-24.

[944] Salas Statement, **RWS-1**, ¶¶ 22-24.

[945] Counter-Memorial, ¶ 412.

[946] Fourth Gordon Burr Statement, **CWS-59**, ¶ 59.

[947] Counter-Memorial, ¶¶ 413-414, 417.

[948] Counter-Memorial, ¶ 414.

[949] Fourth Gordon Burr Statement, **CWS-59**, ¶ 60.

involved in a potential transaction with Televisa in 2015-2016 led by Messrs. Chow and Moreno Quijano that ultimately did not come to fruition.[950] However, as Claimants' witnesses explain, the proposed transaction with Televisa in 2015-2016 was real.[951] In May 2015, the B-Mex Companies' Boards granted Messrs. Conley and Rudden authority to move forward with the sale of the assets.[952] Later in 2015, the Juegos Companies entered into Letters of Intent with Telestar, a subsidiary of Televisa.[953]

373. Moreover, Claimants have presented detailed testimony concerning their negotiations with Televisa before and after Mexico illegally closed the Casinos in 2014. Claimants have also explained how the deal with Televisa failed because when Televisa's representatives communicated to SEGOB (and specifically, Ms. Salas) its interest in Claimants' Casinos, SEGOB would not approve the proposed transaction.[954] Ms. Salas' testimony itself confirms that Televisa was interested in acquiring Claimants' Casinos.[955] Therefore, Mexico's claim that the Televisa deal was not real and that it failed because of causes attributable to the Claimants is both demonstrably false and unavailing.

374. Mexico also attempts to blame Claimants for the failure of the proposed transaction with Messrs. Chow and Pelchat, claiming that it was fraudulent.[956] Specifically, Mexico argues that

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[950] Fourth Gordon Burr Statement, **CWS-59**, ¶ 60.

[951] Fourth Gordon Burr Statement, **CWS-59**, ¶ 60; Fourth Erin Burr Statement, **CWS-60**, ¶¶ 117-118.

[952] Fourth Gordon Burr Statement, **CWS-59**, ¶ 74.

[953] Telestar Naucalpan Casino Letter of Intent (Sept. 1, 2015), **C-423**; Telestar Cuernavaca Casino Letter of Intent (Sept. 1, 2015), **C-424**; Telestar Puebla Casino Letter of Intent (Sept. 1, 2015), **C-425**; Telestar Mexico City Casino Letter of Intent (Sept. 1, 2015), **C-426**; Telestar Villahermosa Casino Letter Intent (Sept. 1, 2015), **C-427**.

[954] Third Gordon Burr Statement, **CWS-50**, ¶¶ 109-115; Fourth Gordon Burr Statement, **CWS-59**, ¶ 60.

[955] Salas Statement, **RWS-1**, ¶¶ 22-24 ("I specifically remember meeting with José Antonio García, Vice President of Corporate Administration for Televisa, who expressed an interest in acquiring E-Games' establishment in Cuernavaca.").

[956] Counter-Memorial, ¶¶ 415-416.

Mr. Rudden defrauded one of B-Mex's investors, Doug Moreland ("**Mr. Moreland**"), by directing money that Mr. Moreland could have loaned to B-Mex after Mexico illegally closed Claimants' Casinos, into a subscription agreement with Grand Odyssey, and keeping 10% of the proceeds for himself.[957] This is false and constitutes nothing more than a misguided deflection from Mexico. As Mr. Burr explains, Mr. Rudden did facilitate a subscription agreement between Grand Odyssey and Mr. Moreland in the hopes of re-opening the Casinos, which involved finding investors interested in investing in Grand Odyssey. But Mr. Rudden never defrauded anyone in doing so, nor did he keep any of the proceeds from this operation for himself.[958] Contrary to what Mexico attempts to argue, the reality is that Mexico is responsible for the failure of the proposed transaction with Messrs. Chow and Pelchat. As Mr. Burr explained in detail in his prior witness statement, Messrs. Chow and Pelchat expressed an interest in buying Claimants' Casino assets, and proposed to do so through the acquisition of the Juegos Companies and their assets by Grand Odyssey, S.A. de C.V. ("**Grand Odyssey**"), a company owned by Mr. Chow.[959] However, the transaction failed chiefly because SEGOB did not provide Messrs. Chow and Pelchat approval for the Casinos to reopen.[960] Messrs. Chow and Pelchat have both admitted in these proceedings that they asked Ms. Salas, as well as her successor, Luis Felipe Cangas ("**Mr. Cangas**"), to reopen the Casinos, and both Ms. Salas and Mr. Cangas were unequivocal that the Casinos would not reopen until the U.S. shareholders of the Juegos Companies were no longer directly involved in the Juegos Companies, and that SEGOB would never allow Exciting Games to reopen any casinos in Mexico.[961] Contrary

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957 Counter-Memorial, ¶¶ 415-416.

958 Fourth Gordon Burr Statement, **CWS-59**, ¶ 61.

959 Third Gordon Burr Statement, **CWS-50**, ¶ 114.

960 Third Gordon Burr Statement, **CWS-50**, ¶ 114.

961 Benjamin Chow Statement, **CWS-11**, ¶ 25; Luc Pelchat Statement, **CWS-10**, ¶ 9; *see also* Hearing on Jurisdictional Objections, Day 3; 7755-9 ("Yes. She told us it was very important. That if we wanted to move forward that we could not be shareholders of the company Exciting Games and the U.S. 7 shareholders could also not be

to Ms. Salas' testimony, these statements coupled with SEGOB's actions, reflect an intentional desire on the part of SEGOB to harm E-Games and the Claimants in this case. The Claimants pursued various potential partners and SEGOB improperly halted every one. Mexico is, once again, the only one to blame for the failures of Claimants' efforts to sell the Casinos, as Mexico aggressively impeded and undermined all of Claimants' efforts to reopen and to sell their assets.

1. The Tribunal Should Draw an Adverse Inference From Mexico's Failure to Produce Documents Related to Mexico's Interferences with Claimants Efforts to Sell the Casinos

375. In the document production phase, Claimants requested various documents related to Mexico's interferences with their efforts to sell the Casinos. Specifically, the Claimants requested that Mexico produce the following documents:

- **Request 54:** Any document related to or prepared in connection with any requests or communications by Grupo Caliente or its representatives to and/or with the Mexican government officials regarding E-Games, its Casino operations and/or its permit holder status, including without limitation, copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (*oficios*), emails or messages sent via Whatsapp, text message, iMessage, WeChat, Signal Messenger, Telegram, or any other cloud-based messaging service, and other documents reflecting such requests or communications, prepared between December 1, 2012 and December 31, 2016.

- **Request 55:** Any document related to or prepared in connection with SEGOB's assessment or review of any proposals or plans made by Mr. Juan Cortina Gallardo, Messrs. José Benjamin Chow del Campo and Luc Pelchat, CODERE, Prensa, Televisa, and any other individuals or entities to purchase Claimants' Casinos and/or to partner with Claimants to reopen their Casinos, including without limitation, copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (*oficios)*, emails or messages sent via Whatsapp, text message, iMessage, WeChat, Signal Messenger, Telegram, or any other cloud-based messaging service, and other documents regarding such proposals or plans, prepared between April 1, 2014 and December 31, 2016.

shareholders of Exciting Games."); 791;8-16 ("The purpose of the shareholders meeting was to--was after the second meeting with Ms. Marcela, who was saying that no U.S. citizen could be part of the company. Q. So, the idea was to convince SEGOB that the U.S. capital was no longer involved? A. Yes, that the shares were going to be transferred to Grand Odyssey and that the Americans were no longer involved.").

376. The Tribunal granted these requests. Mexico did not produce any responsive documents to these requests, claiming it was unable to locate any. Respondent's claimed inability to locate any responsive documents is implausible, as Claimants have produced evidence confirming that the Mexican government revoked E-Games' permit to benefit Grupo Caliente and its owners, the Hank Rhon family.[962] In addition, it is not credible that Respondent would not have generated any documents concerning the meetings Ms. Salas held with Mr. García and with Mr. Cortina, whom Ms. Salas herself acknowledges having met with.[963] As a result of Respondent's failure to identify any documents in response to the aforementioned requests, Claimants request that the Tribunal draw an adverse inference that (i) Mexico improperly and intentionally interfered with Claimants' efforts to reopen the Casinos and/or sell the Casino assets after the closure of the Casinos and (ii) denied Claimants the opportunity to mitigate their damages.

R. Petolof Was Similarly Situated to E-Games; Petolof's Status Today is Further Proof that Mexico Applied and Continues to Apply Different Standards Under Similar Circumstances

377. In the Memorial and *supra*, Claimants explained that on May 27, 2009, SEGOB issued the May 27, 2009 Resolution granting E-Games' request to operate its Casinos autonomously and independently of any permission from E-Mex.[964] More importantly, however, in the May 27, 2009 Resolution, SEGOB determined that E-Games had acquired rights under Mexican law to operate its Casinos within the scope of E-Mex's permit.[965] In this regard, Mr. González previously explained that the legal principle of acquired rights, while not codified in Mexico's Federal Gaming Law or the Gaming Regulation, is nonetheless a principle firmly recognized in Mexican

[962] Memorial, ¶¶ 212-217, 235-237; First Black Cube Statement, **CWS-57**, ¶¶ 44-46, 48.

[963] Salas Statement, **RWS-1**, ¶¶ 22-24.

[964] Memorial, ¶ 106.

[965] Memorial, ¶ 107.

administrative law.[966] Mr. González even concluded that a Mexican administrative body may rely on this valid legal principle of acquired rights to protect a person's property rights.[967]

378. E-Games was able to obtain the independent operator status based on the principle of acquired rights because there was a precedent from October 28, 2008, where SEGOB had recognized that another gaming operator in similar circumstances as E-Games, Petolof, had acquired rights and obligations in connection with a third party's permit, Espectáculos y Deportes del Norte S.A. de C.V. ("**EDN**").[968] More specifically, Claimants established that: (1) when SEGOB issued the May 27, 2009 Resolution, it was following a precedent and its prior interpretation of the Gaming Regulation under very similar circumstances when it granted Petolof the status of independent operator in the October 28, 2008 Resolution;[969] and (2) both resolutions, the October 28, 2008 and May 27, 2009 Resolutions, recognized that a third party (E-Games and Petolof) had acquired rights based on a contractual relationship (an operating agreement) with a permit holder (E-Mex and EDN), to the extent that this contractual relationship gave the third party a right to operate establishments without the permit holder's permission.[970] In light of the above, when SEGOB issued the May 27, 2009 Resolution, it was not rendering a new interpretation of the Gaming Regulation, but rather was being consistent with prior application and interpretation of the Gaming Regulation and with its previous precedent.[971]

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966 Memorial, ¶ 108; First Ezequiel González Matus Report, **CER-3**, ¶ 100.

967 Memorial, ¶ 108; First Ezequiel González Matus Report, **CER-3**, ¶ 101.

968 Memorial, ¶ 117.

969 Memorial, ¶ 123.

970 Memorial, ¶ 124.

971 Memorial, ¶ 117.

1. The Petolof Case Was and Is Applicable to E-Games Because Both Companies Were in Similar Circumstances

379. Mexico now contends that the Petolof case is inapplicable to E-Games because both companies were in different circumstances for three reasons.[972] First, Mexico contends that E-Games' situation was different from Petolof's because SEGOB issued the permit to Petolof in compliance with a court order and, as such, it was not discretionary.[973] Second, Mexico argues that Petolof and E-Games were subject to two different legal systems, meaning that SEGOB issued the October 28, 2008 Resolution to Petolof under the Federal Gaming Law, while SEGOB issued the May 27, 2009 Resolution to E-Games under the Federal Gaming Law and the Gaming Regulation.[974] As a result, Mexico argues that there is a fundamental distinction between both companies because since E-Games was subject to both the Federal Gaming Law and the Gaming Regulation when SEGOB issued the May 27, 2009 Resolution,[975] the analysis of acquired rights is different under the Gaming Regulation.[976] And third, Mexico posits that the scope of the operating agreement between E-Mex and E-Games was substantially different from the agreement between Petolof and EDN.[977] In this regard, Mexico contends that the operating agreement between E-Games and E-Mex was very limited and restrictive in scope, whereas the operating agreement between Petolof and EDN established a series of complex rights and obligations that E-Games never had under the operating agreement with E-Mex.[978] All of Mexico's post-hoc

[972] Counter-Memorial, ¶¶ 436-456.

[973] Counter-Memorial, ¶¶ 426, 440-441.

[974] Counter-Memorial, ¶¶ 445-448.

[975] Counter-Memorial, ¶ 445.

[976] Counter-Memorial, ¶ 445.

[977] Counter-Memorial, ¶¶ 449-453.

[978] Counter-Memorial, ¶ 451.

justifications to distinguish E-Games' situation from Petolof's are unavailing and in stark contradiction with the facts and Mexican law.

(a) SEGOB Independently Recognized Petolof's Acquired Rights, and Not Because of a Court Order

380. In their Memorial, Claimants explained that Petolof began its casino operation under EDN's permit as a result of a services and distribution agreement allowing Petolof to use seven of EDN's gaming establishments in Mexico.[979] At some point in time, SEGOB initiated administrative proceedings to revoke EDN's permit and, while these proceedings were ongoing, Petolof initiated an *amparo* proceeding requesting a right to due process and to participate in EDN's administrative proceedings.[980]

381. As Mr. González explains, the Mexican court granted Petolof's request, meaning that the Mexican court ruled only that Petolof's due process rights had been violated and, as a result, SEGOB had to include Petolof in the ongoing administrative proceedings.[981] At no point did the Mexican court rule that SEGOB had to issue a permit based on the principle of acquired rights.[982] In fact, Mr. González goes on to explain that SEGOB's recognition of Petolof's acquired rights was based on SEGOB's own criteria and independent analysis of Petolof's acquired rights over EDN's permit.[983] And based on this independent analysis, SEGOB granted Petolof independent operator status over seven of EDN's properties in Mexico.[984]

[979] Memorial, ¶ 119.

[980] Memorial, ¶ 119.

[981] Second Ezequiel González Matus Report, **CER-6**, ¶ 116.

[982] Second Ezequiel González Matus Report, **CER-6**, ¶ 116.

[983] Second Ezequiel González Matus Report, **CER-6**, ¶ 116.

[984] Second Ezequiel González Matus Report, **CER-6**, ¶ 118.

382. In light of the above, Mr. González concludes that SEGOB's granting of the October 28, 2008 Resolution in favor Petolof was not the result of a Mexican court order, but rather based on SEGOB's discretionary analysis within the administrative proceedings, and for which the Mexican court had ordered SEGOB to provide Petolof with due process rights therein.[985]

(b) It Is Irrelevant that E-Games Was Subject to Both the Federal Gaming Law and the Gaming Regulation

383. As explained in the Memorial on the Merits, a property right, once acquired, becomes a protected property right and cannot be taken away by either the person who bestowed that right in the first place or by any subsequent legal provision contradicting it.[986] In light of this undisputed legal principle, the fact that E-Games was subject to both the Federal Gaming Law and the Gaming Regulation is of no consequence for several reasons.

384. First, Mr. González explains that E-Games' acquired rights did not depend on whether the Gaming Regulation was in force; rather E-Games' acquired rights depended solely on the fact that each third party (E-Games or Petolof) had acquired operating rights over a permit holder's permit (E-Mex or EDN) based on the particular legal regime that bestowed the acquired rights.[987] Therefore, the relevant legal emphasis is on the recognition of the legal principle of acquired rights, which were recognized both in the case of E-Games as well as Petolof, and not on the particular legal regime that bestowed it, precisely because the principle of acquired rights is a legal concept in and of itself that protects a right from being retroactively taken away once it is protected.[988]

385. Second, to suggest, as Mexico does, that the Gaming Regulation did not apply to Petolof for purposes of analyzing Petolof's acquired rights is in fact a recognition of the above, to the

[985] Second Ezequiel González Matus Report, **CER-6**, ¶ 118.

[986] Memorial, ¶ 108; Second Ezequiel González Matus Report, **CER-6**, ¶ 108.

[987] Second Ezequiel González Matus Report, **CER-6**, ¶ 108.

[988] Second Ezequiel González Matus Report, **CER-6**, ¶108.

extent that Mexico in essence concedes that Petolof had acquired certain rights and that SEGOB had to respect these protected rights despite the fact that the Gaming Regulation entered into effect after the October 28, 2008 Resolution.

386. In light of the above, Mr. González concludes that, because both Petolof's and E-Games' acquired rights arose from the same legal concept (that is, SEGOB's recognition of the principle of acquired rights), it is completely irrelevant whether the acquired rights were bestowed under the Federal Gaming Law and the Gaming Regulation because what ultimately controls is the recognition of the principle of acquired rights as a separate and independent legal norm.[989] Accordingly, SEGOB acted consistently when it issued both resolutions because in both instances it recognized acquired rights in favor of the third party (E-Games or Petolof).[990]

(c) The Scope of the Contractual Relationship Between the Third Party Operator and the Permit Holder is Likewise Irrelevant

387. As mentioned above, the principle of acquired rights does not depend on the type or nature of the contractual relationship between owner and operator; instead it is an independent legal concept that is meant to protect property rights once a party has acquired them.[991] In this regard, Mr. González explains that the controlling issue in this analysis is the undisputed fact that SEGOB recognized the third party's acquired rights over a permit holder's permit, regardless of the legal regime in place or the type of contractual relationship between the third party and the permit holder, in both Petolof's and E-Games' cases.[992]

388. Even more important, E-Games' and Petolof's acquired rights arose from a similar factual situation: the existence of a contractual relationship between permit owner and operator that

[989] Second Ezequiel González Matus Report, **CER-6**, ¶ 105.

[990] Second Ezequiel González Matus Report, **CER-6**, ¶ 106.

[991] Second Ezequiel González Matus Report, **CER-6**, ¶ 108.

[992] Second Ezequiel González Matus Report, **CER-6**, ¶ 110.

SEGOB recognized generated independent acquired rights and obligations for the operator.[993] And it is precisely based on these common features that SEGOB acted consistent with the seminal precept of legal certainty when it recognized E-Games' acquired rights just as it had recognized Petolof's, in the sense that the concept of legal certainty required SEGOB to act in a legally sound and consistent manner when faced with similar cases.[994]

2. Petolof's Status Today Is Further Proof of Mexico's Discriminatory Treatment of Claimants

389. As explained in the Memorial on the Merits, on May 27, 2016, SEGOB granted Petolof the status of permit holder,[995] thus confirming that SEGOB is applying different standards to different permit holders, even though both Petolof and E-Games stood in nearly identical circumstances for purposes of becoming a permit holder.[996] In response to this, Mexico argues that it issued the permit to Petolof in response to a Mexican court order and, as such, it did not discriminate against E-Games.[997] This is not correct.

390. For the same reasons just mentioned above, SEGOB's ruling changing Petolof's status to permit holder denotes a total lack of legal certainty in Mexican administrative law.[998] As was mentioned briefly above and will be explained in greater detail below with respect to Producciones Móviles, the principle of legal certainty requires Mexican administrative bodies to act in a consistent and homogenous manner so as to avoid inconsistencies, bias, irregularities, or arbitrary

[993] Second Ezequiel González Matus Report, **CER-6**, ¶ 112.

[994] Second Ezequiel González Matus Report, **CER-6**, ¶ 119.

[995] Memorial, ¶ 126; Petolof Permit No. DGJS/DGAAD/DCRCA/P-01/2016 (May 27, 2016), https://sijscasinos.segob.gob.mx/AppDGTI/SIJS/docs_salas/permisos/permini_32_.pdf, **C-328**.

[996] Memorial, ¶ 127.

[997] Counter-Memorial, ¶¶ 454-456.

[998] Second Ezequiel González Matus Report, **CER-6**, ¶ 119.

governmental conduct.[999] And when an administrative body does not act in this way, it breaches the law and a party's legitimate expectations to be treated in accordance with it. As a result, in accordance with the constitutional mandate of legal certainty,[1000] SEGOB should have adopted the same position with respect to both E-Games' and Petolof's permits.[1001]

391. That Mexico now argues that it is was complying with a Mexican court order in no way changes the above analysis, as it is unclear from the Petolof permit whether the Mexican court ordered SEGOB to issue a new permit or, like it did before during the EDN administrative proceedings, simply SEGOB to provide Petolof with due process rights.[1002] Mexico could have produced the Mexican court order to further buttress this otherwise unsubstantiated argument, but chose not to do so. It follows, then, that Mexico has still not demonstrated that, with regard to the Petolof permit, it was acting in compliance with the Mexican court order ordering SEGOB to issue the Petolof permit. Even if SEGOB was acting pursuant to a court order, however, the result should remain the same, as there would be nothing of substance to differentiate one situation from the other. If anything, in fact, that a court ordered SEGOB to grant a gaming permit to a company that was in the same circumstances as E-Games buttresses E-Games' entitlement to its own permit.

3. The Tribunal Should Draw Adverse Inferences From Mexico's Failure to Produce Any Documents Related to the Petolof Case

392. During the document production phase, Claimants requested documents related to the principle of acquired rights,[1003] as well as documents related to, prepared in connection with, or

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[999] Second Ezequiel González Matus Report, **CER-6**, ¶ 119.

[1000] Second Ezequiel González Matus Report, **CER-6**, ¶ 113; Mexican Constitution, Articles 8, 14, 16, 17, 18, 19, 20, 21, 22 and 23, **CL-72**.

[1001] Second Ezequiel González Matus Report, **CER-6**, ¶ 113.

[1002] Petolof Permit No. DGJS/DGAAD/DCRCA/P-01/2016 (May 27, 2016), https://sijscasinos.segob.gob.mx/AppDGTI/SIJS/docs_salas/permisos/permini_32_.pdf, **C-328**.

[1003] Procedural Order No. 10 (Mar. 26, 2021), Annex I.

reflecting an analysis or opinion comparing Petolof and E-Games and/or comparing SEGOB's October 28, 2008 Resolution and SEGOB's May 27, 2009 Resolution.[1004] Specifically, the relevant document requests stated:

- **Request 4:** Any document related to, prepared in connection with, or reflecting an analysis or opinion comparing Petolof and E-Games and/or comparing SEGOB's October 28, 2008 Resolution and SEGOB's May 27, 2009 Resolution, including without limitation, copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (*oficios*), and other documents prepared by, without limitation, the Ministry of Economy, and/or SEGOB, between January 1, 2008 and December 31, 2012.

- **Request 5:** Any documents related to, prepared in connection with, or reflecting an analysis or opinion of the concept of acquired rights ("*derechos adquiridos*"), including without limitation, copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (*oficios*), and other documents prepared by, without limitation, the Ministry of Economy, and/or SEGOB, between January 1, 2008 and December 31, 2016.

393. The Tribunal granted those requests. Mexico, however, did not produce any documents related to either document request, stating only that "it has not identified any documents that would be responsive to this request."[1005] Mexico's failure to produce any responsive documents is not only implausible and disingenuous, but also quite telling, particularly given the fact that SEGOB itself established a precedent of recognizing acquired rights in favor of third parties in relation to a permit holder's permit and SEGOB recognized that the principle of acquired rights applied both to E-Games as well as to Petolof. Moreover, it also strains credulity that Mexico would not have *any* documents comparing the October 28, 2008 Resolution and the May 27, 2009 Resolution and/or discussing the implications of the resolutions. The resolutions are strikingly similar and both resolutions sought to grant a third party (E-Games or Petolof) an independent right to operate

[1004] Procedural Order No. 10 (Mar. 26, 2021), Annex I.

[1005] Procedural Order No. 10 (Mar. 26, 2021), Annex I.

their gaming establishments that were being operated under another permit holder's permit and that were being passed on to the operators based upon the legal principle of acquired rights.[1006] In light of Mexico's failure to produce these documents, the Tribunal must infer that responsive documents would not be favorable to Mexico's case. As such, this can only lead to one conclusion: that Mexico is applying different standards under similar circumstances, thus providing preferential treatment to Mexican-owned companies with the same acquired rights as E-Games.

S. Producciones Móviles Was Similarly Situated to E-Games and, Unlike E-Games, Still Operates Under an Independent Permit

394. In the Memorial, Claimants explained how a Mexican gaming operator, Producciones Móviles, who was operating under E-Mex's permit and who stood in essentially identical circumstances to E-Games, sought and obtained an independent permit at essentially the same time as E-Games.[1007] Notwithstanding the above, Producciones Móviles continues to have a valid permit and operate casinos today, while E-Games does not.[1008] In their Memorial, Claimants proved that Mexico's actions not only demonstrate Mexico's application of different standards under similar circumstances, but also a total disregard for the principle of legal certainty in administrative law (requiring administrative bodies to act in a legally sound and consistent manner).[1009]

395. In response to the above, while Mexico concedes that there are certain similarities between E-Games' and Producciones Móviles' permits, it argues that a single difference renders these similarities irrelevant.[1010] According to Mexico, since the Producciones Móviles permit was not a

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[1006] First Ezequiel González Matus Report, **CER-3**, ¶ 110.

[1007] Memorial, ¶ 155.

[1008] Memorial, ¶ 160.

[1009] Memorial, ¶¶ 160-161.

[1010] Counter-Memorial, ¶ 420.

consequence of the May 27, 2009 Resolution and, as a result, not subject to the revocation order in the *Amparo* 1668/2011 judgment, there was no ruling ordering the revocation of the Producciones Moviles permit.[1011] Mexico argues that this is sufficient in and of itself to distinguish E-Games' circumstances from Producciones Móviles.[1012] This is not correct under Mexican law.

396. Under Mexican law, and pursuant to the principle of legal certainty, SEGOB should have assumed similar positions with respect to both permits.[1013] More specifically, Mr. González explains that SEGOB is required to apply the law in accordance with Mexican court rulings and, in fact, even adopt administrative guidelines consistent with those Mexican court rulings.[1014] Otherwise, SEGOB would end up adopting inconsistent and arbitrary decisions with respect to the same issues.[1015] This is precisely what happened here, when SEGOB revoked the E-Games Independent Permit but maintained Producciones Móviles'.

397. Moreover, as Mr. González explains, Mexican law places utmost importance on the principles of legal precedent and universal legal reasoning, both of which require courts, as well as administrative bodies, to apply the law consistently when faced with similar cases.[1016] Mr. González even confirms that these principles arise from a constitutional mandate requiring Mexican authorities to provide legal security in their actions.[1017] Therefore, given Mexico's inconsistent and arbitrary application of the law in similar circumstances, Mr. González concludes

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[1011] Counter-Memorial, ¶ 421.

[1012] Counter-Memorial, ¶ 421.

[1013] Second Ezequiel González Matus Report, **CER-6**, ¶ 125; Mexican Constitution, Articles 8, 14, 16, 17, 18, 19, 20, 21, 22 and 23, **CL-72**.

[1014] Second Ezequiel González Matus Report, **CER-6**, ¶ 123.

[1015] Second Ezequiel González Matus Report, **CER-6**, ¶ 123.

[1016] Second Ezequiel González Matus Report, **CER-6**, ¶ 123.

[1017] Second Ezequiel González Matus Report, **CER-6**, ¶ 123; Mexican Constitution, Articles 8, 14, 16, 17, 18, 19, 20, 21, 22 and 23, **CL-72**.

that Mexico misconstrues the principle of legal certainty by arguing that the *Amparo* 1668/2011 judgment did not constitute a legal precedent for a similar situation.[1018] Mexico thus has applied a different standard to Producciones Móviles, a permitholder that is similarly situated to E-Games, allowing its permit to remain valid and its casinos to remain open, in breach of the principles of legal certainty and legal precedent.

1. The Tribunal Should Draw Adverse Inferences From Mexico's Failure to Produce Any Documents Related to Producciones Móviles

398. During the document production phase, Claimants requested documents related to the Mexico's decision to permit Producciones Móviles' Casinos to remain open, after it shuttered E-Games' Casinos and invalidated the E-Games Independent Permit. Specifically, Claimants requested:

- **Request 44:** Any document related to or prepared in connection with the decision to allow Producciones Móviles' casinos to remain open, including without limitation, copies of internal or external government correspondence, reports, agendas, notes, transcripts, minutes, memoranda, analyses, official resolutions (*oficios*), and other documents prepared by, without limitation, the Ministry of Economy, and/or SEGOB, between January 1, 2013 and December 31, 2014.[1019]

399. The Tribunal granted this request. Mexico, however, did not produce any documents related to this document request, stating only that "it has not identified any documents that would be responsive to this request."[1020] Mexico's failure to produce any responsive documents is highly unusual. Mexico's statement entails that SEGOB never prepared *any* document, memorandum, or communication related to Producciones Móviles' casinos and its decision for its casinos to remain open when shuttering Claimants' Casinos. Producciones Móviles obtained its permit just days

[1018] Second Ezequiel González Matus Report, **CER-6**, ¶ 122.

[1019] Procedural Order No. 10 (Mar. 26, 2021), Annex I.

[1020] Procedural Order No. 10 (Mar. 26, 2021), Annex I.

after, and in the same manner as, E-Games, having previously been an operator under E-Mex's permit. As such, the Tribunal should draw an adverse inference based upon Mexico's failure to produce any documents related to Claimants' document requests regarding Producciones Móviles and find that Mexico treated Producciones Móviles more favorable than it treated E-Games. It should also find that Mexico breached Claimants' legitimate expectations because SEGOB should have acted consistently with respect to E-Games and Producciones Móviles pursuant to the principle of legal certainty. Instead, Mexico applied different standards to identically situated entities and treated a Mexican-owned company better than an international investor.

T. Mexico Initiated Baseless and Punitive Investigations against the Claimants

400. In its Counter-Memorial, Mexico fails to meaningfully justify its baseless, harassing, retaliatory, and politically motivated tax and criminal investigations against Claimants.[1021] Moreover, Mexico's failure to produce documents regarding its harassing and retaliatory tax investigation against Claimants merits an adverse inference.[1022]

1. The SAT's Harassing and Retaliatory Tax Investigation: The Tribunal Should Draw an Adverse Inference Against Mexico

401. In its Counter-Memorial, Mexico fails to engage with Claimants' showing that the PRI-controlled SAT used an audit of E-Games' 2009 taxes, initially launched in September 2012, to pursue its politically motivated campaign against Claimants and issue the baseless February 28, 2014 Resolution that E-Games owed over USD 12.7 million in back taxes. Mexico fails even to address the damning fact that E-Games' 2009 tax returns at issue in the retaliatory investigation

[1021] *See* Memorial, ¶¶ 459-467.

[1022] *See* Counter-Memorial, ¶¶ 428-435.

and the February 28, 2014 Resolution were prepared using *the same methodology* as its 2011 tax returns, which the SAT had approved under the PAN administration in 2012.[1023]

402. Claimants were shocked by the SAT's February 28, 2014 Resolution.[1024] As explained in their Memorial, Claimants always complied with all applicable tax legislation under Mexican law, and even sought advice from the SAT on E-Games' reporting obligations of the casino operations.[1025] The only taxes that Claimants did not ultimately pay (though they planned to do so) were those for the 2013 tax year that would have been due in April 2014, after Mexico unlawfully closed the Casinos, and when Claimants had no income and required those funds to stay afloat.[1026] Further, as Claimants' witnesses explain, the Mexican Enterprises were audited annually.[1027] The Mexican Government required these annual external audits by an independent approved auditor.[1028] Before the PRI-controlled SAT issued its baseless February 28, 2014 Resolution ordering E-Games to pay allegedly owed taxes, the Government had never found any issues with the Mexican Enterprises' filings through these audits.[1029]

403. Mexico offers no explanation for this discrepancy. Its only defense is to state that in conclusory fashion that Claimants' arguments lack evidence and that the SAT's February 28, 2014

[1023] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 106; Third Gordon Burr Statement, **CWS-50**, ¶ 133; Third Erin Burr Statement, **CWS-51**, ¶ 139.

[1024] Third Gordon Burr Statement, **CWS-50**, ¶ 133; Third Erin Burr Statement, **CWS-51**, ¶ 139.

[1025] Memorial, ¶¶ 460-463; Third Gordon Burr Statement, **CWS-50**, ¶ 133; Third Erin Burr Statement, **CWS-51**, ¶ 139.

[1026] Fourth Erin Burr Statement, **CWS-60**, ¶ 130.

[1027] Fourth Gordon Burr Statement, **CWS-59**, ¶ 70, 71; Third José Ramón Moreno Statement, **CWS-63**, ¶¶ 26-27; Fourth Erin Burr Statement, **CWS-60**, ¶¶ 103, 104, 105; Second Neil Ayervais Statement, **CWS-61**, ¶¶ 47, 56, 61-62; Second Daniel Rudden Statement, **CWS-65**, ¶¶ 29, 33.

[1028] Fourth Gordon Burr Statement, **CWS-59**, ¶ 71; Fourth Erin Burr Statement, **CWS-60**, ¶ 103, 105.

[1029] Fourth Erin Burr Statement, **CWS-60**, ¶ 130.

Resolution "originated from its verification powers in tax matters" rather than from retaliation.[1030] That assertion is not only vague and meaningless, but also false, as demonstrated by the SAT's having approved E-Games' 2011 tax returns, and thus the very same methodology that E-Games had used to file their 2009 tax returns.[1031] Mexico has no explanation for the SAT's dramatic about-face between its position under the PAN administration in 2012 and that under the PRI administration in April 2014. Further, Mexico does not rebut Claimants' evidence showing that the Mexican judiciary's review of the SAT's February 28, 2014 Resolution was politically charged.[1032] That political motivation undermined E-Games' efforts to fight the SAT's groundless February 28, 2014 Resolution through a *juicio de nulidad*, an *amparo*, and a *recurso de revision*.[1033]

404. Tellingly, Mexico did not avail itself of the opportunity to justify the SAT's investigation by producing relevant documents when the Tribunal ordered it to do so. Mexico failed to identify or produce:

- **Request 61**: Any documents related to or prepared in connection with the SAT's resolutions (oficios) numbers 500-05-07-2014-3627 and 500-05-2012-50794, as well as inspection order (orden de visita) IDD9500016/12" prepared between January 1, 2012 and the present, even though such documents would be in the sole possession of Mexico as the sovereign authority that launched those tax investigations.[1034]

[1030] Counter-Memorial, ¶ 430 ("*derivó de las facultades de comprobación que dicha autoridad tiene en materia tributaria*.").

[1031] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 106; Third Gordon Burr Statement, **CWS-50**, ¶ 133; Third Erin Burr Statement, **CWS-51**, ¶ 139.

[1032] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶¶ 105, 107.

[1033] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶¶ 106-107.

[1034] Procedural Order No. 10 (Mar. 26, 2021), Annex I.

405. Further, contrary to Mexico's assertion in its response to document Request 61, Exhibit R-88 is not responsive to this Request and does not justify the SAT's baseless investigation.[1035] That Exhibit, a letter from the SAT to Mexico dated October 13, 2020, provides no relevant information, but merely reflects Mexico's inability to explain the inconsistency between Mexico's express approval of E-Games tax reporting methodology in the company's 2011 tax return and its arbitrary rejection of E-Games' usage of the *identical methodology* in its 2009 tax return.[1036]

406. Mexico's failure to produce relevant documents merits an adverse inference: it is not credible that Mexico, a sovereign nation with taxation authority, could not locate or produce *any* documents related to its own tax resolutions and investigations. Clearly, Mexico has documents responsive to this request in its possession and chose not to disclose them. Thus, Claimants request that the Tribunal draw the adverse inference that the tax investigations were designed to harass and retaliate against Claimants.

2. The PGR's Harassing and Retaliatory Criminal Investigations

407. In its Counter-Memorial, Mexico also fails to justify the baseless criminal investigations it brought against E-Games and its representatives in retaliation for Claimants' filing of this NAFTA Arbitration. Claimants have explained that the PRI Government, through SEGOB, used the PGR in an unlawful and arbitrary manner to bring these unwarranted criminal proceedings after it unlawfully closed the Casinos.[1037] Those measures came shortly after the Notice of Intent that Claimants filed on May 23, 2014, *one month after* SEGOB's closure of the casinos.[1038]

[1035] Procedural Order No. 10 (Mar. 26, 2021), Annex I.

[1036] *See* Claimants' Document Request 61; Letter from SAT to Secretaría de Economía (Sept. 9, 2020), **R-088**.

[1037] Memorial, ¶ 464; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶¶ 55, 104-107; Third Gordon Burr Statement, **CWS-50**, ¶ 134.

[1038] Memorial, ¶ 465; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 55.

408. Mexico's sole justification for these retaliatory criminal investigations is that SEGOB "always" files criminal complaints after closing casinos that operate without a permit, and that the Casinos were unpermitted following the Sixteenth District Judge's March 10, 2014 Order.[1039] Mexico's assertion is spurious at best, and an admission of a pattern of harassing international investors at worst. Claimants were authorized to operate the Casinos during this time, and SEGOB's closure of them was illegal.[1040] As Claimants explained in their Memorial and again in Section II.N.2 *supra*, E-Games on September 2, 2013 had obtained an injunction barring the Mexican Government from hindering the Casinos' operations *pending the final resolution* of the *Amparo* 1668/2011 proceeding.[1041] The injunction remained in effect after the Sixteenth District Judge issued the March 10, 2014 Order in the ongoing *Amparo* 1668/2011 proceeding.[1042] Indeed, the justifications SEGOB relied upon to close down the Casinos—that E-Games did not have a valid permit because its permit had been revoked—was the matter under review in the pending appeal proceedings and Mexico was prohibited from acting until the appeal was resolved.[1043] Moreover, Mexico has not shown that SEGOB "always" files criminal complaints after closing down unlicensed casinos. Thus, SEGOB's closure of the Casinos was illegal, and its discretionary criminal complaint based on the closure was arbitrary, baseless, retaliatory, and in furtherance of politically motivated campaign against Claimants.

[1039] *See* Counter-Memorial, ¶¶ 431-35, 613 ("*la SEGOB siempre presenta una denuncia penal cuando se cierra un casino por operar sin permiso* . . . .").

[1040] *See* Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 132; Second Ezequiel González Matus Report, **CER-6**, ¶¶ 198-206.

[1041] *See* Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 70; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 122-124; Injunctive Relief (Sept. 2, 2013), **C-299**.

[1042] *See* Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 132.

[1043] *See* Second Ezequiel González Matus Report, **CER-6**, ¶¶ 198-206.

409. Mexico's reliance on Ms. Gonzalez Salas' statement to assert that the criminal complaint was valid and routine does not advance its position.[1044] Ms. Salas has been unable to justify the illegalities in the closure of Claimants' Casinos and the subsequent administrative process. Moreover, neither Ms. Salas nor Mexico can provide any reasonable justification for Ms. Salas taking the political position from the *beginning* of her tenure at SEGOB that Claimants' permit was illegal, or her ability to forecast that the Claimants' Casinos would be shut down over a year before they were closed, as explained in Section II.J.4 *supra*.[1045]

410. Further, Mexico does not explain why, if SEGOB "always" files such criminal complaints based on operating unlicensed casinos, it waited *over one month* after it illegally closed the Casinos to initiate the criminal investigation, doing so only after it received Claimants' letter of intent to initiate this Arbitration under the NAFTA on May 24, 2014.[1046] The timing of this supposedly routine criminal investigation shows that Mexico really initiated it to retaliate against Claimants for bringing this NAFTA Arbitration.

411. Mexico cryptically adds that the Claimants were not affected by the criminal proceedings. That is simply untrue. The retaliatory criminal investigations of E-Games representatives has caused Claimants substantial harm, interfered with Claimants' ability to continue operating and benefitting from their investment in Mexico, and made E-Games' representatives continue living in fear of unwarranted criminal punishment.[1047] Moreover, Mexico's assertion that Claimants had

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[1044] *See* Counter-Memorial, ¶ 433.

[1045] *See Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón* (Jan. 27, 2013). Retrieved from http://www.jornada.unam.mx/2013/01/27/politica/013n1pol, **C-17**; Email from C. Rayo Zapata re Meeting and Notes with M. Salas (Feb. 22, 2013), **C-401** ("*Exciting Están en proceso ante juzgado, si declara que fueron dados de manera irregular van a ser revocados*."); E-Games Memo, **C-261** ("*La DGJS [Dirección General de Juegos y Sorteos de la SEGOB] nos comunicó que el Permiso Bis fue cancelado debido a que el mismo era un permiso que había sido otorgado al final de la administración anterior de manera irregular*.").

[1046] *See* Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 154-155.

[1047] *See* Third Gordon Burr Statement, **CWS-50**, ¶¶ 131, 134-135; Third Erin Burr Statement, **CWS-51**, ¶¶ 138, 140.

legal remedies at their disposal to challenge the consequences of the baseless criminal investigations is cynical: Mexico has not produced any documents to justify or explain the nature of the investigations of Claimants, and Claimants are defending their rights in this very NAFTA Arbitration (which does not require the exhaustion of local remedies).[1048]

412. Accordingly, Mexico has not rebutted Claimants' explanation that these criminal proceedings were illegitimate, politically motivated, and designed to harass, intimidate, and retaliate against Claimants for their initiating this NAFTA Arbitration. It is completely inappropriate for Mexico, a signatory to the NAFTA, to wield its sovereign criminal authority in retaliation against United States investors bringing a claim under that international agreement. Mexico presents no facts or law to the contrary. Far from advancing its position, Mexico's admission that it "always" abuses its powers in this way dooms it.

U. Mexico's Allegations of Claimants' Purported Illegality Have No Merit

413. In its Counter-Memorial, Mexico raises a litany of specious allegations related to purported illegalities and mismanagement surrounding the Claimants' Casinos based upon its Exhibit R-75.[1049] All of these allegations are false, and Claimants' witnesses universally reject them. As explained in more detail below, the bulk of Mexico's Exhibit R-75 contains Mr. Taylor's alleged "Candidacy Statement," which was created in connection with Mr. Taylor's efforts to be elected to the Board of Managers for B-Mex, LLC and B-Mex II, LLC following Mr. Rudden's vacancy in July 2018 (the "**Taylor Candidacy Statement**").[1050] Mexico suggests that these allegations could affect Claimants' standing or their right to substantive treaty protection or damages in this

[1048] Procedural Order No. 10 (Mar. 26, 2021), Annex I.

[1049] *See* Counter-Memorial, ¶¶ 859-64; Taylor Declaration, **R-075**.

[1050] *See* Taylor Declaration, **R-075**.

proceeding.[1051] They do not. The allegations are spurious and false, and Mexico has no evidence to support these spurious allegations.[1052]

414. Since Mr. Burr first met with Lee Young and considered the possibility of investing in Mexico, he and the Claimants always sought to conduct their business in accordance with applicable laws.[1053] As previously explained, since the inception of the Claimants' operations in Mexico, Mr. Burr conducted extensive due diligence and obtained opinions and guidance from Mexican counsel on the legality of their operations.[1054] Mr. Burr consulted with lawyers throughout the Claimants' operations in Mexico to ensure compliance with applicable laws.[1055] Julio Gutiérrez ("**Mr. Gutiérrez**"), Claimants' Mexican counsel, confirms that to his knowledge, Claimants always followed relevant laws.[1056] The allegations in Exhibit R-75 largely derive from false information delivered by Benjamin Chow ("**Mr. Chow**"), Alfredo Moreno Quijano ("**Mr. Moreno Quijano**"), and others working under their direction and to advance their own interests.

415. Mr. Chow is already known to this Tribunal from his appearances in the jurisdictional phase of this arbitration, including at the hearing on jurisdiction when Claimants' counsel vigorously examined him.[1057] The Claimants had sought to partner with Mr. Chow and his

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[1051] Counter-Memorial, ¶ 861.

[1052] Given that Mr. Taylor is a former client of QEU&S, it cannot respond directly to Mr. Taylor or his lack of knowledge or credibility with respect to these allegations arising from Exhibit R-075. Conflicts counsel, Reed Smith, will address Mr. Taylor directly below in ¶¶ 479-497.

[1053] Fourth Gordon Burr Statement, **CWS-59**, ¶ 63; Fourth Erin Burr Statement, **CWS-60**, ¶ 94; Second Neil Ayervais Statement, **CWS-61**, ¶¶ 11, 39; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 4-8.

[1054] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 3-5, 63; Fourth Erin Burr Statement, **CWS-60**, ¶ 4; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 4-8.

[1055] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 3-5, 63; Fourth Erin Burr Statement, **CWS-60**, ¶¶ 8, 26-27; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 4-8.

[1056] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 4-8.

[1057] Fourth Gordon Burr Statement, **CWS-59**, ¶ 65.

company, Grand Odyssey, in an attempt to reopen the Casinos.[1058] Although Mr. Chow was ultimately unable to reopen the Casinos because the Mexican government refused to permit him to do so, he attempted to take over the Boards of the Juegos Companies and to improperly, and without authorization, transfer the shares in the Juegos Companies to Grand Odyssey.[1059] The Claimants sued Mr. Chow in Federal Court in Denver, Colorado, and Mr. Chow ultimately admitted that no share transfer to Grand Odyssey occurred, including in his witness statement as well as during the jurisdictional hearing in this case.[1060] His cohort, Mr. Moreno Quijano, had a personal history with Claimants and the Juegos Companies that turned sour due to his reproachable behavior. Mr. Moreno Quijano had worked with John Conley ("**Mr. Conley**") in Mexico since 1992, and Mr. Conley trusted Mr. Moreno Quijano on that basis.[1061] At the founding of the Mexican Enterprises, Mr. Moreno Quijano was given the role of Director General of the Juegos Companies, but by 2008, was moved into a more minor role, first overseeing machine selection and, later, assisting with the Companies' charitable foundation.[1062] In 2013, after Mr. Moreno had spent nearly a year in the United States, Mr. Burr fired Mr. Moreno Quijano for not performing his job adequately upon his return to Mexico.[1063] After his firing, Mr. Moreno Quijano openly

[1058] Claimants' Rejoinder on Jurisdiction ("Rejoinder on Jurisdiction"), Section III.A.(d).

[1059] Rejoinder on Jurisdiction, Section III.A.(d).

[1060] Benjamin Chow Statement, **CWS-11**, ¶¶ 17-23; Hearing on Jurisdiction, Day 3, pp. 706-731.

[1061] Fourth Gordon Burr Statement, **CWS-59**, ¶ 79.

[1062] Fourth Gordon Burr Statement, **CWS-59**, ¶ 79.

[1063] Fourth Gordon Burr Statement, **CWS-59**, ¶ 79; *See* Consent to Action in Lieu of Organizational Meeting of the Directors of Juegos y Videos de Mexico, S de R.L. de C.V. (June 1, 2011), **C-47**; Consent to Action in Lieu of Organizational Meeting of the Members of B-Mex, LLC (Apr. 10, 2014), **C-72**; Hearing on Jurisdiction, Day 2, 439:5-7; 469:19 through 470:1; 470:12-20 ("Yeah. It was discovered that Alfredo Moreno was stealing from the companies and taking action against the companies. So, the Boards and, in particular, you know, Gordon and John, you know, made the decision to expel Mr. Alfredo Moreno Quijano from the group."); Hearing on Jurisdiction, Day 3, 618: 15-18 ("Mr. Alfredo Moreno committed to terminating his relationship as an administrator and 16 also as a manager and as a director; that is to say, to come to an end in the work that he used to carry out."): 679:9-19 ("However, Alfredo, my brother, sometime ago started to act in an incorrect fashion. He would fight with employees. He did not go to work. And I must apologize to have to say this, but sometimes he went to work in inappropriate conditions. And, thus, the U.S. shareholders decided to remove him from his position. That is when I was appointed General Director, and

declared his desire to get revenge against Mr. Burr and became intent on taking over the Juegos Companies.[1064] Mr. Moreno Quijano then sought, through various avenues, to undermine the companies' efforts to proceed with the NAFTA Arbitration and to take over the companies for his own personal financial gain.[1065] Mr. Chow was also involved in this effort.[1066] Thus, Messrs. Moreno Quijano and Chow engineered the fraudulent documents and false allegations contained in Mexico's Exhibit R-75 and described below to sow division amongst the managers of the B-Mex Companies and to try to derail efforts to pursue the NAFTA Arbitration.

416. From the outset, it is important to clarify that none of the Claimants heard any of these allegations while the Casinos were open. In fact, the first that any of the Claimants heard of this false information was over a year after the Casinos were closed.[1067] Beginning in May 2015, Messrs. Chow and Moreno Quijano were disseminating this information to the Claimant group in an effort to sow division amongst its members and sabotage their NAFTA claim as well as their attempts to salvage their investments in Mexico, while reaping as much profit as possible for themselves from the ruin that Mexico inflicted upon Claimants' investment.

417. Messrs. Chow and Moreno Quijano first shared this false information with Claimants John Conley and Daniel Rudden ("**Mr. Rudden**") over a year after the Casinos were illegally shut down.[1068] Grand Odyssey's agreement was expiring, and Mr. Burr was pushing to work with a

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he was asked to leave Exciting Games. And the shareholding was restructured, 17 and my shareholding was increased in an amount in proportion to what was left by my brother on departing.").

[1064] Fourth Gordon Burr Statement, **CWS-59**, ¶ 79.

[1065] Fourth Gordon Burr Statement, **CWS-59**, ¶ 79.

[1066] Fourth Gordon Burr Statement, **CWS-59**, ¶ 93; Fourth Erin Burr Statement, **CWS-60**, ¶ 117; Second John Conley Statement, **CWS-70**, ¶¶ 16-17; Second Daniel Rudden Statement, **CWS-65**, ¶ 23.

[1067] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 65, 74; Fourth Erin Burr Statement, **CWS-60**, ¶ 93; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 4-8.

[1068] Second John Conley Statement, **CWS-70**, ¶ 11; Second Daniel Rudden Statement, **CWS-65**, ¶ 23.

different group to sell the Casino asset as well as advance the NAFTA Arbitration.[1069] However, at some point after the allegations in Exhibit R-75 were first raised, Messrs. Conley and Rudden learned that Messrs. Chow and Moreno Quijano in fact had been providing them with disinformation.[1070] Messrs. Conley and Rudden have explained that they never had any personal knowledge of these allegations, and that they were just repeating information that had been conveyed to them by Messrs. Chow and Moreno Quijano. Moreover, they have fully retracted and disavowed any suggestion that Claimants committed any illegality in their investment and have confirmed that to their knowledge, there was no illegality surrounding the Claimants' investments.[1071] As explained, these allegations were never made or raised while the Casinos were open, but were first raised among the B-Mex managers in 2015, when the managers were deciding whether to advance the NAFTA claims and determining the best course of action for salvaging the companies' investments following Mexico's unlawful expropriation of the Casinos.[1072] Moreover, around this time, the Claimants were also engaged in negotiations with Mr. Chow, Luc Pelchat ("**Mr. Pelchat**"), and others regarding the proposed transaction to try to reopen the Casinos and sell the Casinos' assets.[1073] There was disagreement among the managers regarding whether to proceed with the NAFTA Arbitration, whether proceeding with the NAFTA Arbitration would

[1069] Fourth Gordon Burr Statement, **CWS-59**, ¶ 65; Fourth Erin Burr Statement, **CWS-60**, ¶ 95.

[1070] Second John Conley Statement, **CWS-70**, ¶ 9; Second Daniel Rudden Statement, **CWS-65**, ¶ 23; Fourth Gordon Burr Statement, **CWS-59**, ¶ 65.

[1071] Second John Conley Statement, **CWS-70**, ¶¶ 10-11; Second Daniel Rudden Statement, **CWS-65**, ¶ 23.

[1072] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 65, 74; Fourth Erin Burr Statement, **CWS-60**, ¶ 93; Second Neil Ayervais Statement, **CWS-61**, ¶ 41; Second John Conley Statement, **CWS-70**, ¶¶ 9-12; Second Daniel Rudden Statement, **CWS-65**, ¶¶ 15-16.

[1073] Fourth Gordon Burr Statement, **CWS-59**, ¶ 65; Fourth Erin Burr Statement, **CWS-60**, ¶ 135; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 4-8; Second John Conley Statement, **CWS-70**, ¶¶ 10-11; Second Daniel Rudden Statement, **CWS-65**, ¶ 23.

complicate the sale of assets, and ultimately what was the best course of action for the companies.[1074]

418. In an effort to try to understand these allegations, John Conley, one of the managers, hired independent counsel.[1075] In 2015 and 2016, the B-Mex Companies and the Juegos Companies provided Mr. Conley and his counsel with voluminous documentation regarding the U.S. and Mexican entities—including financial records, tax records, bank account statements, etc.—so that his counsel could conduct a detailed investigation and advise accordingly. Based upon this investigation, Mr. Conley's counsel never reported to him or to the U.S. or Mexican entities that there was any evidence of financial irregularities, mismanagement, or otherwise.[1076] And after thoroughly looking into them through counsel, Mr. Conley never took any action—legal or otherwise—based on the misinformation that Messrs. Chow and Moreno Quijano had fed him and others. In December 2016, Mr. Conley's counsel even reported to Neil Ayervais ("**Mr. Ayervais**") that there was no evidence of wrongdoing.[1077] Moreover, the companies, in conjunction with U.S. and Mexican counsel, conducted their own due diligence regarding these allegations and found no evidence of wrongdoing.[1078] Accordingly, the discussion of the allegations in Exhibit R-75 need go no further. Nonetheless, as this investigation confirmed, every allegation in Exhibit R-75 is false, and these allegations mostly arise from fraudulent documents, as explained below.

[1074] Fourth Gordon Burr Statement, **CWS-59**, ¶ 65; Fourth Erin Burr Statement, **CWS-60**, ¶ 135; Second Neil Ayervais Statement, **CWS-61**, ¶ 41.

[1075] Second John Conley Statement, **CWS-70**, ¶ 15.

[1076] Second John Conley Statement, **CWS-70**, ¶ 15; Fourth Gordon Burr Statement, **CWS-59**, ¶ 74; Fourth Erin Burr Statement, **CWS-60**, ¶ 119; Second Neil Ayervais Statement, **CWS-61**, ¶ 47.

[1077] Second Neil Ayervais Statement, **CWS-61**, ¶ 45.

[1078] Fourth Gordon Burr Statement, **CWS-59**, ¶ 74; Fourth Erin Burr Statement, **CWS-60**, ¶ 141; Second Neil Ayervais Statement, **CWS-61**, ¶ 45.

419. In May 2017, Mexico failed to prevent or combat a devastating fire that destroyed much of the Naucalpan Casino, which Mexico had sealed and placed in its custody after illegally closing the Casinos in April 2014.[1079] The Naucalpan Casino housed all hardcopy records and the email servers of the Mexican Enterprises.[1080] Thus, Mexico's failure to protect the Naucalpan Casino resulted in the loss of most of Claimants' physical and digital corporate records, undermining their due process rights in this NAFTA Arbitration. Those records documented Claimants' adherence to the law and roundly disproved the spurious allegations that Mexico now raises. The Tribunal should not entertain Mexico's false allegations after it deprived Claimants of records that would disprove them. In any event, Claimants' witnesses and surviving documents prove each of Mexico's allegations to be false.

1. Mexico's Allegations of Illegality in Exhibit R-75 Largely Arise From Two Fraudulent Documents

420. Mexico's allegations of illegality in Exhibit R-75 largely derive from two fraudulent documents created by or at the direction of Messrs. Moreno Quijano and likely Benjamin Chow that fabricate allegations of misuse of company funds.[1081] These fraudulent documents were created and sent to Mr. Conley in May 2015 and Messrs. Conley and Rudden in September 2015, over a year after Mexico illegally closed the Casinos.[1082] Messrs. Conley and Rudden then

[1079] Fourth Gordon Burr Statement, **CWS-59**, ¶ 46; Fourth Erin Burr Statement, **CWS-60**, ¶ 83; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 108; *see* Claimants' Response to the Tribunal's Decision on Respondent's Document Requests (Oct. 31, 2017) (explaining that relevant records were destroyed in the fire); *Incendio en tela de juicio*. Retrieved from https://elinsurgente.mx/incendioentela-de-juicio/amp/, **C-119**; *Grupo Kash exige se investigue incendio de casino en Naucalpan* (May 15, 2017). Retrieved from https://noticiasenlamira.com/grupo-kash-exigeseinvestigue-incendio-casino-en-naucalpan/, **C-120**; Letter from Claimants in Response to the United Mexican States' Objection to Claimant's Request for Approval to Access the ICSID Additional Facility and Request for Arbitration (July 21, 2016), **C-121**.

[1080] Fourth Gordon Burr Statement, **CWS-59**, ¶ 46; Fourth Erin Burr Statement, **CWS-60**, ¶ 83.

[1081] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 66-78.

[1082] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 66-67, 72; Second Daniel Rudden Statement, **CWS-65**, ¶ 19; Second John Conley Statement, **CWS-70**, ¶ 17.

repeated these allegations without corroborating or even diligencing them. Claimants have always known and unequivocally expressed these documents to be fraudulent.[1083] Messrs. Conley and Rudden now acknowledge that these documents are fraudulent and that they first repeated the false allegations therein without any evidence or firsthand knowledge; they now entirely disavow them.[1084]

421. The first fraudulent document—titled "Summary of Out of the Books Amounts"[1085] ("**Fraudulent Document #1**")—purports to show that certain cash receipts were not recorded in the company's accounting records, and that payments were made to vendors either for services that were not performed or based on invoices that reflect inflated amounts beyond the value of the services that were actually performed.[1086] This document was purportedly (but not actually) created by José Ventura Hernandez ("**Ventura**"), who was the Finance Director for the Juegos

[1083] *See* Cease and Desist Notice from J. Springer to R. Taylor (Sept. 20, 2016), **C-428** (stating that the Summary of out of the Books Amounts, *i.e.* Fraudulent Document #1, is fraudulent); Letter from J. Springer to R. Taylor re allegations of irregularities (Sept. 20, 2016), **C-429** (stating that the Summary of out of the Books Amounts, *i.e.* Fraudulent Document #1, is fraudulent); R. Taylor Candidacy Statement for Class A Manager of B-Mex, LLC and B-Mex II, LLC (Sept. 14, 2019), p. 25, **C-430** (noting that Mr. Burr, Mr. Ayervais, Ms. Burr, Mr. Conley, and Mr. Rudden believe the documents are fraudulent); Email Exchange between D. Ponto and N. Ayervais, G. Burr, J. Conley, R. Taylor and E. Burr re allegations of illegality (Aug. 14 to Sept. 11, 2018), pp. 1-3, **C-431** (explaining that the allegations of mismanagement are false and that the underlying documents are fraudulent); Email from G. Burr to D. Ponto re: allegations of illegality (Sept. 11, 2018), **C-432** (showing that Gordon Burr reached out to David Ponto confirming the allegations are false and offering to discuss further); Cease and Desist Notice from J. Mellon to R. Taylor re allegations of mismanagement (Oct. 25, 2018), **C-433** (explaining that the allegations of mismanagement are false and that the underlying documents are fraudulent); Email from J. Williams to R. Taylor re: allegations of illegality (Nov. 1, 2018), **C-434** (describing Gordon Burr's statement that the allegations of mismanagement are false and that the underlying documents are fraudulent); Declaration of D. Rudden (June 20, 2019), **C-435** (stating that the allegations of mismanagement are false); Claimants' Response to Respondents' Counterclaim in *B-Mex, LLC, et al. v. Randall Taylor and David Ponto* (July 12, 2019), **C-436** (stating that the allegations of mismanagement are false); Expert Opinion of C. Richard re allegations of illegality (Oct. 14, 2019), **C-437** (explaining the detrimental legal effect of the false allegations of mismanagement); Claimants' Closing Argument in *B-Mex, LLC, et al. v. Randall Taylor and David Ponto* (Feb. 26, 2020), pp. 33-35, **C-438** (explaining that the allegations of mismanagement are false and that the underlying documents are fraudulent); Claimants' More Definite Statement Regarding the Basis of Its Claims in *B-Mex, LLC, et al. v. Randall Taylor and David Ponto* (July 3, 2019), pp. 12-32, **C-439** (explaining that the allegations of mismanagement are false and that the underlying documents are fraudulent).

[1084] Second Daniel Rudden Statement, **CWS-65**, ¶¶ 19-21; Second John Conley Statement, **CWS-70**, ¶¶ 16-18.

[1085] Summary of Out of the Books Amounts ("Fraudulent Document #1") (Sept. 14, 2016), **C-440**.

[1086] Fourth Gordon Burr Statement, **CWS-59**, ¶ 68; Second Daniel Rudden Statement, **CWS-65**, ¶ 19; Second John Conley Statement, **CWS-70**, ¶ 17.

Companies.[1087] In reality, Fraudulent Document #1 was manufactured by Mr. Moreno Quijano in an attempt to sabotage this NAFTA arbitration and Claimants' attempts to salvage the value of their investments.[1088]

422. The creation and appearance of Fraudulent Document #1 coincided with Claimants' initiating key decisions regarding bringing this NAFTA arbitration. On May 1, 2015, the U.S. companies held a board meeting to discuss whether or not to extend any relationship with Mr. Chow, as the Share Purchase Agreement between U.S. shareholders of the Juegos Companies and Grand Odyssey, Mr. Chow's company—intended to avoid SEGOB's stated intent to refuse to allow the Casinos to reopen if U.S. shareholders remained directly invested—was going to expire.[1089] Mr. Burr voiced concerns about extending any relationship with Mr. Chow for various reasons, including the alleged fraudulent transfer of shares in November 2014, the recent discovery of the fraudulent *desistimiento* filed with the Ministry of Economy and SEGOB,[1090] and Mr. Chow's inability to reopen the Casinos as he had indicated he would. Based upon these misgivings, Mr. Burr instead recommended that Claimants work with an outside group to sell the casino assets.[1091] Mr. Burr and Ms. Burr then presented to the boards of the U.S. companies

[1087] Fraudulent Document #1 (Sept. 14, 2016), **C-440**.

[1088] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 66-67; Fourth Erin Burr Statement, **CWS-60**, ¶ 115; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 178; Second Neil Ayervais Statement, **CWS-61**, ¶¶ 48-51.

[1089] *See* Claimants' Rejoinder on Jurisdictional Objections ("Rejoinder on Jurisdictional Objections"), ¶¶ 146-48; Executed Stock Purchase Agreement – Boomer Financial Inc., Grand Odyssey Casino, S.A. de C.V. (Jan. 15, 2015), **C-134**; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 65, 75; Fourth Erin Burr Statement, **CWS-60**, ¶ 95.

[1090] The *desistimiento* is a letter dated October 24, 2014 and signed by Mr, José Luis Segura Cárdenas that fraudulently and without authorization purported to waive the Notice of Intent filed on behalf of E-Games. As Claimants explained during the jurisdictional phase of this NAFTA Arbitration, the *desistimiento*, being fraudulent, is wholly without legal effect. The Tribunal rejected Mexico's attempt to use this fraudulent document to support its jurisdictional objections. *See* Partial Award on Jurisdictional Objections ("Award on Jurisdiction") (July 19, 2019), ¶¶ 258-264; Claimants' Counter-Memorial on Jurisdiction ("Counter-Memorial on Jurisdiction"), ¶¶ 106-113, 472-491; Rejoinder on Jurisdictional Objections, ¶ 21; Letter signed by Mr. José Luis Segura Cárdenas purportedly waiving the Notice of Intent filed on behalf of E-Games (*desistimiento*), **R-005**.

[1091] Fourth Gordon Burr Statement, **CWS-59**, ¶ 65; Fourth Erin Burr Statement, **CWS-60**, ¶ 95.

recommending that Claimants advance this NAFTA Arbitration, introducing Quinn Emanuel (who would become the QEU&S Claimants' counsel) for the first time and seeking permission to begin more formal discussions with the firm.[1092] The Boards did not reach a formal decision on either topic and agreed to reconvene later that month.[1093]

423. Fraudulent Document #1 shows that, mere weeks later on May 18, 2015, Ventura purportedly sent it to Mr. Conley.[1094] Minutes after that, Ventura also purportedly sent Fraudulent Document #1 to Mr. Moreno Quijano—who was then trying to sabotage this NAFTA Arbitration and Claimants' attempts to salvage the value of their investment.[1095] Mr. Moreno Quijano subsequently sent this document to a person ostensibly named "Bernie Walker" (email address wbernie1976@yahoo.com).[1096] Claimants' witnesses have affirmed that they are unaware of anyone who worked for the Casinos by the name of "Bernie Walker."[1097] At some point after Fraudulent Document #1 was sent to Mr. Conley, it was also shared with Mr. Rudden.[1098]

424. Soon after, on May 27, 2015, the U.S. Boards voted to allow Mr. Burr and Ms. Burr to move forward with this NAFTA Arbitration and negotiate with Quinn Emanuel.[1099] The Board also authorized Mr. Conley and Mr. Rudden to proceed with the sale of the casino assets with

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[1092] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 67, 75; Fourth Erin Burr Statement, **CWS-60**, ¶¶ 95, 97.

[1093] Fourth Gordon Burr Statement, **CWS-59**, ¶ 75; Fourth Erin Burr Statement, **CWS-60**, ¶ 97.

[1094] Fraudulent Document #1, (Sept. 14, 2016), **C-440**; Fourth Gordon Burr Statement, **CWS-59**, ¶ 75; Fourth Erin Burr Statement, **CWS-60**, ¶ 99; Second Daniel Rudden Statement, **CWS-65**, ¶ 19; Second John Conley Statement, **CWS-70**, ¶ 17; Second Neil Ayervais Statement, **CWS-61**, ¶ 49.

[1095] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 66-67; Fourth Erin Burr Statement, **CWS-60**, ¶ 97; Second Daniel Rudden Statement, **CWS-65**, ¶ 19; Second John Conley Statement, **CWS-70**, ¶ 17; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 174-175; Second Neil Ayervais Statement, **CWS-61**, ¶¶ 48-49.

[1096] Fraudulent Document #1, (Sept. 14, 2016), **C-440**.

[1097] Fourth Gordon Burr Statement, **CWS-59**, ¶ 67; Fourth Erin Burr Statement, **CWS-60**, ¶ 99; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 178; Third José Ramón Moreno Statement, **CWS-63**, ¶ 35.

[1098] Second Daniel Rudden Statement, **CWS-65**, ¶ 19.

[1099] Fourth Gordon Burr Statement, **CWS-59**, ¶ 75.

Messrs. Chow and Moreno Quijano.[1100] Mr. Moreno Quijano, who believed that the Claimants could not both sell the assets and proceed with this NAFTA Arbitration, later attempted to sell the assets to Televisa, as described above. He and Mr. Chow would have received handsome financial remuneration from that deal.[1101]

425. Mr. Burr and Ms. Burr first learned about this fraudulent document's existence in October 2015, shortly after they had begun taking action to advance the NAFTA Arbitration.[1102] In late September 2015, Mr. Gutierrez and Mr. Orta went to Denver to meet the U.S. shareholders and to discuss the NAFTA Arbitration.[1103] Mr. Gutiérrez recalls that there was a gentleman at the meeting who introduced himself as Juan Carlos Terroba ("**Mr. Terroba**").[1104] Mr. Terroba raised questions about the success of the NAFTA Arbitration and made various efforts to discourage the case from moving forward, including telling the U.S. shareholders that it was not possible to pursue a NAFTA Arbitration and to sell the Casino facilities.[1105]

426. Shortly after the meeting in Denver, Mr. Burr and Ms. Burr learned about the existence of Fraudulent Document #1's from Mr. Gutiérrez when Mr. Moreno Quijano, Mr. Gabriel Velasco ("**Mr. Velasco**"), and three other Mexican shareholders of the Juegos Companies came to Mr. Gutiérrez's office and Mr. Velasco showed Mr. Gutiérrez Fraudulent Document #1.[1106]

[1100] Second Daniel Rudden Statement, **CWS-65**, ¶ 19; Second John Conley Statement, **CWS-70**, ¶ 16.

[1101] *See* Telestar Naucalpan Casino Letter of Intent (Sept. 1, 2015), **C-423**; Telestar Cuernavaca Casino Letter of Intent (Sept. 1, 2015), **C-424**; Telestar Puebla Casino Letter of Intent (Sept. 1, 2015), **C-425**; Telestar Mexico City Casino Letter of Intent (Sept. 1, 2015), **C-426**; Telestar Villahermosa Casino Letter Intent (Sept. 1, 2015), **C-427**.

[1102] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 69, 75; Fourth Erin Burr Statement, **CWS-60**, ¶ 98; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 178-179.

[1103] J. Gutiérrez Declaration (July 16, 2018), **C-441**.

[1104] J. Gutiérrez Declaration (July 16, 2018), **C-441**.

[1105] J. Gutiérrez Declaration (July 16, 2018), **C-441**.

[1106] Fifth Julio Gutiérrez Statement**, CWS-62**, ¶ 180; Fourth Gordon Burr Statement, **CWS-59**, ¶ 66; Fourth Erin Burr Statement, **CWS-60**, ¶ 98.

Messrs. Moreno Quijano and Velasco threatened to use Fraudulent Document #1 to sue Mr. Burr and to stop the NAFTA Arbitration, unless the Claimants agreed not to move forward with it.[1107] Mr. Gutiérrez told Messrs. Moreno Quijano and Velasco that, particularly given the threatening context in which they were presenting the document, that it appeared that they had manufactured Fraudulent Document #1 in order to try to hinder the advancement of the NAFTA Arbitration.[1108] This is particularly true given that Mr. Gutiérrez, who was Mexican counsel for the Mexican Companies, had never heard these allegations nor had he ever been asked to investigate them.[1109] Messrs. Moreno Quijano and Velasco made clear that they wanted to secure the sale of the Casinos to Televisa and did not think that the Claimants could pursue an asset sale and the NAFTA Arbitration at the same time.[1110] Mr. Moreno Quijano also made clear that he stood to obtain a finder's fee should the asset sale to Televisa proceed, and that he was actively persuading other Mexican shareholders to vote against the NAFTA Arbitration.[1111] Messrs. Moreno Quijano and Velasco showed Mr. Gutiérrez Fraudulent Document #1 but would not permit him to retain a copy.[1112] After this meeting, Mr. Gutiérrez prepared a declaration explaining these events.[1113]

427. Although Fraudulent Document #1 was sent to Mr. Conley in May 2015, it was sent to Ms. Burr only in September 2016, by the "Bernie Walker" persona.[1114] No person named Bernie

[1107] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 180; Fourth Gordon Burr Statement, **CWS-59**, ¶ 66; Fourth Erin Burr Statement, **CWS-60**, ¶ 98.

[1108] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 175.

[1109] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 175.

[1110] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 176; Fourth Gordon Burr Statement, **CWS-59**, ¶ 66; Fourth Erin Burr Statement, **CWS-60**, ¶ 98.

[1111] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 176.

[1112] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 180; Fourth Gordon Burr Statement, **CWS-59**, ¶ 66; Fourth Erin Burr Statement, **CWS-60**, ¶ 98.

[1113] Fourth Gordon Burr Statement, **CWS-59**, ¶ 66; Fourth Erin Burr Statement, **CWS-60**, ¶ 98; J. Gutiérrez Declaration (July 16, 2018), **C-441**.

[1114] Fourth Gordon Burr Statement, **CWS-59**, ¶ 67; J. Gutiérrez Declaration (July 16, 2018), **C-441**.

Walker (or any name resembling this) ever worked for the Casinos, however.[1115] When the document was sent to Ms. Burr by email, Mr. Burr had been speaking on the phone with Mr. Moreno Quijano, as Mr. Moreno Quijano had been offering to "help" the Claimants.[1116] Mr. Burr mentioned to Mr. Moreno Quijano that someone was circulating a fraudulent document purporting to reflect financial malfeasance.[1117] Mr. Moreno Quijano told Mr. Burr that he knew what the document was and that he would send it to Ms. Burr, but that it would come from an alias email address.[1118] He specifically stated that the document would come to Ms. Burr by email from a "Bernie Walker."[1119] "Bernie Walker" (who Claimants believe to be Mr. Moreno Quijano) then sent Fraudulent Document #1 to Ms. Burr.

428. When Mr. Burr and Ms. Burr first saw Fraudulent Document #1 in September 2016, they immediately investigated its contents and origins. They first contacted Julio Gutiérrez, Claimants' Mexican counsel.[1120] Mr. Gutiérrez reviewed the document and confirmed that this was substantially the same document that Mr. Velasco had shown him, and had threatened him with, nearly a year prior.[1121] Mr. Gutiérrez then contacted Ventura, who categorically denied any involvement in creating or disseminating this document.[1122] Indeed, Ventura cannot speak, read,

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[1115] Fourth Gordon Burr Statement, **CWS-59**, ¶ 67;; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 178; Third José Ramón Moreno Statement, **CWS-63**, ¶ 35.

[1116] Fourth Gordon Burr Statement, **CWS-59**, ¶ 67.

[1117] Fourth Gordon Burr Statement, **CWS-59**, ¶ 67; Fourth Erin Burr Statement, **CWS-60**, ¶ 99.

[1118] Fourth Gordon Burr Statement, **CWS-59**, ¶ 67; Fourth Erin Burr Statement, **CWS-60**, ¶ 99.

[1119] Fourth Gordon Burr Statement, **CWS-59**, ¶ 67; Fourth Erin Burr Statement, **CWS-60**, ¶ 99.

[1120] Fourth Gordon Burr Statement, **CWS-59**, ¶ 69; Fourth Erin Burr Statement, **CWS-60**, ¶ 101.

[1121] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 179.

[1122] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 179; Third José Ramón Moreno Statement, **CWS-63**, ¶¶ 35-38; J. Ventura Declaration (Oct. 6, 2016), **C-442**; Fourth Gordon Burr Statement, **CWS-59**, ¶ 69; Second Daniel Rudden Statement, **CWS-65**, ¶ 19; Second John Conley Statement, **CWS-70**, ¶ 17; Fourth Erin Burr Statement, **CWS-60**, ¶ 101.

or write English, the language in which this document was written.[1123] Subsequently, on October 16, 2016, Ventura signed a sworn and notarized declaration confirming that he did not prepare or send this document and that he is unfamiliar with its creation or contents.[1124] In his witness statement submitted with this Reply, Ventura unequivocally confirms again, five years later, that he was not involved in the creation or sending of this document, that he did not even at the time have access to the email account from which it was sent, and that he had never encountered these allegations before learning of Fraudulent Document #1.[1125]

429. Even more important, Fraudulent Document #1 is nonsensical on its face and the information contained in it is demonstrably false. The Juegos Companies were regularly audited, and any irregularity of this type would have been reflected in an audit.[1126] There are also numerous examples of gross inaccuracies in this fraudulent document.[1127] For example, the document asserts that amounts coming from table games were not properly reported.[1128] However, nearly all of the tables in the Casinos were managed electronically (meaning they did not have a dealer) and were not even operated with cash.[1129] Thus, these systems were not subject to manipulation.[1130] Similarly, with respect to the allegation that cash from sports book was not handled properly, the

[1123] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 179; J. Ventura Declaration (Oct. 6, 2016), **C-442**; Fourth Gordon Burr Statement, **CWS-59**, ¶ 69; Second Daniel Rudden Statement, **CWS-65**, ¶ 19; Second John Conley Statement, **CWS-70**, ¶ 17.

[1124] J. Ventura Declaration (Oct. 6, 2016), ¶¶ 3-8, **C-442**; Fourth Gordon Burr Statement, **CWS-59**, ¶ 69; Second Daniel Rudden Statement, **CWS-65**, ¶ 19; Second John Conley Statement, **CWS-70**, ¶ 17; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 179.

[1125] J. Ventura Declaration (Dec. 2, 2021), ¶¶ 3-8, **C-443**.

[1126] Fourth Gordon Burr Statement, **CWS-59**, ¶ 70; Second Daniel Rudden Statement, **CWS-65**, ¶ 19; Second John Conley Statement, **CWS-70**, ¶ 16.

[1127] Fourth Gordon Burr Statement, **CWS-59**, ¶ 70; Fourth Erin Burr Statement, **CWS-60**, ¶ 104.

[1128] Fourth Gordon Burr Statement, **CWS-59**, ¶ 70; Fourth Erin Burr Statement, **CWS-60**, ¶ 104.

[1129] Fourth Gordon Burr Statement, **CWS-59**, ¶ 70; Fourth Erin Burr Statement, **CWS-60**, ¶ 104.

[1130] Fourth Gordon Burr Statement, **CWS-59**, ¶ 71; Fourth Erin Burr Statement, **CWS-60**, ¶ 104.

Juegos Companies did not even manage the sports book portion of the Casinos, as it was completely outsourced to and managed by a third-party company called BetCris.[1131] Additionally, all of the Casinos had an elaborate video surveillance system, so it would have been impossible for someone to siphon off cash without being noticed.[1132] Mr. Burr was frequently on the floor of the Naucalpan Casinos and never saw and/or heard these allegations from anyone, including any of the other B-Mex Board members, Juegos Companies' Board members, employees of the Casinos, or auditors of the Casinos while the Casinos were open.[1133]

430. Thus, the Claimants' witnesses believe Fraudulent Document #1 was created by Mr. Moreno Quijano, or those under his direction, acting under the alias of "Bernie Walker," to sow division among the B-Mex boards regarding the decision to pursue this NAFTA Arbitration.[1134]

431. The second fraudulent document ("Fraudulent Document #2") is an email sent from the email address pekerroberts@gmail.com to Mr. Rudden and Mr. Conley on September 23, 2015, purporting to show that Casino funds were mismanaged and that "GB" (presumably Gordon Burr) improperly removed money from the vaults to pay a "singer" at the Casinos.[1135] The Claimants never knew anybody named Peker Roberts (or any variation of such name) who worked for the Juegos Companies or the B-Mex Companies, and they are unfamiliar with this email address.[1136]

[1131] Fourth Gordon Burr Statement, **CWS-59**, ¶ 71; Fourth Erin Burr Statement, **CWS-60**, ¶ 105.

[1132] Fourth Gordon Burr Statement, **CWS-59**, ¶ 71; Fourth Erin Burr Statement, **CWS-60**, ¶ 105; Third José Ramón Moreno Statement, **CWS-63**, ¶ 28.

[1133] Fourth Gordon Burr Statement, **CWS-59**, ¶ 71; Fourth Erin Burr Statement, **CWS-60**, ¶ 115.

[1134] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 180; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 66-67, 74, 77; Second Daniel Rudden Statement, **CWS-65**, ¶ 19; Second John Conley Statement, **CWS-70**, ¶ 17.

[1135] GB Info from Arturo ("Fraudulent Document #2") (Sept. 23, 2015), **C-444**; Fourth Gordon Burr Statement, **CWS-59**, ¶ 72; Second Daniel Rudden Statement, **CWS-65**, ¶ 20; Second John Conley Statement, **CWS-70**, ¶ 18.

[1136] Fourth Gordon Burr Statement, **CWS-59**, ¶ 72; Fourth Erin Burr Statement, **CWS-60**, ¶ 116; Second Daniel Rudden Statement, **CWS-65**, ¶ 20; Second John Conley Statement, **CWS-70**, ¶ 18; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 181.

Claimants' witnesses believe Fraudulent Document #2 was also created by Mr. Moreno Quijano in furtherance of his attempt to sabotage this NAFTA Arbitration.[1137] Mr. Conley also confirms that "Peker Roberts" is another alias that Mr. Moreno Quijano has used.[1138]

432. It is thus no coincidence that Fraudulent Document #2's creation also coincided with Claimants' key decisions regarding this NAFTA Arbitration. Namely, as previously explained, on September 3, 2015, a B-Mex member meeting was called for September 29, 2015 for the U.S. investors to meet with Quinn Emanuel partner David Orta and Mexican counsel Julio Gutiérrez in Denver to discuss advancing the NAFTA Arbitration.[1139] On September 21, a reminder for this meeting was sent out by email to all B-Mex members.[1140] A mere two days later, on September 23, 2015, the "Peker Roberts" identity sent Fraudulent Document #2 to Mr. Rudden and Mr. Conley.[1141] On September 29, 2015, Mr. Orta and Mr. Gutiérrez made a presentation to the U.S. investors in Denver regarding this NAFTA Arbitration.[1142]

433. Thus, as with Fraudulent Document #1, the Claimants' witnesses believe Fraudulent Document #2 was created by Mr. Moreno Quijano, or those under his direction, to sow division among the B-Mex boards regarding the decision to pursue this NAFTA Arbitration.[1143]

434. Only about two weeks later, on October 14, 2015, Mr. Moreno Quijano and Mr. Gabriel Velasco, as well as three other Mexican shareholders of the Juegos Companies, accosted

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[1137] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 72, 74; Fourth Erin Burr Statement, **CWS-60**, ¶ 116; Second Daniel Rudden Statement, **CWS-65**, ¶ 20; Second John Conley Statement, **CWS-70**, ¶ 17; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 181.

[1138] Second John Conley Statement, **CWS-70**, ¶ 18.

[1139] Fourth Gordon Burr Statement, **CWS-59**, ¶ 76; Fourth Erin Burr Statement, **CWS-60**, ¶ 106.

[1140] Fourth Gordon Burr Statement, **CWS-59**, ¶ 76; Fourth Erin Burr Statement, **CWS-60**, ¶ 106.

[1141] Fourth Gordon Burr Statement, **CWS-59**, ¶ 76; Fourth Erin Burr Statement, **CWS-60**, ¶ 106.

[1142] Fourth Gordon Burr Statement, **CWS-59**, ¶ 76; Fourth Erin Burr Statement, **CWS-60**, ¶ 106.

[1143] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 180; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 74, 77; Second Daniel Rudden Statement, **CWS-65**, ¶ 19; Second John Conley Statement, **CWS-70**, ¶ 17.

Mr. Gutiérrez at his office with Fraudulent Document #1 disseminated by the nonexistent "Bernie Walker."[1144] As described above, Mr. Moreno Quijano threatened Mr. Burr with a lawsuit based on the false allegations therein if the NAFTA Arbitration would interfere with Mr. Moreno Quijano's ability to sell and profit from the Casino assets.[1145] Mr. Quijano—no doubt fully aware of the fraud that are these documents—never followed through on his threat.

435. As explained further below, and as Claimants' witnesses confirm, Mr. Burr never removed money from the Casino vaults for any purpose, let alone to pay a singer.[1146] One singer who regularly performed at the Casinos, named Andrea Martínez Porras ("**Aneeka**"), may be the singer to whom the fraudulent document's author was trying to refer in Fraudulent Document #2.[1147] As she confirms in her witness statement, Aneeka was paid hourly when she performed at the Casinos.[1148] This hourly wage was the only payment she received from the Juegos Companies, and she never received cash.[1149] To receive payment, she submitted invoices for the hours she performed at the Casinos, and was paid by direct transfer into her bank account.[1150] Mr. Burr, along with some other Claimants, were impressed with Aneeka's talent and wished to invest in her career, and to that end established and funded a limited liability company called EIG, LLC

[1144] Fifth Julio Gutiérrez Statement**, CWS-62**, ¶ 150; Fourth Gordon Burr Statement, **CWS-59**, ¶ 67; Fourth Erin Burr Statement, **CWS-60**, ¶ 98.

[1145] Fifth Julio Gutiérrez Statement**, CWS-62**, ¶ 150; Fourth Gordon Burr Statement, **CWS-59**, ¶ 77; Fourth Erin Burr Statement, **CWS-60**, ¶ 98.

[1146] Fourth Gordon Burr Statement, **CWS-59**, ¶ 72; Second Daniel Rudden Statement, **CWS-65**, ¶ 20; Second John Conley Statement, **CWS-70**, ¶ 18; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 181; First Witness Statement of Andrea Martínez Porras ("Aneeka Statement"), **CWS-71**, ¶ 9.

[1147] Aneeka Statement, **CWS-71**, ¶¶ 4-8; Fourth Gordon Burr Statement, **CWS-59**, ¶ 73; Second Daniel Rudden Statement, **CWS-65**, ¶ 20; Second John Conley Statement, **CWS-70**, ¶ 18.

[1148] Aneeka Statement, **CWS-71**, ¶ 9; Fourth Gordon Burr Statement, **CWS-59**, ¶ 73; Second Daniel Rudden Statement, **CWS-65**, ¶ 20; Second John Conley Statement, **CWS-70**, ¶ 18.

[1149] Aneeka Statement, **CWS-71**, ¶¶ 11, 16; Fourth Gordon Burr Statement, **CWS-59**, ¶ 73; Second Daniel Rudden Statement, **CWS-65**, ¶ 20; Second John Conley Statement, **CWS-70**, ¶ 18.

[1150] Aneeka Statement, **CWS-71**, ¶¶ 10-11; Fourth Gordon Burr Statement, **CWS-59**, ¶ 73; Second Daniel Rudden Statement, **CWS-65**, ¶ 20; Second John Conley Statement, **CWS-70**, ¶ 18.

("**EIG**").[1151] EIG paid Aneeka and her manager to help her produce an album and music videos.[1152] Any funds that EIG paid to Aneeka were entirely separate from any payment she received from the Juegos Companies.[1153] The fraudulent document also references payments to the "singer's" manager and a bodyguard named "Antonino."[1154] EIG helped Aneeka hire a manager/agent named Miguel Trujillo who had previously worked for Sony's music division in Mexico, and EIG hired a bodyguard for Aneeka following a dangerous incident.[1155] However, Aneeka's bodyguard was named Giovanni, not Antonino, and neither he nor Aneeka was ever paid in cash.[1156] Rather, EIG paid Aneeka's manager and bodyguard by direct transfer.[1157] While Aneeka's bodyguard did also work for the Casinos, EIG would pay directly for any work he did for Aneeka.[1158] For example, in 2013, EIG paid $5,926.49 for Aneeka's security according to EIG's 2014 tax return.[1159]

436. The members of the B-Mex Companies' Boards discussed and investigated the allegations contained in these fraudulent documents in conjunction with counsel.[1160] This investigation, as

[1151] Aneeka Statement, **CWS-71**, ¶¶ 12-15; Fourth Gordon Burr Statement, **CWS-59**, ¶ 73; Second Daniel Rudden Statement, **CWS-65**, ¶ 20; Second John Conley Statement, **CWS-70**, ¶ 18.

[1152] Aneeka Statement, **CWS-71**, ¶¶ 12-15; Fourth Gordon Burr Statement, **CWS-59**, ¶ 73; Second Daniel Rudden Statement, **CWS-65**, ¶ 20; Second John Conley Statement, **CWS-70**, ¶ 18.

[1153] Fourth Gordon Burr Statement, **CWS-59**, ¶ 73; Second Daniel Rudden Statement, **CWS-65**, ¶ 20; Second John Conley Statement, **CWS-70**, ¶ 18.

[1154] Fraudulent Document #2 (Sept. 23, 2015), **C-444**.

[1155] Aneeka Statement, **CWS-71**, ¶ 16; Fourth Gordon Burr Statement, **CWS-59**, ¶ 73; Fourth Erin Burr Statement, **CWS-60**, ¶ 113.

[1156] Aneeka Statement, **CWS-71**, ¶ 16; Fourth Gordon Burr Statement, **CWS-59**, ¶ 73; Fourth Erin Burr Statement, **CWS-60**, ¶ 113.

[1157] Aneeka Statement, **CWS-71**, ¶ 16; Fourth Gordon Burr Statement, **CWS-59**, ¶ 73; Fourth Erin Burr Statement, **CWS-60**, ¶ 113.

[1158] Fourth Gordon Burr Statement, **CWS-59**, ¶ 73.

[1159] Fourth Gordon Burr Statement, **CWS-59**, ¶ 73; EIG, LLC 2014 Federal Tax Return, **C-445**.

[1160] Fourth Gordon Burr Statement, **CWS-59**, ¶ 74; Second Daniel Rudden Statement, **CWS-65**, ¶ 21; Second John Conley Statement, **CWS-70**, ¶ 19.

well as the one that Mr. Conley initiated and carried out through his own counsel, revealed no evidence to substantiate the allegations in these fraudulent documents.[1161] And there is no other evidence to support these allegations. If there were, one would have expected that a state like Mexico, with full police powers and investigative might, would have uncovered it. Yet Mexico has presented nothing, relying instead on uncorroborated, fabricated documents.

437. Further, none of these allegations were raised while the Casinos were in operation, and none of Claimants' witnesses ever saw any information that confirmed any of these allegations.[1162] These allegations only began to surface when Claimants were discussing whether or not to work with Mr. Chow and Mr. Moreno Quijano to sell the assets and how to proceed forward with this NAFTA Arbitration.[1163] As Claimants' witnesses explain, this was a difficult time for the Claimants as they sought to understand why Mexico had shut down their Casinos, they sought to mitigate their damages and sell their assets, and they were considering whether to move forward with the NAFTA Arbitration. Misinformation, fueled by these fraudulent documents, permeated the Claimant group and divided the managers.

438. In short, the documents that underlie the false allegations in Mexico's Exhibit R-75 are fraudulent and were created by Alfredo Moreno Quijano with the intent of dividing Claimants and suppressing this NAFTA Arbitration. And despite having unlimited investigative and police resources at its disposal, Mexico has not mustered even a single piece of corroborating evidence.

[1161] Fourth Gordon Burr Statement, **CWS-59**, ¶ 74; Second Daniel Rudden Statement, **CWS-65**, ¶ 21; Second John Conley Statement, **CWS-70**, ¶ 19.

[1162] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 66, 74; Fourth Erin Burr Statement, **CWS-60**, ¶ 115; Second Daniel Rudden Statement, **CWS-65**, ¶ 19; Second John Conley Statement, **CWS-70**, ¶ 19.

[1163] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 66, 74; Fourth Erin Burr Statement, **CWS-60**, ¶ 115; Second Daniel Rudden Statement, **CWS-65**, ¶ 19; Second John Conley Statement, **CWS-70**, ¶ 18.

That is enough for the Tribunal to treat these allegations and documents as the smoke and mirrors that they are.

2. Mexico's Allegations of Illegality Are False

439. As this background suggests, the substantive allegations of illegality raised in Exhibit R-75 are completely false and baseless. The QEU&S Claimants unequivocally reject the assertion that there was any illegality in the making and/or the execution of the Claimants' investment in Mexico. Predictably, Mexico has no evidence to substantiate any of these allegations, because such evidence does not exist. Claimants' witnesses, who have personal knowledge relevant to the operations of the B-Mex companies and are in a position to know the veracity of the allegations, unequivocally reject the allegations in their entirety.[1164] Indeed, Claimants have maintained that these allegations are false since they first learned of them.[1165] Messrs. Conley and Rudden, who

[1164] *See* Fourth Gordon Burr Statement, **CWS-59**, ¶ 80; Fourth Erin Burr Statement, **CWS-60**, Section VIII; Second Neil Ayervais Statement, **CWS-61**, Section 4A,C; Third José Ramón Moreno Statement, **CWS-63**, ¶ 25; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 7, 13, 14; Second Daniel Rudden Statement, **CWS-65**, ¶ 23; Second John Conley Statement, **CWS-70**, ¶¶ 8-10.

[1165] *See* Email from N. Ayervais to R. Taylor, G. Burr, D. Rudden, J. Conley, and E. Burr re: allegations of irregularities (Oct. 13, 2016), **C-446** (noting allegations of irregularities are false); Letter from N. Ayervais to R. Taylor re allegations of mismanagement (Nov. 8, 2016), **C-447** (noting that allegations of illegality are false); Email from N. Ayervais to R. Taylor, G. Burr, E. Burr, D. Rudden, J. Conley, and N. Rudden re: allegations of improper compensation (Feb. 18, 2017), **C-448** (noting that allegations of improper compensation are false); Email from N. Ayervais to R. Taylor, G. Burr, E. Burr, D. Rudden, J. Conley, and N. Rudden re: allegations of improper compensation (Feb. 19, 2017), **C-449** (noting that allegations of improper compensation are false); Email Exchange between D. Ponto and N. Ayervais, G. Burr, J. Conley, R. Taylor and E. Burr re allegations of illegality (Aug. 14 to Sept. 11, 2018), pp. 1-3, **C-431** (explaining that the allegations of mismanagement are false and that the underlying documents are fraudulent); Email from G. Burr to D. Ponto re: allegations of illegality (Sept. 11, 2018), **C-432** (showing that Gordon Burr reached out to David Ponto confirming the allegations are false and offering to discuss further); Cease and Desist Notice from J. Mellon to R. Taylor re allegations of mismanagement (Oct. 25, 2018), **C-433** (explaining that the allegations of mismanagement are false and that the underlying documents are fraudulent); Email from J. Williams to R. Taylor re: allegations of illegality (Nov. 1, 2018), **C-434** (describing Gordon Burr's statement that the allegations of mismanagement are false and that the underlying documents are fraudulent); Declaration of D. Rudden (June 20, 2019), **C-435** (stating that the allegations of mismanagement are false); Claimants' Response to Respondents' Counterclaim in *B-Mex, LLC, et al. v. Randall Taylor and David Ponto* (July 12, 2019), **C-436** (stating that the allegations of mismanagement are false); Expert Opinion of C. Richard re allegations of illegality (Oct. 14, 2019), **C-437** (explaining the detrimental legal effect of the false allegations of mismanagement); Claimants' Closing Argument in *B-Mex, LLC, et al. v. Randall Taylor and David Ponto* (Feb. 26, 2020), pp. 33-35 **C-438** (explaining that the allegations of mismanagement are false and that the underlying documents are fraudulent); Claimants' More Definite Statement Regarding the Basis of Its Claims in *B-Mex, LLC, et al. v. Randall Taylor and*

initially were misled by Messrs. Chow and Moreno Quijano with these false allegations in 2015, have for years understood them to be completely baseless.

440. In addition to rejecting Fraudulent Documents #1 and 2, Claimants' witnesses also unequivocally reject the allegations of mismanagement and purported illegality Mexico raises, without any supporting evidence, in its Counter-Memorial.[1166]

(a) There Is No Evidence of Embezzlement By the Managers

441. Claimants' witnesses confirm that there is no evidence of embezzlement by the managers.[1167] Mr. Burr, Mr. Rudden, and Mr. Conley, three of the managers, never embezzled any company funds and had no evidence that other managers were embezzling funds.[1168] José Ramón Moreno ("**Mr. Moreno**"), who was Director of Operations of the Juegos Companies and E-Games, as well as Ms. Burr and Mr. Ayervais confirm that there was no misappropriation of funds by any administrators.[1169] Mr. Julio Gutiérrez also confirms that there was no financial misappropriation by administrators of the Mexican companies or the B-Mex companies.[1170] The Mexican Companies' financials were audited annually and the auditors never raised any issues or concerns.[1171] In Mexico, the Mexican Enterprises were audited annually by external auditors

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David Ponto (July 3, 2019), pp. 12-32, **C-439** (explaining that the allegations of mismanagement are false and that the underlying documents are fraudulent).

[1166] *See* Counter-Memorial, ¶¶ 859-880.

[1167] *See* Counter-Memorial, ¶ 860; Fourth Gordon Burr Statement, **CWS-59**, ¶ 81; Fourth Erin Burr Statement, **CWS-60**, ¶ 121; Second Neil Ayervais Statement, **CWS-61**, ¶ 56; Second Daniel Rudden Statement, **CWS-65**, ¶ 24; Second John Conley Statement, **CWS-70**, ¶¶ 8-10.

[1168] Fourth Gordon Burr Statement, **CWS-59**, ¶ 81; Second Daniel Rudden Statement, **CWS-65**, ¶ 24-25, Second John Conley Statement, **CWS-70**, ¶¶ 8-10; Fourth Erin Burr Statement, **CWS-60**, ¶ 121; Second Neil Ayervais Statement, **CWS-61**, ¶ 56.

[1169] Third José Ramón Moreno Statement, **CWS-63**, ¶ 26; Fourth Erin Burr Statement, **CWS-60**, ¶ 122; Second Neil Ayervais Statement, **CWS-61**, ¶ 56.

[1170] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 134.

[1171] Fourth Gordon Burr Statement, **CWS-59**, ¶ 81; Fourth Erin Burr Statement, **CWS-60**, ¶ 129; Second Neil Ayervais Statement, **CWS-61**, ¶ 56; Third José Ramón Moreno Statement, **CWS-63**, ¶ 26; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 146-147.

selected by the Mexican government who did not identify any issues with the companies' financials.[1172] The assertion of embezzlement is meritless.

(b) There Is No Evidence that the Managers Misused Funds

442. Claimants' witnesses also confirm that there is no evidence that the managers misused funds.[1173] Mr. Burr, Mr. Rudden, and Mr. Conley, who were managers for the B-Mex Companies and the Juegos Companies, confirm this, as do Mr. Moreno and Mr. Julio Gutiérrez.[1174] Mr. Burr further explains that, while he occasionally used his Video Gaming Services, Inc. ("**VGS**") credit card for travel related to the Mexican Enterprises as well as for travel for unrelated projects, he would repay the company for the travel expenses incurred in connection with any unrelated project with 8% interest.[1175] Mr. Burr also loaned the Juegos Companies money on more than one occasion when the companies needed cash and did not charge, and was not repaid with, interest.[1176]

(c) There Is No Evidence that Managers Put Family Members on the Payroll or Allowed Them to Perform No Work

443. Claimants' witnesses, including Mr. Moreno, who was Director of Operations of the Juegos Companies and E-Games, confirm that there is no evidence that managers put family members on the payroll even though no work was performed by those family members.[1177] In reality, there

[1172] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 88-89; Fourth Erin Burr Statement, **CWS-60**, ¶ 129; Second Neil Ayervais Statement, **CWS-61**, ¶ 56; Third José Ramón Moreno Statement, **CWS-63**, ¶ 26; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 146-147.

[1173] *See* Counter-Memorial, ¶ 860; Fourth Gordon Burr Statement, **CWS-59**, ¶ 82; Fourth Erin Burr Statement, **CWS-60**, ¶ 122; Second Neil Ayervais Statement, **CWS-61**, ¶ 57; Second Daniel Rudden Statement, **CWS-65**, ¶¶ 24-25; Second John Conley Statement, **CWS-70**, ¶¶ 8-10.

[1174] Fourth Gordon Burr Statement, **CWS-59**, ¶ 82; Second Daniel Rudden Statement, **CWS-65**, ¶ 20; Second John Conley Statement, **CWS-70**, ¶¶ 8-10; Third José Ramón Moreno Statement, **CWS-63**, ¶ 26; Fourth Erin Burr Statement, **CWS-60**, ¶ 122; Second Neil Ayervais Statement, **CWS-61**, ¶ 57; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 134.

[1175] Fourth Gordon Burr Statement, **CWS-59**, ¶ 82.

[1176] Fourth Gordon Burr Statement, **CWS-59**, ¶ 82.

[1177] *See* Counter-Memorial, ¶ 860; Third José Ramón Moreno Statement, **CWS-63**, ¶ 30; Fourth Gordon Burr Statement, **CWS-59**, ¶ 83; Fourth Erin Burr Statement, **CWS-60**, ¶ 123; Second Neil Ayervais Statement, **CWS-61**, ¶ 58; Second Daniel Rudden Statement, **CWS-65**, ¶ 22; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 163.

were a handful of family members of B-Mex company managers who worked for the companies, all of whom performed valuable work and were paid for that work, as any working employee would have been.[1178] This particular allegation in Exhibit R-75 derives from an offhand comment that Mr. Burr made about Mr. Conley's stepson, Matthew Roberts ("**Mr. Roberts**"), in a moment of frustration with Mr. Conley.[1179] As Mr. Burr explains, at the time Mr. Burr made this statement about Mr. Roberts, he was frustrated with Mr. Conley because Mr. Conley was raising objections to Ms. Burr's compensation as she worked on issues related to this NAFTA Arbitration.[1180] The fact of the matter is that Mr. Roberts performed valuable work.[1181] Specifically, he was involved with site selection and construction of the Casinos, as well as coordinating with vendors and personnel, and helping to introduce customers to the Casinos.[1182] Mr. Roberts accordingly was paid for his labor. However, Mr. Burr also understood and expected that Mr. Roberts would work on the floor of the Naucalpan Casino, but he did not.[1183] Mr. Burr eventually terminated Mr. Roberts' employment, as the managers needed Mr. Roberts to work on the floor of the Casino and

[1178] Third José Ramón Moreno Statement, **CWS-63**, ¶ 33; Fourth Gordon Burr Statement, **CWS-59**, ¶ 83; Fourth Erin Burr Statement, **CWS-60**, ¶ 123; Second Neil Ayervais Statement, **CWS-61**, ¶¶ 58-59; Second Daniel Rudden Statement, **CWS-65**, ¶ 26; Second John Conley Statement, **CWS-70**, ¶¶ 10, 14; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 163.

[1179] Fourth Gordon Burr Statement, **CWS-59**, ¶ 83; Second John Conley Statement, **CWS-70**, ¶ 13; Fourth Erin Burr Statement, **CWS-60**, ¶ 123.

[1180] Fourth Gordon Burr Statement, **CWS-59**, ¶ 83; Second John Conley Statement, **CWS-70**, ¶ 13; Fourth Erin Burr Statement, **CWS-60**, ¶ 123.

[1181] Fourth Gordon Burr Statement, **CWS-59**, ¶ 83; Second John Conley Statement, **CWS-70**, ¶ 10; Fourth Erin Burr Statement, **CWS-60**, ¶ 124; Second Neil Ayervais Statement, **CWS-61**, ¶ 59.

[1182] Fourth Gordon Burr Statement, **CWS-59**, ¶ 83; Second John Conley Statement, **CWS-70**, ¶ 10; Second Daniel Rudden Statement, **CWS-65**, ¶ 26; Fourth Erin Burr Statement, **CWS-60**, ¶ 124; Second Neil Ayervais Statement, **CWS-61**, ¶ 59.

[1183] Fourth Gordon Burr Statement, **CWS-59**, ¶ 83; Second John Conley Statement, **CWS-70**, ¶ 14; Second Daniel Rudden Statement, **CWS-65**, ¶ 26; Fourth Erin Burr Statement, **CWS-60**, ¶ 124; Second Neil Ayervais Statement, **CWS-61**, ¶ 59.

no longer needed his services for site selection.[1184] Mexico's allegation thus is not only false and lacking any evidentiary support, but also presented without any relevant context.

(d) There Is No Evidence that Gordon Burr and Others Were Improperly Removing Money from the Casino Vault

444. Claimants strongly reject and condemn Mexico's naked and unsupported allegation that Gordon Burr and others were effectively stealing from the Casino vaults.[1185] Claimants' witnesses, including Mr. Moreno, who oversaw operations and money transfers, universally confirm that Claimants did not permit and/or facilitate the improper removal of money from the Casino vaults, full stop.[1186]

445. Even pretending that Claimants or their employees would steal cash from their own business, it would not even have been possible for them to remove cash from the vaults at the Casinos, let alone to do so in secret.[1187] The allegation itself reflects a lack of knowledge of the Casinos and how they operated. There were vaults in *each* of the five Casinos and they all had elaborate security procedures. Each of the vaults had state of the art security, was fingerprint-protected, and required a special access card.[1188] None of the Claimants, including Mr.

[1184] Fourth Gordon Burr Statement, **CWS-59**, ¶ 83; Second John Conley Statement, **CWS-70**, ¶ 14; Second Daniel Rudden Statement, **CWS-65**, ¶ 26; Fourth Erin Burr Statement, **CWS-60**, ¶ 127 Second Neil Ayervais Statement, **CWS-61**, ¶ 59.

[1185] *See* Counter-Memorial, ¶ 860.

[1186] Fourth Gordon Burr Statement, **CWS-59**, ¶ 84; Fourth Erin Burr Statement, **CWS-60**, ¶ 125; Third José Ramón Moreno Statement, **CWS-63**, ¶¶ 27-28; Second Neil Ayervais Statement, **CWS-61**, ¶ 60; Second Daniel Rudden Statement, **CWS-65**, ¶ 27; Second John Conley Statement, **CWS-70**, ¶¶ 12, 17; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 165.

[1187] Fourth Gordon Burr Statement, **CWS-59**, ¶ 84; Third José Ramón Moreno Statement, **CWS-63**, ¶ 28; Fourth Erin Burr Statement, **CWS-60**, ¶ 125; Second Neil Ayervais Statement, **CWS-61**, ¶ 60; Second Daniel Rudden Statement, **CWS-65**, ¶ 23.

[1188] Fourth Gordon Burr Statement, **CWS-59**, ¶ 84; Third José Ramón Moreno Statement, **CWS-63**, ¶ 29-31; Fourth Erin Burr Statement, **CWS-60**, ¶ 125; Second Neil Ayervais Statement, **CWS-61**, ¶ 53.

Burr, had either fingerprint access or the required access card for the vaults.[1189] The Juegos Companies managers intentionally made the vaults extremely secure so that the Casinos would not be vulnerable to theft and the managers would not be vulnerable to kidnapping and/or extortion threats.[1190] When it came time to remove cash from the vaults, armored vehicles would back up directly into the vaults to remove the money at random times during the week to minimize the chance of predictability and transport it directly to the bank.[1191] The Casinos also had an extensive security camera surveillance system, including inside the vaults.[1192] The surveillance videos were monitored in real time by the security staff and recorded.[1193] Thus, it defies reality to suggest that anyone could walk into the Casino, walk into the vault, take cash, and walk out.

446. Mr. Burr also explains that he only went inside the Naucalpan vault *two times*.[1194] One occasion was during the construction of the Casino, when Mr. Burr entered the vault with two other staff members to observe the vault procedures and safeguards and how the video surveillance system worked.[1195] The Naucalpan vault was empty at the time. Mr. Burr entered the Naucalpan Casino vault on a second occasion with a representative of the Navegante Group, a Nevada gaming company that was considering working with E-Games in Mexico.[1196] Mr. Burr wanted to show

[1189] Fourth Gordon Burr Statement, **CWS-59**, ¶ 84; Third José Ramón Moreno Statement, **CWS-63**, ¶¶ 28-29; Fourth Erin Burr Statement, **CWS-60**, ¶ 125; Second Neil Ayervais Statement, **CWS-61**, ¶ 53.

[1190] Fourth Gordon Burr Statement, **CWS-59**, ¶ 84; Third José Ramón Moreno Statement, **CWS-63**, ¶¶ 29-31; Fourth Erin Burr Statement, **CWS-60**, ¶ 109; Second Neil Ayervais Statement, **CWS-61**, ¶ 53.

[1191] Fourth Gordon Burr Statement, **CWS-59**, ¶ 84; Third José Ramón Moreno Statement, **CWS-63**, ¶ 30; Fourth Erin Burr Statement, **CWS-60**, ¶ 109; Second Neil Ayervais Statement, **CWS-61**, ¶ 53.

[1192] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 84-85; Third José Ramón Moreno Statement, **CWS-63**, ¶ 30; Fourth Erin Burr Statement, **CWS-60**, ¶ 108; Second Neil Ayervais Statement, **CWS-61**, ¶ 53.

[1193] Fourth Gordon Burr Statement, **CWS-59**, ¶ 85; Third José Ramón Moreno Statement, **CWS-63**, ¶ 30; Fourth Erin Burr Statement, **CWS-60**, ¶ 105; Second Neil Ayervais Statement, **CWS-61**, ¶ 53.

[1194] Fourth Gordon Burr Statement, **CWS-59**, ¶ 85.

[1195] Fourth Gordon Burr Statement, **CWS-59**, ¶ 85.

[1196] Fourth Gordon Burr Statement, **CWS-59**, ¶ 85.

the representative E-Games' operations, as well as the vault safeguards and procedures.[1197] Mr. Burr was let in and out of the vault by the security staff, and he did not touch and/or remove anything from the vault.[1198] Simply put, there is not a shred of evidence to support this baseless, bad faith allegation.

(e) There Is No Evidence that Accounting Records Were Improperly Removed from the Casino Vaults

447. Claimants' witnesses confirm that accounting records were not improperly removed from the Casino vaults, and there is no evidence to support the allegation that they were.[1199] In fact, the Mexican Enterprises' accounting records *were not even kept in the Casino vaults*, and thus could not have been removed from them, let alone improperly.[1200] They were kept in the accounting and finance area as transactions were processed, and eventually were stored in the file room in Naucalpan, which housed all of the company financial records.[1201] These records burned in the fire in 2017.[1202] Moreover, as noted, the Mexican Enterprises' financial records were audited by

[1197] Fourth Gordon Burr Statement, **CWS-59**, ¶ 85.

[1198] Fourth Gordon Burr Statement, **CWS-59**, ¶ 68.

[1199] *See* Counter-Memorial, ¶ 860; Third José Ramón Moreno Statement, **CWS-63**, ¶¶ 29, 32; First Patricio Chávez Statement, **CWS-54**, ¶¶ 19-20; Fourth Gordon Burr Statement, **CWS-59**, ¶ 88; Fourth Erin Burr Statement, **CWS-60**, ¶ 129; Second Neil Ayervais Statement, **CWS-61**, ¶ 60; Second Daniel Rudden Statement, **CWS-65**, ¶ 29; Second John Conley Statement, **CWS-70**, ¶¶ 8-10, 13; Fifth Julio Gutiérrez Statement, **CWS-62**, 167.

[1200] Third José Ramón Moreno Statement, **CWS-63**, ¶¶ 29, 32; First Patricio Chávez Statement, **CWS-54**, ¶¶ 19-20; Fourth Gordon Burr Statement, **CWS-59**, ¶ 88; Fourth Erin Burr Statement, **CWS-60**, ¶ 129; Second Neil Ayervais Statement, **CWS-61**, ¶ 61; Second Daniel Rudden Statement, **CWS-65**, ¶ 25, Second John Conley Statement, **CWS-70**, ¶¶ 8-10, 13.

[1201] Third José Ramón Moreno Statement, **CWS-63**, ¶ 32; Fourth Gordon Burr Statement, **CWS-59**, ¶ 88; Fourth Erin Burr Statement, **CWS-60**, ¶ 129; Second Neil Ayervais Statement, **CWS-61**, ¶ 61; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 167.

[1202] Memorial ¶ 415; Third José Ramón Moreno Statement, **CWS-63**, ¶ 32; Fourth Gordon Burr Statement, **CWS-59**, ¶ 88; Fourth Erin Burr Statement, **CWS-60**, ¶ 129; Second Neil Ayervais Statement, **CWS-61**, ¶ 61; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 167.

external auditors annually from 2006 until 2013, and the auditors never raised any concerns as to the accounting records.[1203] Accordingly, this allegation is baseless.

(f) There Is No Evidence that Money Was Not Properly Reported on the Books, Were Removed from the Vault, or Went Missing

448. Claimants' witnesses confirm that Mexico's allegations regarding improper bookkeeping, the removal from the vaults of millions of dollars, or millions of dollars going "missing" are also false.[1204] The source of these allegations, Mr. Rudden, expressly recants them in their entirety and clarifies that he had no firsthand knowledge of these allegations, that he has never seen evidence of improper bookkeeping, and that Messrs. Chow and/or Moreno Quijano originally conveyed this information to him, consistent with their misrepresentations to various of the U.S. shareholders following the closure of the Casinos to advance their own personal agendas.[1205] Mr. Rudden also clarifies that, while he was not aware of Messrs. Chow or Moreno Quijano's ulterior motives at the time, he is aware of them now, and thus doubts the veracity of this information and all of the other information that they were passing along to Mr. Rudden.[1206]

449. As noted, the Mexican Enterprises were audited annually.[1207] The Mexican government required these annual external audits by a government-approved auditor.[1208] The government

[1203] Fourth Gordon Burr Statement, **CWS-59**, ¶ 88; Fourth Erin Burr Statement, **CWS-60**, ¶ 129; Second Neil Ayervais Statement, **CWS-61**, ¶ 61; Third José Ramón Moreno Statement, **CWS-63**, ¶¶ 26-27.

[1204] *See* Counter-Memorial, ¶ 860; Third José Ramón Moreno Statement, **CWS-63**, ¶¶ 26-27; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 86-87, 89; Fourth Erin Burr Statement, **CWS-60**, ¶ 131; Second Neil Ayervais Statement, **CWS-61**, ¶¶ 60-62; Second Dan Rudden Statement, **CWS-65**, ¶ 27-28; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 166-168.

[1205] Second Daniel Rudden Statement, **CWS-65**, ¶¶ 27-31.

[1206] Second Daniel Rudden Statement, **CWS-65**, ¶¶ 27-31.

[1207] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 81, 89; Third José Ramón Moreno Statement, **CWS-63**, ¶¶ 26-27; Fourth Erin Burr Statement, **CWS-60**, ¶ 130; Second Neil Ayervais Statement, **CWS-61**, ¶¶ 61-62; Second Daniel Rudden Statement, **CWS-65**, ¶¶ 29, 33.

[1208] Fourth Gordon Burr Statement, **CWS-59**, ¶ 89; Fourth Erin Burr Statement, **CWS-60**, ¶ 130; Second Neil Ayervais Statement, **CWS-61**, ¶ 61.

never found any issues with the Mexican Enterprises filings and, as mentioned above, these allegations were only raised over a year after the Casinos were closed and never raised when the Casinos were operating.[1209] Mexico itself oversaw the audit process that approved Claimants' accounting and no questions were raised about the Mexican Enterprises' accounting while the Casinos were open.

450. Further, Claimants' witnesses confirm that they never heard that money was not appropriately recorded on the books.[1210] Had money gone unreported, Claimants certainly would have learned of it. The Casinos operated on a cashless system in which customers loaded money onto cards and used the cards to play the various games.[1211] This cashless system was run by an external company and could not be manipulated.[1212] On a daily basis, the Mexican Enterprises' accountants would reconcile the money that came in against the money loaded onto these cards and spent on the machines through a detailed and sophisticated process in which the Casinos' vault bosses prepared various reports during the day monitoring the cash flow into and out of the vaults.[1213] Each day, the Casinos' cashiers had to enter their fingerprints into fingerprint readers in order to load money onto the cards of the customers who would be playing that day at the casino.[1214] After every two or three hours of sales—*i.e.*, charges to the cards—the money

[1209] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 65, 74, 89; Fourth Erin Burr Statement, **CWS-60**, ¶ 95; Second Neil Ayervais Statement, **CWS-61**, ¶ 61.

[1210] Third José Ramón Moreno Statement, **CWS-63**, ¶ 26; Fourth Gordon Burr Statement, **CWS-59**, ¶ 72; Fourth Erin Burr Statement, **CWS-60**, ¶ 131; Second Neil Ayervais Statement, **CWS-61**, ¶ 61; Second Daniel Rudden Statement, **CWS-65**, ¶¶ 33-41; Second John Conley Statement, **CWS-70**, ¶ 17.

[1211] Third José Ramón Moreno Statement, **CWS-63**, ¶ 26; Fourth Gordon Burr Statement, **CWS-59**, ¶ 89; Fourth Erin Burr Statement, **CWS-60**, ¶ 131; Second Neil Ayervais Statement, **CWS-61**, ¶ 61.

[1212] Third José Ramón Moreno Statement, **CWS-63**, ¶ 26; Fourth Gordon Burr Statement, **CWS-59**, ¶ 89; Fourth Erin Burr Statement, **CWS-60**, ¶ 131.

[1213] Third José Ramón Moreno Statement, **CWS-63**, ¶ 31.

[1214] Third José Ramón Moreno Statement, **CWS-63**, ¶ 31.

accumulated up to that point was collected.[1215] At that time, a report was also prepared reflecting the amounts sold by the tellers and the cash flow on hand.[1216] The reports were prepared several times throughout the day until the end of the day, at which time the money was taken to the corresponding Casino vault.[1217] The vault bosses and shift bosses entered the money into the vault and were the only people who were authorized to access the vaults and who had the passwords and security controls necessary to physically enter the vaults.[1218] At the end of the day, the vault chiefs prepared a report that was sent to their direct supervisors in Mexico City. Money that was deposited in the vault of each casino had to match the figures reflected in the daily reports of the casino in question.[1219] Thus, both the corresponding workers in the Casinos and the members of the administration team of the Casinos in Mexico City knew daily what was entered in the vaults.[1220] If someone had been manipulating the system by failing to report money, the Mexican Enterprises would have found out about it.[1221]

(g) There Is No Evidence that Cash Was Used To Pay Millions of Dollars to Third Parties Without Proper Controls

451. Contrary to Mexico's allegations, Claimants' witnesses confirm that there is no evidence that cash from the Casinos was used for improper purposes or paid to third parties without proper controls, and there is no evidence to support this allegation.[1222] Once again, the source of this

[1215] Third José Ramón Moreno Statement, **CWS-63**, ¶ 31.

[1216] Third José Ramón Moreno Statement, **CWS-63**, ¶ 31.

[1217] Third José Ramón Moreno Statement, **CWS-63**, ¶ 31.

[1218] Third José Ramón Moreno Statement, **CWS-63**, ¶ 31; Fourth Erin Burr Statement, **CWS-60**, ¶ 107.

[1219] Third José Ramón Moreno Statement, **CWS-63**, ¶ 31.

[1220] Third José Ramón Moreno Statement, **CWS-63**, ¶ 31.

[1221] Third José Ramón Moreno Statement, **CWS-63**, ¶ 26; Fourth Gordon Burr Statement, **CWS-59**, ¶ 89; Second Neil Ayervais Statement, **CWS-61**, ¶ 61.

[1222] *See* Counter-Memorial, ¶ 860; Third José Ramón Moreno Statement, **CWS-63**, ¶¶ 26-27; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 86-87, 89; Fourth Erin Burr Statement, **CWS-60**, ¶ 110; Second Daniel Rudden Statement, **CWS-65**, ¶¶ 34-35.

allegation, Mr. Rudden, recants it in its entirety and states that: he does not have firsthand knowledge that anyone working for the Casinos, including any officers or directors, used cash for improper purposes; he had no responsibility and/or oversight over accounting or how money was allocated in the Mexican Enterprises and/or the B-Mex Companies; he only heard this information from another source after the Casinos were illegally shut down in April 2014; he has never seen any documents or other evidence that would indicate that cash was used for improper purposes; and he has no reason to believe that this allegation is true.[1223]

452. The sole instance in which Mr. Burr authorized that cash be requested from and paid out of the vaults was entirely proper and duly documented. As Mr. Burr explains, at some point in 2013, the security team for the Casinos figured out that Mr. Rojas Cardona was having people follow Mr. Burr and that he was also likely tapping Mr. Burr's phones and hacking into his email.[1224] The security team also anticipated that Mr. Rojas was planning to have Mr. Burr kidnapped.[1225] Mr. Frye, the Director of Security for the Casinos, initiated contact with the United States Federal Bureau of Investigation ("FBI") and the United States Drug Enforcement Administration ("DEA") to report these security concerns.[1226] Both law enforcement agencies recommended that the Casinos hire former federal police from Mexico to do some surveillance work on Mr. Rojas.[1227] Mr. Burr and Mr. Frye decided to hire these men in order to protect the

[1223] Second Daniel Rudden Statement, **CWS-65**, ¶¶ 38-39.

[1224] Fourth Gordon Burr Statement, **CWS-59**, ¶ 86; Second Daniel Rudden Statement, **CWS-65**, ¶ 28; Fourth Erin Burr Statement, **CWS-60**, ¶ 126; Second Neil Ayervais Statement, **CWS-61**, ¶ 9.

[1225] Fourth Gordon Burr Statement, **CWS-59**, ¶ 86; Second Daniel Rudden Statement, **CWS-65**, ¶ 28; Fourth Erin Burr Statement, **CWS-60**, ¶ 126.

[1226] Fourth Gordon Burr Statement, **CWS-59**, ¶ 86; Second Daniel Rudden Statement, **CWS-65**, ¶ 28; Fourth Erin Burr Statement, **CWS-60**, ¶ 126.

[1227] Fourth Gordon Burr Statement, **CWS-59**, ¶ 86; Second Daniel Rudden Statement, **CWS-65**, ¶ 28; Fourth Erin Burr Statement, **CWS-60**, ¶ 126; Second Neil Ayervais Statement, **CWS-61**, ¶ 9.

Casinos, their management, and the employees.[1228] Mr. Burr authorized Mr. Frye to request cash from the vault to pay for the additional security.[1229] This was done to ensure the utmost discretion in this operation for the safety of Mr. Burr and all the employees.[1230] Although the payment for these security expenses was made in cash, it was appropriately reported, documented, and recorded in the Mexican Enterprises' financial records.[1231] The Juegos Companies had a formal system for payment and reimbursement of expenses.[1232] Before any payment was made, it required the authorization of at least two people.[1233] Notably, Mr. Burr never went into the vaults and removed any money, but authorized the companies to use the money for this limited security purpose to ensure confidentiality and discretion.[1234]

453. In addition, the allegation in Exhibit R-75 that cash was removed from the vault to pay for construction projects is false.[1235] As explained in detail in the Claimants' Memorial and Mr. Burr's Third Witness Statement, the funds used for the companies' various construction and renovation projects never came from the vault.[1236] Mr. Burr, who directed these construction projects, never authorized and/or even suggested that money be removed from the vault for this

[1228] Fourth Gordon Burr Statement, **CWS-59**, ¶ 86; Fourth Erin Burr Statement, **CWS-60**, ¶ 126.

[1229] Fourth Gordon Burr Statement, **CWS-59**, ¶ 86; Second Daniel Rudden Statement, **CWS-65**, ¶ 28; Fourth Erin Burr Statement, **CWS-60**, ¶ 126.

[1230] Fourth Gordon Burr Statement, **CWS-59**, ¶ 86; Second Daniel Rudden Statement, **CWS-65**, ¶ 28; Fourth Erin Burr Statement, **CWS-60**, ¶ 127; Second Neil Ayervais Statement, **CWS-61**, ¶ 9.

[1231] Fourth Gordon Burr Statement, **CWS-59**, ¶ 86; Second Daniel Rudden Statement, **CWS-65**, ¶ 28; Fourth Erin Burr Statement, **CWS-60**, ¶ 127; Second Neil Ayervais Statement, **CWS-61**, ¶ 61.

[1232] Fourth Gordon Burr Statement, **CWS-59**, ¶ 86; Fourth Erin Burr Statement, **CWS-60**, ¶ 127.

[1233] Fourth Gordon Burr Statement, **CWS-59**, ¶ 86; Fourth Erin Burr Statement, **CWS-60**, ¶ 127.

[1234] Fourth Gordon Burr Statement, **CWS-59**, ¶ 86.

[1235] Fourth Gordon Burr Statement, **CWS-59**, ¶ 87; Taylor Declaration, p. 6, **R-075**.

[1236] Fourth Gordon Burr Statement, **CWS-59**, ¶ 87.

purpose.[1237] Rather, the funding for these construction expenses came from the Mexican Enterprises' profits and was properly document and recorded.[1238]

(h) There Is No Evidence of Any Financial Impropriety Regarding a Separate Set of Books or "Payola," and Mr. Rudden Has Totally Recanted Any Prior Statements or Allegations of Impropriety

454. Again, contrary to Mexico's allegations, there is no evidence that the B-Mex Companies or the Mexican Enterprises maintained a separate set of accounting books.[1239] Mexico bases this allegation on a quote of Mr. Rudden found in Exhibit R-75 and implies a nefarious purpose on Claimants' part. But the Tribunal cannot credit serious allegations like this one based solely on plainly fabricated and in any event uncorroborated documents and supposition.

455. As explained above, Mr. Rudden entirely recants any suggestion of illegality that he repeated without any firsthand knowledge, because: it was based on second- or third-hand information; Mr. Rudden had not attempted at the time to verify any such information for its accuracy; Mr. Rudden never saw and/or reviewed any credible documents that confirmed any of the information in the Taylor Declaration; the sources of the information, primarily Messrs. Chow and Moreno Quijano, are unreliable and were acting adversely to the QEU&S Claimants' interests; and Mr. Rudden now believes the allegations to be false.[1240] Mr. Rudden also specifically states that, to his knowledge, all money was properly reported on the Casinos' books.[1241]

[1237] Fourth Gordon Burr Statement, **CWS-59**, ¶ 87.

[1238] Fourth Gordon Burr Statement, **CWS-59**, ¶ 87.

[1239] *See* Counter-Memorial, ¶ 860.

[1240] Second Daniel Rudden Statement, **CWS-65**, ¶¶ 13-47.

[1241] Second Daniel Rudden Statement, **CWS-65**, ¶¶ 32-34.

456. Messrs. Burr, Rudden, Conley, Moreno, and Gutiérrez also confirm that there was never a separate set of books for the B-Mex Companies or for the Mexican Enterprises.[1242] Rather, there were accounting records and books at the U.S. level and at the Mexican level, and all income was appropriately recorded.[1243] Further, as explained above, Claimants' witnesses uniformly confirm that all of the Mexican Enterprises' accounting practices were proper, and that no money was improperly removed from the vaults, improperly paid to third parties, or went "missing." And once again, the U.S. and Mexican Enterprises' financials were audited annually both in Mexico and the U.S., and the auditors never raised any issues or concerns about the companies' accounting practices.[1244]

457. There is also no evidence that Claimants made any improper payments, or "*payola*," with Casino money or otherwise. Mexico again bases this allegation on a quote of Mr. Rudden found in its Exhibit R-75.[1245] This quote by Mr. Rudden is immaterial and presented without context. In the transcript from which this quote by Mr. Rudden was drawn, Mr. Rudden clarified that this statement referred to security matters.[1246]

458. Mr. Burr was not aware of any improper payments or "payola."[1247] As Mr. Burr confirms, this statement in Exhibit R-75 refers to the aforementioned payments that were made to the former

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[1242] Fourth Gordon Burr Statement, **CWS-59**, ¶ 90; Second Daniel Rudden Statement, **CWS-65**, ¶¶ 32-34; Third José Ramón Moreno Statement, **CWS-63**, ¶ 26; Fourth Erin Burr Statement, **CWS-60**, ¶ 132; Second Neil Ayervais Statement, **CWS-61**, ¶ 62; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 30.

[1243] Fourth Gordon Burr Statement, **CWS-59**, ¶ 90; Second Daniel Rudden Statement, **CWS-65**, ¶¶ 32-34; John Conley Statement, **CWS-70**, ¶ 16; Fourth Erin Burr Statement, **CWS-60**, ¶ 132; Second Neil Ayervais Statement, **CWS-61**, ¶ 62.

[1244] Third José Ramón Moreno Statement, **CWS-63**, ¶¶ 26-27; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 71, 81, 89, 90; Fourth Erin Burr Statement, **CWS-60**, ¶ 132; Second Neil Ayervais Statement, **CWS-61**, ¶ 47; Second Daniel Rudden Statement, **CWS-65**, ¶¶ 29, 33.

[1245] Counter-Memorial, ¶ 860; Taylor Declaration, pp. 13-14, **R-075**.

[1246] Taylor Declaration, p. 14, **R-075**.

[1247] Fourth Gordon Burr Statement, **CWS-59**, ¶ 91.

Mexican Federal police who were hired to investigate Mr. Rojas Cardona.[1248] When Mr. Burr told Mr. Conley and Mr. Rudden about these allegations, he cautioned them not to share the information with anyone because if Mr. Rojas Cardona found out that the managers were surveilling him, he could have violently retaliated against them.[1249] Mr. Burr therefore explained that if they revealed the information about the surveillance to anyone, that they all could be in danger.[1250]

459. Mr. Burr thus reaffirms that Mexico's suggestions of impropriety are meritless. And as explained above, Mr. Rudden expressly has recanted any allegation of improper payments or bookkeeping by the relevant companies as well as all of the allegations in Exhibit R-75.[1251]

(i) There Is No Evidence of Problems Relating to Collateralization of Notes

460. Mexico next alleges that there was an issue with the collateralization of notes.[1252] Once again, it bases this allegation on a quote from Mr. Conley.

461. Mr. Conley explains that his statement regarding improper collateralization of notes was false and was not based on any firsthand knowledge or evidence, but rather arose from disinformation by Messrs. Chow and Moreno Quijano and others under their direction after the Casinos were illegally shut down.[1253] Claimants' witnesses further confirm that no notes were improperly collateralized.[1254]

[1248] Fourth Gordon Burr Statement, **CWS-59**, ¶ 91.

[1249] Fourth Gordon Burr Statement, **CWS-59**, ¶ 91.

[1250] Fourth Gordon Burr Statement, **CWS-59**, ¶ 91.

[1251] Second Daniel Rudden Statement, **CWS-65**, ¶¶ 13-47.

[1252] *See* Counter-Memorial, ¶ 860; Taylor Declaration, p. 17, **R-075**.

[1253] Second John Conley Statement, **CWS-70**, ¶¶ 8-9, 11-12.

[1254] Fourth Gordon Burr Statement, **CWS-59**, ¶ 92; Second Daniel Rudden Statement, **CWS-65**, ¶ 42; Fourth Erin Burr Statement, **CWS-60**, ¶ 134; Second Neil Ayervais Statement, **CWS-61**, ¶ 63.

462. In reality, after the Casinos were closed, in 2014, B-Mex issued notes to provide cash to the Juegos Companies to pay for rent and security.[1255] These notes were properly collateralized.[1256] Mr. Burr, as the President of the Board of the Juegos Companies, had the authority to unilaterally initiate these notes without a vote of the shareholders in an *asamblea*.[1257] Mr. Burr did so specifically in order that the Juegos Companies could continue paying rent and other expenses.[1258] Accordingly, Mexico's allegation of improper note collateralization is both irrelevant and false.

(j) There Is No Evidence that Mr. Conley and Mr. Rudden Conspired With Former Employees and Benjamin Chow Against the Interests of the B-Mex Companies

463. Mexico next alleges that Gordon Burr and Erin Burr have alleged that John Conley and Dan Rudden were working with former employees and Benjamin Chow in a conspiracy against the interests of B-Mex.[1259] That assertion too is false. Claimants' witnesses confirm that Mr. Conley and Mr. Rudden never conspired with former employees and/or Mr. Chow against the interests of the B-Mex companies.[1260]

464. As Mr. Burr and Ms. Burr explain, neither Mr. Conley, Mr. Rudden, nor any of the other Claimants ever worked with Mr. Chow in a conspiracy against the Claimants.[1261] Again, Mr.

[1255] Fourth Gordon Burr Statement, **CWS-59**, ¶ 92; Second Daniel Rudden Statement, **CWS-65**, ¶ 42; Fourth Erin Burr Statement, **CWS-60**, ¶ 134; Second Neil Ayervais Statement, **CWS-61**, ¶ 63.

[1256] Fourth Gordon Burr Statement, **CWS-59**, ¶ 92; Second Daniel Rudden Statement, **CWS-65**, ¶ 42; Fourth Erin Burr Statement, **CWS-60**, ¶ 134; Second Neil Ayervais Statement, **CWS-61**, ¶ 63.

[1257] Fourth Gordon Burr Statement, **CWS-59**, ¶ 92; Second Daniel Rudden Statement, **CWS-65**, ¶ 38; Fourth Erin Burr Statement, **CWS-60**, ¶ 134; Second Neil Ayervais Statement, **CWS-61**, ¶ 63.

[1258] Fourth Gordon Burr Statement, **CWS-59**, ¶ 92; Second Daniel Rudden Statement, **CWS-65**, ¶ 38; Fourth Erin Burr Statement, **CWS-60**, ¶ 134; Second Neil Ayervais Statement, **CWS-61**, ¶ 63.

[1259] *See* Counter-Memorial, ¶ 860.

[1260] Fourth Gordon Burr Statement, **CWS-59**, ¶ 93; Fourth Erin Burr Statement, **CWS-60**, ¶ 135; Second Neil Ayervais Statement, **CWS-61**, ¶ 64; Second Daniel Rudden Statement, **CWS-65**, ¶ 39.

[1261] Fourth Gordon Burr Statement, **CWS-59**, ¶ 93; Fourth Erin Burr Statement, **CWS-60**, ¶ 135; Second Neil Ayervais Statement, **CWS-61**, ¶ 64.

Chow and other bad actors created spread this false allegation in order to promote misinformation and divide the Claimant group.[1262] Messrs. Rudden and Conley, the subjects of Mexico's false allegation, reject the assertion that they conspired against the B-Mex Companies.[1263]

465. In reality, after Mexico illegally closed the Casinos, the Claimants engaged in negotiations and an eventual dispute with Messrs. Chow, Pelchat, and others regarding the proposed transaction that the Claimants sought to enter into with Messrs. Chow and Pelchat.[1264] While the Claimants believed that Mr. Chow would help them to reopen the Casinos, he instead worked with at least one of the Mexican investors (Alfredo Moreno Quijano) to attempt to take over the Juegos Companies.[1265] These malefactors actively concealed these actions from the entire Claimant group.[1266] In result, after the November 2014 *asambleas*, there was a lot of confusion as to what had actually happened.[1267] Moreover, there was disagreement among the managers regarding the best course of action with Mr. Chow, and bad actors sought to promote misinformation to divide Claimant group.[1268] The truth is that Messrs. Conley and Rudden did not conspire with Mr. Chow and others against the B-Mex Companies.

(k) There Is No Evidence that Mr. Conley, Other Employees and/or Others Working Under Their Direction Stole Gaming Machines and

[1262] Fourth Gordon Burr Statement, **CWS-59**, ¶ 93; Fourth Erin Burr Statement, **CWS-60**, ¶ 135; Second Neil Ayervais Statement, **CWS-61**, ¶ 64.

[1263] Second Daniel Rudden Statement, **CWS-65**, ¶ 43; Second John Conley Statement, **CWS-70**, ¶¶ 8-10.

[1264] Fourth Gordon Burr Statement, **CWS-59**, ¶ 93; Second Daniel Rudden Statement, **CWS-65**, ¶ 43; Fourth Erin Burr Statement, **CWS-60**, ¶ 135; Second Neil Ayervais Statement, **CWS-61**, ¶ 64.

[1265] Fourth Gordon Burr Statement, **CWS-59**, ¶ 93; Second Daniel Rudden Statement, **CWS-65**, ¶ 43; Fourth Erin Burr Statement, **CWS-60**, ¶ 135; Second Neil Ayervais Statement, **CWS-61**, ¶ 64.

[1266] Fourth Gordon Burr Statement, **CWS-59**, ¶ 93; Second Daniel Rudden Statement, **CWS-65**, ¶ 43; Fourth Erin Burr Statement, **CWS-60**, ¶ 135; Second Neil Ayervais Statement, **CWS-61**, ¶ 64.

[1267] Fourth Gordon Burr Statement, **CWS-59**, ¶ 93; Second Daniel Rudden Statement, **CWS-65**, ¶ 43; Fourth Erin Burr Statement, **CWS-60**, ¶ 135; Second Neil Ayervais Statement, **CWS-61**, ¶ 64.

[1268] Fourth Gordon Burr Statement, **CWS-59**, ¶ 93; Second Daniel Rudden Statement, **CWS-65**, ¶ 43; Fourth Erin Burr Statement, **CWS-60**, ¶ 136; Second Neil Ayervais Statement, **CWS-61**, ¶ 64.

Other Equipment from the Casinos After Mexico Illegally Closed Them

466. Mexico next alleges that Mr. Conley, former employees and/or others working under their direction stole gaming machines and other equipment from the Casinos.[1269] This vague, unsupported allegation is false. Claimants' witnesses confirm that there is no evidence that gaming machines and other equipment were stolen from the Casinos after their closure by Mr. Conley, other employees, or anyone under their direction.[1270] Mexico presents this reference in Exhibit R-75 to a statement by Mr. Burr without evidence or context.[1271]

467. In reality, after Mexico illegally closed the Casinos in 2014, it placed on seals the Casinos that prevented any of the Claimants from accessing them.[1272] Despite this action, Mexico failed to protect the Casinos from physical incursions by third parties, violating, *inter alia*, its obligations under article 1105(1) of the NAFTA, as discussed *infra*. The QEU&S Claimants believe that bad actors in Mexico, who were outside of the Claimant group, may have stolen gaming machines and other equipment from the Naucalpan Casinos during this time with the knowledge (or at least given the negligence) of the Mexican government, which had custody and control of the facilities after it illegally closed them.[1273] In fact, the landlord of the Naucalpan Casino told Mr. Burr that Mr. Moreno Quijano had succeeded in entering the Naucalpan facility and had stolen machines from the facility.[1274] If anyone tried to remove machines from the Casinos, it was Mr. Moreno Quijano

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[1269] *See* Counter-Memorial, ¶ 860.

[1270] Second John Conley Statement, **CWS-70**, ¶¶ 8-10; Fourth Gordon Burr Statement, **CWS-59**, ¶ 94; Fourth Erin Burr Statement, **CWS-60**, ¶ 136; Second Neil Ayervais Statement, **CWS-61**, ¶ 65; Second Daniel Rudden Statement, **CWS-65**, ¶ 44.

[1271] Counter-Memorial, ¶ 860; Taylor Declaration, p. 22, **R-075**.

[1272] Fourth Gordon Burr Statement, **CWS-59**, ¶ 94;; Second Neil Ayervais Statement, **CWS-61**, ¶ 65; Second Daniel Rudden Statement, **CWS-65**, ¶ 44.

[1273] Fourth Gordon Burr Statement, **CWS-59**, ¶ 94; Fourth Erin Burr Statement, **CWS-60**, ¶ 136; Second Neil Ayervais Statement, **CWS-61**, ¶ 65; Second Daniel Rudden Statement, **CWS-65**, ¶ 44.

[1274] Fourth Gordon Burr Statement, **CWS-59**, ¶ 94; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 185.

who was decidedly working against the Claimants' interests. This equipment was valuable and was a depreciating asset when it sat idle in the Casino.[1275] This theft, plus theft in the other Casinos, damaged all of the Claimants in this proceeding, including Mr. Conley.

(l) There Is No Evidence that Mr. Conley and/or Former Employees Were Working to Open Competing Casinos With Assets from the Claimants' Casinos

468. In contrast to Mexico's bare, unsupported allegations, Claimants' witnesses confirm that neither Mr. Conley nor any Claimants worked to open competing casinos with assets from the Claimants.[1276] After Mexico illegally closed the Casinos in April 2014, the resultant confusion and stress of the closures, as well as disinformation campaigns run by Messrs. Moreno Quijano and Chow, sowed division amongst the Claimant group. The Claimants pursued various avenues to reopen or sell the Casinos, including meeting with competitors to try to sell the Casinos.[1277] Mr. Burr, who led that effort, met with Televisa, Juan Cortina, Codere, and others to try and sell the Casinos.[1278] Mr. Burr also negotiated with Messrs. Chow and Pelchat, as explained above.[1279] Mr. Conley and Mr. Rudden also engaged in ultimately unsuccessful negotiations with Televisa and others to sell the Casino assets.[1280] However, there is no evidence even to suggest that any of the Claimants ever worked to open competing Casinos.

[1275] Fourth Gordon Burr Statement, **CWS-59**, ¶ 94; Fourth Erin Burr Statement, **CWS-60**, ¶ 136; Second Neil Ayervais Statement, **CWS-61**, ¶ 65; Second Daniel Rudden Statement, **CWS-65**, ¶ 44.

[1276] *See* Counter-Memorial, ¶ 860; Fourth Gordon Burr Statement, **CWS-59**, ¶ 95; Fourth Erin Burr Statement, **CWS-60**, ¶ 137; Second Neil Ayervais Statement, **CWS-61**, ¶ 66; Second Daniel Rudden Statement, **CWS-65**, ¶ 45; Second John Conley Statement, **CWS-70**, ¶¶ 8-10.

[1277] Fourth Gordon Burr Statement, **CWS-59**, ¶ 95; Fourth Erin Burr Statement, **CWS-60**, ¶ 137; Second Neil Ayervais Statement, **CWS-61**, ¶ 64, 66; Second Daniel Rudden Statement, **CWS-65**, ¶ 45; Second John Conley Statement, **CWS-70**, ¶ 11.

[1278] Fourth Gordon Burr Statement, **CWS-59**, ¶ 95.

[1279] Fourth Gordon Burr Statement, **CWS-59**, ¶ 95.

[1280] Second Dan Rudden Statement, **CWS-65**, ¶ 45; Second John Conley Statement, **CWS-70**, ¶ 10.

(m) The Other Allegations in Exhibit R-75 Regarding Withholding Accounting Records, Commingling Funds, and the Defrauding of a B-Mex Member Are False and Unsupported By Evidence

469. Mexico perpetuates a handful of other spurious allegations that Claimants wish to quickly debunk. None is supported by a single shred of credible evidence and, therefore, clearly were made in bad faith.

470. *First*, Mexico, relying only on Exhibit R-75, alleges that B-Mex accounting records were withheld from Messrs. Rudden and Conley or not provided in a timely manner.[1281] Claimants' witnesses—including Ms. Burr, who shared the accounting records with Messrs. Rudden and Conley—confirm that this allegation is false.[1282] The B-Mex Companies and the Juegos Companies shared voluminous material with Messrs. Conley and Rudden in 2015 and 2016, including accounting records.[1283]

471. *Second*, Mexico through Exhibit R-75 only, alleges that Mr. Burr commingled personal money with company money based on an unspecified comment or comments made by Mr. Conley or Mr. Rudden.[1284] This allegation too is false and unsupported by evidence, and Mr. Burr never commingled personal money with company money.[1285] As explained above, the Mexican Companies' financials were audited annually and the auditors never raised any issues or concerns.[1286] Mr. Rudden, specifically states that he does not have firsthand knowledge that

[1281] Taylor Declaration, p. 7, **R-075**.

[1282] Second Daniel Rudden Statement, **CWS-65**, ¶ 45; Second John Conley Statement, **CWS-70**, ¶ 10; Fourth Gordon Burr Statement, **CWS-59**, ¶ 96; Fourth Erin Burr Statement, **CWS-60**, ¶ 120.

[1283] Second Daniel Rudden Statement, **CWS-65**, ¶ 45; Second John Conley Statement, **CWS-70**, ¶ 10; Fourth Gordon Burr Statement, **CWS-59**, ¶ 96; Fourth Erin Burr Statement, **CWS-60**, ¶ 119; Second Neil Ayervais Statement, **CWS-61**, ¶ 45.

[1284] Taylor Declaration, p. 7, **R-075**.

[1285] Fourth Gordon Burr Statement, **CWS-59**, ¶ 82.

[1286] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 81, 89; Fourth Erin Burr Statement, **CWS-60**, ¶ 129; Second Neil Ayervais Statement, **CWS-61**, ¶ 47; Third José Ramón Moreno Statement, **CWS-63**, ¶ 26; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 146-147.

anyone working for the Casinos, including any officers or directors, commingled personal money with company money, that he had no responsibility and/or oversight over accounting or how money was allocated in the Mexican Enterprises and/or the B-Mex Companies, and that he was provided this information only well after Mexico illegally closed the Casinos in April 2014.[1287] Mr. Rudden further confirms that he has never seen any documents or other evidence that would indicate that money was improperly reported, intermingled, and/or recorded, and he has no reason to believe that thus allegation of commingling is true.[1288] Mr. Conley likewise confirms that he has no firsthand knowledge of this allegation and that he knows it now to be false.[1289]

472. *Third*, Mexico, again solely through Exhibit R-75, alleges that Mr. Burr and Ms. Burr stated that they allowed B-Mex member Doug Moreland ("**Mr. Moreland**") to be defrauded by Mr. Rudden and aided and allowed Mr. Rudden to usurp a B-Mex corporate opportunity by allowing Mr. Rudden to divert Mr. Moreland's money into a subscription agreement with Mr. Chow's company, Grand Odyssey, rather than be loaned to B-Mex.[1290] This allegation is false and unsupported by evidence. Claimants' witnesses, including Mr. Burr, Ms. Burr, Mr. Conley, and Mr. Rudden, confirm that Mr. Rudden did not defraud Mr. Moreland with respect to the subscription agreement, and there is no evidence to suggest that he did or that he kept any proceeds of the operation for himself.[1291] In reality, Mr. Rudden simply facilitated a subscription agreement between Mr. Moreland and Grand Odyssey in an attempt to reopen the Casinos—the plan that involved finding investors interested in investing in Grand Odyssey.

[1287] Second Daniel Rudden Statement, **CWS-65**, ¶ 40.

[1288] Second Daniel Rudden Statement, **CWS-65**, ¶ 40.

[1289] Second John Conley Statement, **CWS-70**, ¶¶ 8-10.

[1290] *See* Counter-Memorial, ¶ 416; Taylor Declaration, p. 18, **R-075**.

[1291] Fourth Gordon Burr Statement, **CWS-59**, ¶ 61; Fourth Erin Burr Statement, **CWS-60**, ¶ 89; Second Daniel Rudden Statement, **CWS-65**, ¶ 46; Second John Conley Statement, **CWS-70**, ¶¶ 8-10.

(n) Mr. Rudden's Ponzi Scheme Did Not Impact the Claimants or Their Investments in Mexico

473. Mexico's Exhibit R-75 makes passing reference to Mr. Rudden's having admitted to running a Ponzi scheme.[1292] To avoid any confusion that Mexico is attempting to sow through its exhibit, Claimants emphasize that the Ponzi scheme for which Mr. Rudden was convicted did not impact or relate to the Claimants or their investments in Mexico in any way.[1293] Mexico does not argue otherwise.

474. Mr. Rudden founded Financial Visions in 2001 as a limited liability company that provided funeral financing loans to families to help pay for funeral expenses.[1294] To fund its business activities, Financial Visions borrowed money from people and paid them an above market interest rate.[1295] Over time, Financial Visions grew and was paying interest to over 200 individuals.[1296] On July 9, 2018, Mr. Rudden admitted that sometime around 2010 or 2011, Financial Visions became a Ponzi scheme when he could no longer support the company's debt load.[1297] Mr. Rudden reached a plea agreement with United States federal prosecutors in relation to this crime in June 2019 and pleaded guilty to one count of mail fraud.[1298]

475. In his Second Witness Statement, Mr. Rudden confirms that he alone was responsible for the Financial Visions Ponzi scheme.[1299] He never told any of the other Claimants or, indeed, any

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[1292] Taylor Declaration, p. 3, **R-075**.

[1293] Fourth Gordon Burr Statement, **CWS-59**, ¶ 62; Fourth Erin Burr Statement, **CWS-60**, ¶ 90; Second Neil Ayervais Statement, **CWS-61**, ¶ 36; Second Daniel Rudden Statement, **CWS-65**, ¶ 10; Second John Conley Statement, **CWS-70**, ¶ 6.

[1294] Second Daniel Rudden Statement, **CWS-65**, ¶ 7.

[1295] Second Daniel Rudden Statement, **CWS-65**, ¶ 7.

[1296] Second Daniel Rudden Statement, **CWS-65**, ¶ 7.

[1297] Second Daniel Rudden Statement, **CWS-65**, ¶ 7.

[1298] Second Daniel Rudden Statement, **CWS-65**, ¶ 7.

[1299] Second Daniel Rudden Statement, **CWS-65**, ¶ 8; Fourth Gordon Burr Statement, **CWS-59**, ¶ 62; Fourth Erin Burr Statement, **CWS-60**, ¶ 90; Second Neil Ayervais Statement, **CWS-61**, ¶ 36.

other person that about this scheme until he turned himself in to the authorities and confessed in July 2018.[1300] None of the other Claimants were aware of nor were they involved in any way in the scheme.[1301] In addition, none of the other Claimants benefited in any way from the Ponzi scheme.[1302]

476. Further, Mr. Rudden did not initiate this scheme until 2010 or 2011, years after the investments in the B-Mex Companies and in the Juegos Companies had already been made.[1303] Mr. Rudden confirms that the illegalities associated with the Ponzi scheme that he ran did not affect the investments made in the B-Mex Companies or any of the Juegos Companies.[1304]

477. In addition, Mr. Rudden's participation in the Boards of the B-Mex Companies, JVE Mexico and JVE Sureste was completely independent from, and was in no way related to, Financial Vision's Ponzi scheme.[1305] Mr. Rudden confirms that the other Board members of the B-Mex Companies, JVE Mexico and JVE Sureste were not aware of Financial Vision's Ponzi scheme, were not involved in any way in the scheme, and never voted to use company money for any illegal or improper purpose.[1306] Similarly, Mr. Rudden never used his influence in the companies

[1300] Second Daniel Rudden Statement, **CWS-65**, ¶ 8; Fourth Gordon Burr Statement, **CWS-59**, ¶ 62; Fourth Erin Burr Statement, **CWS-60**, ¶ 90; Second Neil Ayervais Statement, **CWS-61**, ¶ 36.

[1301] Second Daniel Rudden Statement, **CWS-65**, ¶ 8; Fourth Gordon Burr Statement, **CWS-59**, ¶ 62; Fourth Erin Burr Statement, **CWS-60**, ¶ 90.

[1302] Second Daniel Rudden Statement, **CWS-65**, ¶ 8; Fourth Gordon Burr Statement, **CWS-59**, ¶ 62; Fourth Erin Burr Statement, **CWS-60**, ¶ 90.

[1303] Second Daniel Rudden Statement, **CWS-65**, ¶ 9.

[1304] Second Daniel Rudden Statement, **CWS-65**, ¶ 9; Fourth Gordon Burr Statement, **CWS-59**, ¶ 62; Fourth Erin Burr Statement, **CWS-60**, ¶ 90; Second Neil Ayervais Statement, **CWS-61**, ¶ 36.

[1305] Second Daniel Rudden Statement, **CWS-65**, ¶ 10; Fourth Gordon Burr Statement, **CWS-59**, ¶ 62; Fourth Erin Burr Statement, **CWS-60**, ¶ 90.

[1306] Second Daniel Rudden Statement, **CWS-65**, ¶ 10; Fourth Gordon Burr Statement, **CWS-59**, ¶ 62; Fourth Erin Burr Statement, **CWS-60**, ¶ 90.

resulting from his role as a member of the Boards of the B-Mex Companies, JVE Mexico, and JVE Sureste in connection with, or in furtherance of, Financial Visions' Ponzi scheme.[1307]

478. Finally, it bears noting that Mr. Rudden will not receive any financial benefit from a favorable Award to the Claimants in the NAFTA Arbitration.[1308] Instead, his share of any proceeds will be distributed to the victims of Financial Visions' Ponzi scheme.[1309]

(o) Mexico's Allegations of Illegality are Entirely Premised on the Unfounded Allegations of an Unreliable Narrator Lacking in any Personal Knowledge – Mr. Taylor

479. Following the disinformation campaigns run by Messrs. Moreno Quijano and Chow, Mr. Taylor continued the dissemination of the Fraudulent Documents and their allegations, despite requesting and receiving evidence disproving the allegations, which resulted in their inclusion in the Taylor Candidacy Statement. The Taylor Candidacy Statement makes up the bulk of Mexico's Exhibit R-75 and is the basis for all of Mexico's allegations of mismanagement and alleged illegality by the Claimants in this arbitration.[1310] Relying on Exhibit R-75 (in particular, the Taylor Candidacy Statement), Mexico asserts that Claimants might have engaged in some illegal or improper conduct in "operating the Mexican Enterprises."[1311]

480. Mr. Taylor's allegations should be put in context: for six years, he has attempted to gain an improper share of any proceeds that may result out of the NAFTA Arbitration to the detriment

[1307] Second Daniel Rudden Statement, **CWS-65**, ¶ 11; Fourth Gordon Burr Statement, **CWS-59**, ¶ 62; Fourth Erin Burr Statement, **CWS-60**, ¶ 90.

[1308] Second Daniel Rudden Statement, **CWS-65**, ¶ 12; Fourth Gordon Burr Statement, **CWS-59**, ¶ 54; Fourth Erin Burr Statement, **CWS-60**, ¶ 90; Second Neil Ayervais Statement, **CWS-61**, ¶ 36.

[1309] Second Daniel Rudden Statement, **CWS-65**, ¶ 12; Fourth Gordon Burr Statement, **CWS-59**, ¶ 54; Fourth Erin Burr Statement, **CWS-60**, ¶ 90; Second Neil Ayervais Statement, **CWS-61**, ¶ 36.

[1310] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 98-103; Fourth Erin Burr Statement, **CWS-60**, ¶ 91.

[1311] Counter-Memorial, ¶ 860.

of the other Claimants once he learned the potential size of the damages. Mr. Taylor, in particular, sought to obtain the award proceeds from the Cabo and Cancun Projects.

481. Towards this end, Mr. Taylor looked to distort two transactions that had lain dormant for years and weaponized the allegations contained in the Fraudulent Documents and Taylor Candidacy Statement, among other egregious actions. One transaction involved personal loans that he provided to Mr. Burr in 2010 and 2011. Mr. Taylor unsuccessfully tried to foreclose on collateral, including Mr. Burr's rights in the Cabo and Cancun projects and to obtain all the award proceeds that may be awarded regarding the Cabo and Cancun Projects, even though by Mr. Taylor's own design, no payment was due on the loans until October 2019. When his personal attempts to obtain all of the Cabo and Cancun claims failed, Mr. Taylor threatened to damage them in this proceeding.[1312]

482. Mr. Taylor has also tried to turn $175,000, which was the outstanding balance on an advance from 2011, into what he was never entitled to.[1313] The first step of this process was to have the managers of B-Mex II convert the outstanding balance into a loan, which it never was. Indeed, starting in December of 2015, Mr. Taylor began surreptitiously recording the managers of the B-Mex Companies under the guise that there was a disagreement about whether money that he had invested was in fact a loan to try to manipulate conversations that he could later use to try to coerce the managers into offering him a better financial position in the outcome of the NAFTA Arbitration.[1314] Of course, none of the individuals that were surreptitiously recorded ever did qualify the advance as a loan, despite ample prodding by Mr. Taylor.

[1312] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 113-125; Fourth Erin Burr Statement, **CWS-60**, ¶ 158. Mr. and Ms. Burr are the sole members of B-Cabo and Colorado Cancun, the entities they formed to pursue expansion projects in Cabo and Cancun. Mr. Taylor was not a member.

[1313] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 126-127; Fourth Erin Burr Statement, **CWS-60**, ¶ 169.

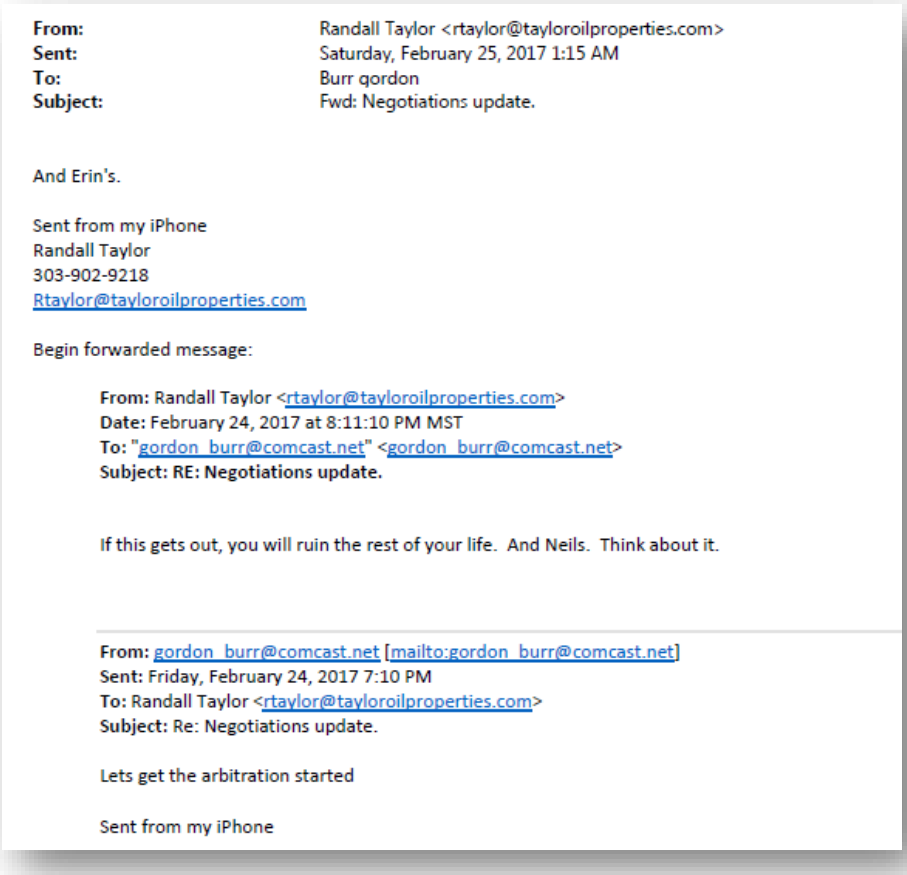
[1314] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 128-130, 133-142; Fourth Erin Burr Statement, **CWS-60**, ¶ 163.

483. Mr. Taylor has repeatedly threatened to use the allegations contained in the Fraudulent Documents and the Taylor Candidacy Statement against the Claimants if Mr. Burr, Ms. Burr and the other managers did not give in to his demands for preferential recovery in the NAFTA Arbitration.

484. Part of the pressure Mr. Taylor employed was through direct threats to ruin the lives and livelihood of the Burrs and corporate counsel, Mr. Ayervais, by spreading the fraudulent allegations contained in the Taylor Candidacy Statement.

485. By way of example, on February 24, 2017, around 8 p.m., Mr. Taylor emailed Mr. Burr stating, "If this gets out, you will ruin the rest of your life. And Neils. (sic) Think about it." Later that night at 1:15 a.m., he emailed Mr. Burr again, this time threatening to ruin Ms. Burr's life:[1315]

[1315] *See* Email from R Taylor to G. Burr re: R. Taylor threats (Feb. 24, 2017), **C-582**.



From: Randall Taylor <rtaylor@tayloroilproperties.com>
Sent: Saturday, February 25, 2017 1:15 AM
To: Burr gordon
Subject: Fwd: Negotiations update.

And Erin's.

Sent from my iPhone
Randall Taylor
303-902-9218
Rtaylor@tayloroilproperties.com

Begin forwarded message:

From: Randall Taylor <rtaylor@tayloroilproperties.com>
Date: February 24, 2017 at 8:11:10 PM MST
To: "gordon_burr@comcast.net" <gordon_burr@comcast.net>
Subject: RE: Negotiations update.

If this gets out, you will ruin the rest of your life. And Neils. Think about it.

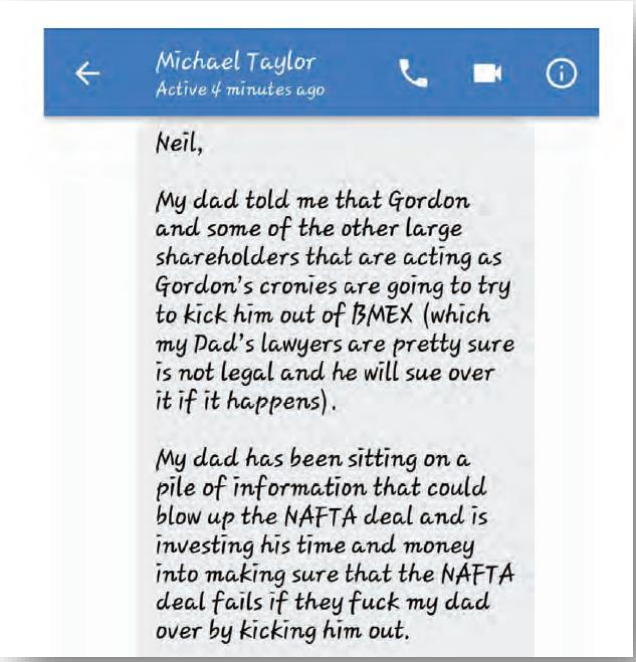
From: gordon_burr@comcast.net [mailto:gordon_burr@comcast.net]
Sent: Friday, February 24, 2017 7:10 PM
To: Randall Taylor <rtaylor@tayloroilproperties.com>
Subject: Re: Negotiations update.

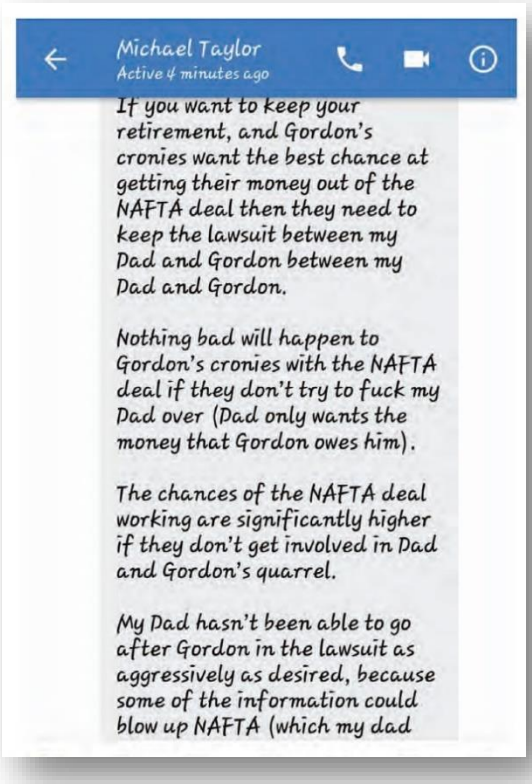
Lets get the arbitration started

Sent from my iPhone

486. And a few months later, on April 15, 2017, Mr. Taylor's son sent Mr. Ayervais several threatening messages through Facebook's Instant Messenger, which included a threat that if the managers of the B-Mex Companies did not comply with Mr. Taylor's demands, his father would, among other things, seek to "blow up NAFTA:"[1316]

[1316] *See* Facebook Text from M. Taylor to N. Ayervais re: R. Taylor threats (Apr. 16, 2017), **C-583**; Second Witness Statement of Neil Ayervais, **CWS-61**, ¶ 110.


Michael Taylor
Active 4 minutes ago
Neil,
My dad told me that Gordon and some of the other large shareholders that are acting as Gordon's cronies are going to try to kick him out of BMEX (which my Dad's lawyers are pretty sure is not legal and he will sue over it if it happens).
My dad has been sitting on a pile of information that could blow up the NAFTA deal and is investing his time and money into making sure that the NAFTA deal fails if they fuck my dad over by kicking him out.


Michael Taylor
Active 4 minutes ago
If you want to keep your retirement, and Gordon's cronies want the best chance at getting their money out of the NAFTA deal then they need to keep the lawsuit between my Dad and Gordon between my Dad and Gordon.
Nothing bad will happen to Gordon's cronies with the NAFTA deal if they don't try to fuck my Dad over (Dad only wants the money that Gordon owes him).
The chances of the NAFTA deal working are significantly higher if they don't get involved in Dad and Gordon's quarrel.
My Dad hasn't been able to go after Gordon in the lawsuit as aggressively as desired, because some of the information could blow up NAFTA (which my dad

487. As set forth more fully in the Witness Statements of Mr. Burr, Ms. Burr, and Mr. Ayervais, Mr. Taylor was unsuccessful in all of his attempts to obtain a disproportionate share of the NAFTA Arbitration proceeds.[1317] Mr. Taylor's claims on the personal loans and the advance have been adjudicated, both in a bankruptcy proceeding where Mr. Taylor was found to be an unsecured creditor, and in a AAA arbitration where his claim on the advance was finally adjudicated by an arbitrator. It is worth noting that Mr. Taylor leveled the same allegations contained in the Taylor Candidacy Statement against Mr. Burr in his bankruptcy, and upon seeing the evidence, the bankruptcy judge implied that Mr. Taylor's threats and actions were in fact extortion.[1318]

488. Now, having failed in his efforts at obtaining preferential recovery in this NAFTA Arbitration, Mr. Taylor is following through on his threats to try to "blow up" this Arbitration.

489. However, Mr. Taylor's allegations should be seen for what they are – the vindictive allegations of someone with no personal knowledge made after the Burrs (and others) were successful in blocking his many attempts at gaining preferential recovery in the NAFTA Arbitration.

490. Indeed, in the Taylor Candidacy Statement, Mr. Taylor readily admits that he cannot verify his various allegations of mismanagement.[1319] Since 2016, Mr. Taylor has repeatedly acknowledged that he has no basis for verifying the allegations: [1320]

[1317] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 103, 113, 125; Fourth Erin Burr Statement, **CWS-60**, ¶ 169.

[1318] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 159-161.

[1319] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 78, 99, 101, 145; Fourth Erin Burr Statement, **CWS-60**, ¶ 198. These are the same allegations that are contained in the Fraudulent Documents that were created by or at the direction of Messrs. Chow and Alfredo Moreno in their attempts to thwart the Claimants' NAFTA Arbitration, as described above.

[1320] Fourth Gordon Burr Statement, **CWS-59**, ¶ 99; Fourth Erin Burr Statement, **CWS-60**, ¶ 178.

Be advised that at no time have I represented, what I believe is the document to which you are referring, the "Summary of out of the Books Amounts" spreadsheet, as being an accurate representation of the financial situation in BMEX. I have told every party that I received the document from BMEX insiders and further stated I have no way of judging the veracity of the document. I was told by the party that provided the document that it was prepared by a BMEX financial person. I have also expressed to others that I have no way of independently verifying that this is truly the source. I have expressed to them that only an examination of the company books would allow for verification. As an investor, there is no way I could merely ignore the matter.

491. Notwithstanding, Mr. Taylor has continued to disseminate the false allegations for over five years in a ruthless disinformation campaign, including to members of the B-Mex Companies and the Claimants.[1321] He has done so despite requesting and receiving evidence disproving the allegations, and despite the thorough investigations conducted by the managers of the B-Companies' boards each time new allegations surfaced:[1322]

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communications will further any investigation into the alleged overpayment to employees. You already have disseminated to some investors in the Companies and to others information about alleged improper actions in Mexico, based in whole or part on documents that now have been proven to have been fabricated and false, as explained in previous communications. As you should be aware, those very same allegations and one or more of the documents have been created and/or used by Mr. Chow and Mr. Pelchat, who engaged in fraudulent and criminal acts which damaged and continue to damage the Companies, their subsidiaries and affiliates, to attempt to defend ongoing litigation against them and extort millions of dollars in a settlement of that litigation, to which you are a plaintiff. Your dissemination of similar material and related actions may impair the prosecution of that lawsuit and further the cause of the defendants. Moreover, the actions and proposals of Mr. Chow and Mr. Pelchat are all too similar to those you employed to obtain personal gain in our October 8 meeting.

[1321] Email from R. Taylor to T. Malley re: allegations of illegality (Sept. 6, 2016), **C-575**; Fourth Gordon Burr Statement, **CWS-59**, ¶ 99; Fourth Erin Burr Statement, **CWS-60**, ¶ 178.

[1322] Letter from N. Ayervais to R. Taylor re: allegations of mismanagement (Nov. 8, 2016) **C-447**; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 99, 104, 139,144; Fourth Erin Burr Statement, **CWS-60**, ¶ 177.

492. Mr. Taylor never witnessed any of the purported illegalities. Mr. Taylor never spoke with anyone who witnessed any of the purported illegalities. Mr. Taylor moreover never held a position within the B-Mex Companies or the Juegos Companies or E-Games. He never was an employee, consultant, advisor, director of the board any of the Mexican Enterprises, or manager the board of the B-Mex Companies. Mr. Taylor rarely traveled to Mexico and his only visits to the Casinos were primarily limited to the floor and coincided with vacations; and on one occasion, to see a concert that EIG funded that showcased Aneeka and her first album, which was entirely independent from the Casinos.[1323]

493. What is transpiring in the NAFTA Arbitration is a continuation of Mr. Taylor's tactics. On numerous occasions, Mr. Taylor made threats on the Burrs, Mr. Ayervais, the Cabo and Cancun claims, and the NAFTA Arbitration itself unless they conceded to his demands.[1324] Mr. Taylor has been clear with what the ramifications would be for not complying with his demands for increased compensation – Mr. Taylor is now simply following through on what he always said he would do.

494. As case in point, the Claimants now know that as of at least March of 2019, David Ponto ("**Mr. Ponto**") – Mr. Taylor's business partner and close personal friend – contacted Mr. Orlando Pérez Garate ("**Mr. Pérez**"), the lead attorney representing Mexico in this Arbitration since January 16, 2019, regarding the Fraudulent Documents and the allegations contained in the Taylor Candidacy Statement.[1325] For reference, Mr. Ponto is a member of B-Mex II and the only investor who has remained supportive of Mr. Taylor's efforts to gain a disproportional share of the NAFTA

[1323] Fourth Gordon Burr Statement, **CWS-59**, ¶ 108; Fourth Erin Burr Statement, **CWS-60**, ¶ 112.

[1324] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 98, 103, 110, 112, 131, 141-142, 147, 154-155, 157-158; Fourth Erin Burr Statement, **CWS-60**, ¶¶ 170-172; Second Neil Ayervaris Statement, **CWS-61**, ¶¶ 108-109.

[1325] *See* Email from D. Ponto to O. Perez Garate re: Ponto (Mar. 11, 2019), **C-586**.

Arbitration for himself and those who supported him. Mr. Taylor's alignment of forces with Mexico are the latest chapter in Mr. Taylor's personal vendetta against the Burrs and others.

495. Moreover, it is highly unlikely Mexico would have ever gained access to the Taylor Candidacy Statement, absent cooperation from Mr. Taylor and / or his cronies. The Candidacy Statement was filed as an exhibit as part of Mr. Taylor's petition to confirm the AAA Award in a Colorado State Court proceeding ("**Colorado Litigation**"). Not only is it unlikely that Mexico was canvassing individual state court dockets to identify the petition, it is also unlikely that Mexico would have known to have asked for access to the Taylor Candidacy Statement. It is the Claimants' understanding that while the Taylor Candidacy Statement is in theory publicly available, filings in that Colorado state court docket are presumed to be confidential and marked "Protected," absent a specific request to the clerk of the court for information with the specific details of the case and the parties to the case, along with the specific documents requested.[1326] In any event, Mr. Ayervais confirms that when he attempted to obtain access to the Taylor Candidacy Statement on the Colorado Court docket, he was prevented from achieving access to that document, which was designated by the court as "protected and only viewable by case parties of record."[1327]

[1326] Second Neil Ayervais Statement, **CWS-61**, ¶ 71

[1327] Second Neil Ayervais Statement, **CWS-61**, ¶ 70; Denver Court Docket Screenshot (Dec. 2, 2021), **C-588**.

Randall Joseph Taylor, David A Ponto	☐	Response	RESPONSE TO DEFENDANTS MOTION TO WITHDRAW THE ORDEROF JUDGMENT CONFIRMING ARBITRATION AWARD, AMENDFINDINGS AND REQUEST TO STAY EXECUTION (w/attach)	Public
	☐	Exhibit - Attach to Pleading/Doc	Exhibit 1 to RESPONSE TO DEFENDANTS MOTION TO WITHDRAW THE ORDER OF JUDGMENT CONFIRMING ARBITRATION AWARD, AMEND FINDINGS AND REQUEST TO STAY EXECUTION - 15 pages financial info	Protected
	☐	Exhibit - Attach to Pleading/Doc	Exhibit 2 to RESPONSE TO DEFENDANTS MOTION TO WITHDRAW THE ORDER OF JUDGMENT CONFIRMING ARBITRATION AWARD, AMEND FINDINGS AND REQUEST TO STAY EXECUTION - Taylor affidavit	Protected R-75
	☐	Exhibit - Attach to Pleading/Doc	Exhibit 3 to RESPONSE TO DEFENDANTS MOTION TO WITHDRAW THE ORDER OF JUDGMENT CONFIRMING ARBITRATION AWARD, AMEND FINDINGS AND REQUEST TO STAY EXECUTION - Erin Burr emails	Protected

496. Mr. Ayervais confirms his understanding that, as a result, it is unlikely that anyone, including Mexico, other than a party of record in the Colorado Litigation would have been able to know of the existence and the contents of the Taylor Candidacy Statement unless counsel to Mr. Taylor and Mr. Ponto, Mr. Taylor's co-plaintiff in the Colorado Litigation, or a person directed by one of those individuals, had provided the Taylor Candidacy Statement or information relating to the Taylor Candidacy Statement to Mexico.

497. Needless to say, Mr. Taylor's allegations have no foundation or merit and should be disregarded outright and should not detract from the merits of the claims at hand before this Tribunal, which is whether Mexico violated its obligations under the NAFTA in relation to the Claimants' investments in Mexico.

V. The Black Cube Evidence Was Obtained Legally and Should Be Admitted

1. Black Cube Evidence

(a) Black Cube Complied with Relevant Mexican Law as well as the Law of Other Jurisdictions Where It Operates

498. As explained in detail in Claimants' Memorial on the Merits, Black Cube is an elite intelligence-gathering enterprise at the forefront of its field.[1328] Founded in 2012 by Avi Yanus

[1328] First Witness Statement of Black Cube ("First Black Cube Statement"), **CWS-57**, ¶¶ 4–5; Memorial, ¶¶ 96-98.

("**Mr. Yanus**"), Black Cube largely comprises former Israeli military intelligence professionals.[1329] Black Cube develops intelligence for use in litigation proceedings around the world, with a focus on developing human intelligence, or gathering information from knowledgeable individuals.[1330]

499. As Mr. Yanus stated in his First Witness Statement (**CWS-57**) and reiterated in his Second Witness Statement (**CWS-64**), Black Cube conducts research on potentially relevant individuals and instructs its agents regarding a given engagement, and then the agents seek to meet with the individuals in person in public places.[1331] Black Cube makes recordings only in jurisdictions where it is lawful to record a conversation with consent from only one of the parties to the conversation ("**one-party consent states**").[1332] In this matter, Black Cube met with individuals in the United States (New York) and Mexico.[1333] For the avoidance of doubt, each of these jurisdictions is a one-party consent jurisdiction, which allows recording of conversation where at least one of the parties participating in it consents to the recording.[1334] Black Cube recorded all of the conversations with individuals in this case after being satisfied that it was legal to do so in each of the jurisdictions where meetings took place.[1335]

[1329] First Black Cube Statement, **CWS-57**, ¶ 5; Second Witness Statement of Black Cube ("Second Black Cube Statement"), **CWS-64**, ¶ 3.

[1330] First Black Cube Statement, **CWS-57**, ¶ 6; Second Black Cube Statement, **CWS-64**, ¶ 3, 7-8; Second Black Cube Statement, **CWS-64**, ¶¶ 3-4; Black Cube's methods are explained in detail in the Memorial, ¶¶ 96-98.

[1331] First Black Cube Statement, **CWS-57**, ¶ 8; Second Black Cube Statement, **CWS-64**, ¶ 5; Black Cube's methods are explained in detail in the Merits, ¶¶ 96-98.

[1332] First Black Cube Statement, **CWS-57**, ¶ 9; Second Black Cube Statement, **CWS-64**, ¶ 9.

[1333] First Black Cube Statement, **CWS-57**, ¶¶ 9, 29-30; Second Black Cube Statement, **CWS-64**, ¶¶ 6, 10.

[1334] First Black Cube Statement, **CWS-57**, ¶ 9; Second Black Cube Statement, **CWS-64**, ¶¶ 6-10.

[1335] First Black Cube Statement, **CWS-57**, ¶ 9; Second Black Cube Statement, **CWS-64**, ¶ 6.

500. Furthermore, Black Cube obtains legal opinions from top law firms regarding the legality of its methods in the jurisdictions where it operates.[1336] Black Cube has obtained legal opinions confirming the legality of its operations in New York and Mexico.[1337] The legal opinions confirm not only the legality of recording the individuals, but also the legality of Black Cube's methodologies and investigative techniques, including using various online sources to conduct research on individuals, profiling individuals to meet with, constructing cover stories, and arranging in-person meetings.[1338] Based upon the legal opinions it has received, Black Cube has affirmed the legality of its methods.[1339]

(b) The Law the Respondent Cites Does Not Support Exclusion of the Black Cube Evidence

501. Mexico argues in its Counter-Memorial that the Black Cube evidence, specifically the recordings of Messrs. Rosenberg and Mayo, are illegal under the Mexican Constitution and thus the Tribunal should exclude them.[1340] The relevant law does not support the exclusion of this evidence. First, Mexico argues that Messrs. Rosenberg and Mayo had no knowledge they were being recorded and thus were unable to provided consent to the recordings.[1341] As explained previously, the meetings with the individuals in this case were conducted in Mexico and New York, which are both one-party consent jurisdictions.[1342] As Mr. Yanus confirms in his witness statement (and contrary to Mexico's nonsensical suggestion that somehow the Black Cube agents

[1336] First Black Cube Statement, **CWS-57**, ¶ 13; Second Black Cube Statement, **CWS-64**, ¶ 6.

[1337] First Black Cube Statement, **CWS-57**, ¶ 9, 13; Second Black Cube Statement, **CWS-64**, ¶ 6.

[1338] First Black Cube Statement, **CWS-57**, ¶¶ 27-28; Second Black Cube Statement, **CWS-64**, ¶ 6.

[1339] First Black Cube Statement, **CWS-57**, ¶ 14; Second Black Cube Statement, **CWS-64**, ¶ 6.

[1340] Counter-Memorial, ¶¶ 457, 469-472.

[1341] Counter-Memorial, ¶ 472.

[1342] First Black Cube Statement, **CWS-57**, ¶ 9; Second Black Cube Statement, **CWS-64**, ¶¶ 6-10.

did not consent to the recording[1343]), the Black Cube agents conducting the interviews at issue in this case consented to the recordings.[1344] That consent plainly is enough to satisfy the one-party consent requirement. As such, the recordings were appropriately conducted under New York and Mexican law, and Mexico does not provide any cogent argument or binding authority to the contrary.[1345]

502. Second, Mexico incorrectly argues that the recordings violate the right to data protection under a ruling of 10th Collegiate Administrative Court of the First Circuit and the *Ley Federal de Proteccion de Datos Personales en Posesion de los Particulares*.[1346] This is simply a roundabout attempt by Mexico to avoid the fact that the recordings were made in one-party consent jurisdictions—including in Mexico itself—in its desperate attempt to exclude plainly relevant and damning evidence. Mexico does not describe a single piece of information provided by Messrs. Rosenberg or Mayo that would, in its view, be protected from disclosure under these laws, however. Instead, Mexico broadly and nakedly asserts that the recordings "contain moral beliefs and political opinions that may affect their personal and professional relationships."[1347] That vague assertion is not only too perfunctory to be taken seriously but also untrue, as the recordings do not disclose, and Mexico does not point to any, such beliefs or opinions of Messrs. Rosenberg or Mayo let alone the effects they might have. Further, neither the recordings nor Mr. Yanus' witness statements reveal any private, personal, or embarrassing information regarding the interviewees that would or should be protected. As noted above, Black Cube actively attempts to

[1343] Counter-Memorial, ¶ 472.

[1344] Second Black Cube Statement, **CWS-64**, ¶ 10.

[1345] First Black Cube Statement, **CWS-57**, ¶ 9; Second Black Cube Statement, **CWS-64**, ¶¶ 6-10.

[1346] Counter-Memorial, ¶¶ 473-479.

[1347] Counter-Memorial, ¶ 478.

prevent interviewees from divulging such information. A review of the recordings or their transcripts shows that the interviews comprise Messrs. Rosenberg and Mayo's recollections of Mexico's treatment of Claimants' investment based on questions posed by Black Cube regarding the gaming industry in Mexico. Accordingly, after carefully reviewing the methodology applied during the investigation, as well as Mr. Yanus' witness statements, Claimants' Mexican counsel, Julio Gutiérrez Morales, concluded that the furnished evidence does not violate any right to private communication or data protection under Mexican law.[1348]

503. *Third*, Mexico adds without explanation that it is a party to two international treaties that recognize respect for private life, family, the home, personal correspondence, honor, and reputation.[1349] Mexico's assertion is meaningless and legally irrelevant. The NAFTA contains no such provision. Even were the other two treaties that Mexico cites—Article 17 of the International Covenant on Civil and Political Rights and Article 11 of the American Convention on Human Rights—applicable here (they are not, because said treaties apply to the State Parties, not private individuals), they would not implicate the content of the recordings. Neither the witness statement of Mr. Yanus nor the recordings disclose data or information related to privacy, honor, reputation, or the personal data of Messrs. Rosenberg and Mayo. Rather, they concern truthful statements regarding Mexico's unlawful treatment of Claimants and their investment. In any event, these two treaties do not alter the legality of the recordings under Mexican law, as described above, nor their admissibility under international arbitral standards, as described below.

(c) International Arbitration Standards

(i) <u>The Tribunal Has Wide Discretion with Respect to the Admissibility of Evidence</u>

[1348] *See* Fifth Julio Gutierrez Statement, **CWS-62**, ¶¶ 135-136; Second Black Cube Statement, **CWS-64**, ¶ 11.

[1349] Counter-Memorial, ¶ 478.

504. International tribunals have wide discretion with respect to the admission of evidence in international arbitration. The ICSID Additional Facility Rules provide that "[t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value."[1350]

505. In accordance with Procedural Order 1, the Tribunal may refer to the *IBA Rules on the Taking of Evidence in International Arbitration* (2010) (the "IBA Rules") for guidance as to the practices commonly accepted in international arbitration, but it shall not be bound to apply them.[1351] The IBA Rules provide seven reasons that tribunals may exclude evidence. These grounds include: "lack of sufficient relevance to the case or materiality to its outcome" (9.2.a), "legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable" (9.2.b), "unreasonable burden" (9.2.c), "loss or destruction" (9.2.d), "commercial or technical confidentiality" (9.2.e), "special political or institutional sensitivity" (9.2.f), and "procedural economy," "proportionality," and "fairness or equality" (9.2.g).[1352] None of the factors in the IBA Rules for excluding evidence are present in this case.

506. The evidence that Black Cube obtained is directly relevant to the case and material to its outcome. The interviewees confirmed that Mexico's motivation behind the revocation of the Claimants' permit was to benefit the ruling PRI party and the PRI-allied Grupo Caliente (one of Mexico's major gambling companies) and to discredit the previous PAN administration.[1353]

507. There is also no legal impediment or privilege that impacts the Black Cube evidence. Black Cube has confirmed that it obtains legal opinions affirming the legality of its operations in all of

[1350] ICSID Additional Facility Rules, 2006 Article 41, **CL-260**.

[1351] Procedural Order 1, Section 15.1.

[1352] IBA Rules on the Taking of Evidence, Article 9, **CL-261**.

[1353] First Black Cube Statement, **CWS-57**, ¶¶ 40-48, 50-53; *see* Black Cube Recordings, **C-399**; *see also* Black Cube Recordings Transcripts, **Appendix B**.

the jurisdictions where it operates.[1354] Mr. Yanus confirmed that Black Cube is careful to avoid eliciting any information from the individuals that may be protected by attorney-client privilege—if the individual seems to be divulging such information, Black Cube agents will attempt to change the conversation to steer away from these revelations.[1355] In this investigation, the individuals did not share protected or privileged material to Black Cube's knowledge.[1356]

508. Moreover, while Black Cube may investigate and research private aspects of the individuals' lives using online databases and open source information in order to effectively approach each individual, the substance of the meetings with the individuals (and therefore the recordings of those meetings) related primarily to trying to understand the basis for revoking the Claimants' permit and closing the Claimants' casinos.[1357] Black Cube also did not intentionally reveal private or personal information about the individuals, nor did it question the sources about embarrassing and/or private information as a part of this investigation.[1358] There is no unreasonable burden here, as Claimants have already produced this evidence, and there is no possibility or evidence of loss or destruction of relevant evidence. There is also no commercial or technical confidential information that has been disclosed.

509. There is also no special political or institutional sensitivity with respect to disclosing the reasons for revoking the E-Games Independent Permit and closing the Casinos. Mexico does not assert this ground for exclusion and would not be entitled to it in any event. In determining whether special political or institutional sensitivity merits the exclusion of evidence pursuant to IBA Rule

[1354] First Black Cube Statement, **CWS-57**, ¶ 13; Second Black Cube Statement, **CWS-64**, ¶ 6.

[1355] First Black Cube Statement, **CWS-57**, ¶ 12.

[1356] First Black Cube Statement, **CWS-57**, ¶ 12.

[1357] First Black Cube Statement, **CWS-57**, ¶¶ 28, 38-53; Second Black Cube Statement, **CWS-64**, ¶ 17.

[1358] Second Black Cube Statement, **CWS-64**, ¶ 17.

9.2.f, NAFTA tribunals consider "evidence that has been classified as secret by a government or a public international institution" and determine whether that asserted privilege is "compelling."[1359] Tribunals weigh that claim of privilege against "the extent to which the availability of such documents might be crucial for the adequate preparation of the Investor's memorials and the presentation of its case."[1360] Where the evidence is necessary to the Claimants' case, "[t]he interest in the proper administration of justice is evident."[1361] Tribunals will also admit evidence if admission "will weigh in favour of the interest in the administration of justice, particularly in view that [the evidence] do[es] not compromise the sensitivity of [Government] discussions and deliberations which would be protected by a public interest in non-disclosing."[1362]

510. Here, the Black Cube evidence is not and cannot be "classified" as secret material of the government of Mexico and does not contain governmental discussions or deliberations of legitimate state policy. Rather, it discloses Mexico's illegitimate political and corrupt motivations for unlawfully revoking Claimants' permit and closing the Casinos. Admitting evidence of Mexico's violations of its own law and international law is important to Claimants' case in this Arbitration and "will weigh in favour of the interest in the administration of justice" in Mexico and before this Tribunal. Conversely, there is no public interest in non-disclosure of Mexico's illegitimate motivations and unlawful conduct, and Mexico cannot seriously articulate any. Thus, this exclusionary ground does not apply here.

[1359] IBA Rules on the Taking of Evidence, Article 9, **CL-261**; *Merrill & Ring Forestry L.P. v. The Government of Canada* ("*Merrill*"), ICSID Case No. UNCT/07/1, Decision on Production of Documents in Respect of Which Cabinet Privilege Has Been Invoked (Sept. 3, 2008), ¶ 14, **CL-262**.

[1360] *Merrill*, Decision on Production of Documents in Respect of Which Cabinet Privilege Has Been Invoked, ¶ 21, **CL-262**.

[1361] *Merrill*, Decision on Production of Documents in Respect of Which Cabinet Privilege Has Been Invoked, ¶ 21, **CL-262**.

[1362] *Merrill*, Decision on Production of Documents in Respect of Which Cabinet Privilege Has Been Invoked, ¶ 23, **CL-262**.

511. Additionally, procedural economy, proportionality, fairness, and equality weigh in favor of admitting the Black Cube evidence. Individuals with direct and firsthand knowledge about the government's discrimination, favoritism, and decision-making will generally not openly highlight this behavior out of fear of retaliation. The Black Cube evidence helps to prove that the Mexican government's revocation of Claimants' permit was politically motivated and therefore is directly relevant and material to the outcome of this case.

512. Accordingly, the Black Cube evidence does not fall within any of the seven categories under the IBA Rules under which tribunals may exclude evidence.

513. Furthermore, the interest of justice favors the admission of the Black Cube evidence. Due to fear of reprisals, it is rare that an individual with firsthand knowledge about the actual reasons for revoking Claimants' permit would testify to the matter. As such, the admission of the Black Cube evidence, along with the testimony of Claimants and circumstantial evidence, is the only way to prove the actual reason for the unfair and unlawful treatment of the Claimants' business in this case. Importantly, Black Cube was able to elicit testimony which explained the underlying motivation behind the Mexican government's actions.[1363] If the Tribunal were to fail to consider the given testimony of the two sources with direct knowledge, the result would be an unjust resolution of the case and an award that is factually wrong and/or incomplete.

514. In this context, Black Cube is essentially uncovering and exposing unlawful and improper behavior that would otherwise go unreported.[1364] This is akin to the work of a whistleblower. The OECD recognized that the "protection of whistleblowers who disclose misconduct in the civil

[1363] Second Black Cube Statement, **CWS-64**, ¶¶ 21-23.

[1364] Second Black Cube Statement, **CWS-64**, ¶ 4.

service should be a core component of any public sector integrity framework."[1365] The NAFTA Parties, including Mexico, have committed to whistleblower protection in their international treaties and in their domestic legal regimes.

515. Mexico, like the other NAFTA Parties, has signed and ratified the United Nations Convention on Corruption, which was adopted by the U.N. General Assembly on October 31, 2003 and entered into force on December 14, 2005, and is the only legally binding multilateral international anti-corruption treaty.[1366] This Convention proscribes various forms of corruption, including bribery, solicitation of bribery, trading in influence, and abuse of authority by public officials.[1367] To combat these corrupt acts, the Convention provides for the protection of whistleblowers. Article 33, "Protection of reporting persons," provides that "[e]ach State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention."[1368] Further, Article 37, "Cooperation with law enforcement authorities," provides that "[e]ach State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for

[1365] OECD, OECD Integrity Review of Mexico: Taking a Stronger Stance Against Corruption, OECD Public Governance Reviews, OECD Publishing, Paris, p. 124 (2017). Retrieved from https://www.oecd-ilibrary.org/docserver/9789264273207-en.pdf?expires=1632430158&id=id&accname=guest&checksum=3E9B7C64E9E59CD071BBF3B28E733F02 , **CL-263**.

[1366] United Nations Convention Against Corruption (2004), **CL-264**; United Nations Convention Against Corruption Signature and Ratification Status (Aug. 11, 2021). Retrieved from https://www.unodc.org/unodc/en/corruption/ratification-status.html, **CL-265**.

[1367] United Nations Convention Against Corruption (2004), Articles 15-20, **CL-264**.

[1368] United Nations Convention Against Corruption (2004), Article 33, **CL-264**.

investigative and evidentiary purposes and to provide factual, specific help to competent authorities" to combat such offences.[1369] Such measures include mitigating criminal punishment for or granting immunity from prosecution to reporting persons.[1370]

516. Various regional anti-corruption treaties preceded the United Nations Convention, including the Inter-American Convention Against Corruption ("Inter-American Convention"), which came into force on March 6, 1997. All three NAFTA Parties, in addition to nearly the entire Americas region, are signatories to the Inter-American Convention.[1371] Like the United Nations Convention, the Inter-Americas Convention proscribes bribery, trading in influence, and various forms of corruption.[1372] It also provides for the protection of whistleblowers, stating that member States shall "create, maintain and strengthen . . . [s]ystems for protecting public servants and private citizens who, in good faith, report acts of corruption, including protection of their identities, in accordance with their Constitutions and the basic principles of their domestic legal systems.[1373]

517. Similarly, all three NAFTA Parties are members to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Anti-Bribery Convention"), which came into force on February 15, 1999.[1374] The OECD Anti-Bribery convention proscribes bribery and related forms of corruption.[1375] In November 2009, the Council

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[1369] United Nations Convention Against Corruption (2004), Article 37(1), **CL-264**.

[1370] United Nations Convention Against Corruption (2004), Articles 37(2)-(3), **CL-264**.

[1371] Inter-American Convention Against Corruption Signature and Ratification Status (Mar. 29, 1996). Retrieved from https://www.oas.org/en/sla/dil/docs/inter_american_treaties_B-58_against_Corruption.pdf, **CL-266**.

[1372] Inter-American Convention Against Corruption Signature and Ratification Status (Mar. 29, 1996), Article VI. Retrieved from https://www.oas.org/en/sla/dil/docs/inter_american_treaties_B-58_against_Corruption.pdf, **CL-266**.

[1373] Inter-American Convention Against Corruption Signature and Ratification Status (Mar. 29, 1996), Article III(8). Retrieved from https://www.oas.org/en/sla/dil/docs/inter_american_treaties_B-58_against_Corruption.pdf, **CL-266**.

[1374] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Anti-Bribery Convention"), Signature and Ratification Status (Feb. 15, 1999). Retrieved from https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf, **CL-267**.

[1375] OECD Anti-Bribery Convention (Feb. 15. 1999). Retrieved from https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf, **CL-267**.

for Further Combating Bribery of Foreign Public Officials in International Business Transactions formally recommended that member States ensure the protection of whistleblowers.[1376]

518. Each of the NAFTA Parties expressly reaffirmed their adherence to these three anti-corruption conventions, and further proscribed corrupt acts, in the United States-Mexico-Canada Agreement, which is the successor to the NAFTA that entered into force on July 1, 2020.[1377] The USMCA protects whistleblowers, requiring each Party to "adopt or maintain measures . . . to protect against unjustified treatment a person who, in good faith and on reasonable grounds, reports to the competent authorities facts concerning" corrupt offenses.[1378]

519. Consistent with these international obligations, in their domestic legal systems, the NAFTA parties recognize the importance of whistleblowers in exposing this damaging behavior both in the public and private sectors and incentivize whistleblowers with protection from retaliation and financial remuneration. In the United States, various whistleblower laws protect individuals who report wrongdoing in the public and the private sectors. By way of example, Section 922 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* provides that if an individual provides information to the Securities and Exchange Commission ("SEC") that leads to a successful enforcement action over USD 1 million, the award to the individual is required to be between 10 percent and 30 percent of the total monetary sanctions collected, while also

[1376] OECD Anti-Bribery Convention, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Recommendation IX (Feb. 15, 1999). Retrieved from https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf, **CL-267**.

[1377] United States-Mexico-Canada Agreement ("USMCA") (July 1, 2020), Articles 27.2(2), 27.3(1), 27.7. Retrieved from https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement, **CL-268**.

[1378] USMCA (July 1, 2020), Article 27.3(7). Retrieved from https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement, **CL-268**.

protecting whistleblowers from retaliation.[1379] Similar compensation is available under other whistleblower reward programs.[1380]

520. Similarly, in Canada, the Canadian Revenue Agency has an Offshore Tax Informant Program, which awards whistleblowers if they provide information which leads to a compliance or enforcement action that results in the collection of more than CAD 100,000 of federal tax.[1381] The award amount will be between 5% and 15% of the tax collected.[1382] The Ontario Securities Commission Office of the Whistleblower also offers awards for whistleblowers who provide information regarding violations of Ontario securities law. The whistleblower may collect between 5% and 15% of the total monetary sanctions ordered and/or voluntary payments made, up to a maximum of CAD 5 million.[1383] Legal protection and the financial remuneration in the whistleblower context are akin to a success fee, because governments want to incentivize individuals with information of wrongdoing to come forward.

521. Mexico has made similar commitments to protecting whistleblowers. In regard to the treaties noted above, Mexico signed the Inter-American Convention on the first day and ratified it on May 27, 1997. Mexico signed the OECD Anti-Bribery Convention on May 27, 1999 and the Convention went into force on July 26, 1999. Mexico passed legislation implementing the OECD Anti-Bribery Convention on May 18, 2000. Mexico also hosted the opening of the United Nations

[1379] Securities and Exchange Commission, Dodd-Frank Act Rulemaking: Whistleblower Program, **C-450**.

[1380] For example, the IRS also has a similar whistleblower program. If the taxes, penalties, interest and other amounts in dispute exceed $2 million, and a few other qualifications are met, the IRS will pay 15 percent to 30 percent of the amount collected. *See* Internal Revenue Code 7623-(b), **C-451**.

[1381] Government of Canada, Canada Revenue Agency, Offshore Tax Informant Program (OTIP) v 2.0 – Privacy Impact Assessment Summary (Apr. 3, 2020), **C-452**.

[1382] Government of Canada, Canada Revenue Agency, Offshore Tax Informant Program (OTIP) v 2.0 – Privacy Impact Assessment Summary (Apr. 3, 2020), **C-452**.

[1383] Ontario Securities Commission (OSC), OSC Whistleblower Program, Award Eligibility and Process, **C-453**.

Convention for signature in Merida, Mexico, from December 9-11, 2003, and signed it on the first day. Mexico ratified the United Nations Convention six months later on July 20, 2004.

522. Mexico criminalizes bribery of public officials under the Mexican Federal Criminal Code, Article 222.[1384] Further, in 2014, the Attorney General of Mexico created a special prosecutor's office to handle corruption matters.[1385] On May 28, 2015, Mexico passed a constitutional amendment creating the National Anti-Corruption System, which coordinates the federal, state, and municipal governments in Mexico to prevent, detect and punish corruption in the public and private sectors.[1386] Naturally, and pursuant to the above international commitments, this prohibition would call for the protection of whistleblowers as well. In 2012, Mexico enacted the Federal Anticorruption Law on Public Procurement, criminalizing corruption in public procurement and creating a legal obligation for public officials to report corruption.[1387] Mexico recently passed the General Law on Administrative Responsibility, which strengthened prior whistleblower protections.[1388]

523. However, the OECD reports that culture in Mexico may deter individuals from disclosing misconduct, and the law could do more to protect whistleblowers from dismissal and other work-related sanctions.[1389]

[1384] *See* Federal Penal Code, Official Journal of the Federation (Apr. 12, 2019), Article 222, **CL-269**.

[1385] Agreement A/011/14 establishing the specialized prosecutor's office for crimes related to corruption, Official Journal of the Federation (Mar. 12, 2014), **CL-270**.

[1386] Decree by which various provisions of the Constitution of the United Mexican States are reformed, added and repealed, in matters related to combating corruption, Official Journal of the Federation (May 27, 2015), **CL-271**.

[1387] *See* Federal Procurement Anticorruption Law, Official Journal of the Federation (July 18, 2016), **CL-272**.

[1388] OECD, OECD Integrity Review of Mexico: Taking a Stronger Stance Against Corruption, OECD Public Governance Reviews, OECD Publishing, Paris, p. 124 (2017), Retrieved from https://www.oecd-ilibrary.org/docserver/9789264273207-en.pdf?expires=1632430158&id=id&accname=guest&checksum=3E9B7C64E9E59CD071BBF3B28E733F02, **CL-263**.

[1389] OECD, OECD Integrity Review of Mexico: Taking a Stronger Stance Against Corruption, OECD Public Governance Reviews, OECD Publishing, Paris, p. 124 (2017), Retrieved from https://www.oecd-ilibrary.org/docserver/9789264273207-

524. As such, all of the relevant factors point towards the admission of the Black Cube evidence in this case and the evidence should not be excluded from the proceeding.

(ii) The Black Cube Evidence Is Relevant and Material to the Outcome of the Case and Has Significant Evidentiary Value

525. The Black Cube evidence is highly relevant to key issues in this proceeding. Black Cube agents met with two sources familiar with the circumstances surrounding the revocation of Claimants' permit and closure of their casinos.[1390] The individuals made various statements that strongly support Claimants' arguments in this case. One individual, Mr. Avila Mayo, a former high-ranking SEGOB official who had specific and firsthand knowledge by virtue of his former position, confirmed that the Mexican government illegally revoked Claimants' gaming permit.[1391] Specifically, the official explained that the Claimants' permit was revoked by SEGOB under the leadership of Ms. Gonzalez Salas, the former Director of the Games and Raffles division, to benefit the PRI government and the PRI-allied Grupo Caliente (one of the Claimants' principal competitors), and to discredit the previous PAN government.[1392] Mr. Avila Mayo also revealed that Ms. Salas personally benefitted from the revocation of the Claimants' permit because her husband had previously worked for and maintained close ties to Grupo Caliente.[1393] The other individual, Mr. Rosenberg, the Director of Business Development at Televisa's PlayCity, one Mexico's biggest gambling companies, explained that SEGOB improperly influenced the Mexican

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en.pdf?expires=1632430158&id=id&accname=guest&checksum=3E9B7C64E9E59CD071BBF3B28E733F02, **CL-263**.

[1390] First Black Cube Statement, **CWS-57**, ¶¶ 28-30.

[1391] First Black Cube Statement, **CWS-57**, ¶¶ 40-48; Black Cube Recordings, **C-399**; Black Cube Recordings Transcripts, **Appendix B**.

[1392] First Black Cube Statement, **CWS-57**, ¶¶ 40-48; Black Cube Recordings, **C-399**; Black Cube Recordings Transcripts, **Appendix B**.

[1393] First Black Cube Statement, **CWS-57**, ¶¶ 46; Black Cube Recordings, **C-399**; Black Cube Recordings Transcripts, **Appendix B**.

Supreme Court so the court would decline to review whether the lower courts had erred in revoking the Claimants' permit.[1394] Both individuals confirmed that corruption and favoritism were widespread within SEGOB and local players with strong ties to the government, such as PlayCity, received preferential treatment to obtain new permits, eliminate competitors, and suppress a new gaming law.[1395]

526. Claimants have successfully established the truthfulness and genuine character of the Black Cube evidence. As. Mr. Yanus explained in his First Witness Statement and confirmed in his Second Witness Statement, each conversation was recorded from start to finish, without breaks, and multiple recording devices were used to ensure that all statements were captured during the meetings.[1396] Black Cube preserves each of the audio recordings in its entirety and does not alter the original recordings in any way.[1397] Black Cube then makes copies of the recording, and for purposes of producing copies of the recordings to Mexico and the Tribunal, Black Cube used software to alter the voices of the agents in the copies in order to protect their identities and ensure that they are not subject to retaliation.[1398] Black Cube made no other alterations to the recordings submitted in this case.[1399] The Tribunal can ultimately cross examine Mr. Yanus and make its own judgment as to the authenticity of all the produced recordings.

527. Moreover, Claimants have produced the entirety of the recordings with Messrs. Rosenberg and Mayo. Respondent incorrectly claims that not all copies of the recordings were produced. As Mr. Yanus explains in his statements, Black Cube generally uses multiple recording devices for

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[1394] First Black Cube Statement, **CWS-57**, ¶ 49.

[1395] First Black Cube Statement, **CWS-57**, ¶¶ 41-48, 51-53.

[1396] First Black Cube Statement, **CWS-57**, ¶ 10; Second Black Cube Statement, **CWS-64**, ¶ 11.

[1397] First Black Cube Statement, **CWS-57**, ¶ 11; Second Black Cube Statement, **CWS-64**, ¶ 12.

[1398] First Black Cube Statement, **CWS-57**, ¶ 11; Second Black Cube Statement, **CWS-64**, ¶ 12.

[1399] First Black Cube Statement, **CWS-57**, ¶ 11; Second Black Cube Statement, **CWS-64**, ¶ 12.

each meeting to ensure that all statements are captured.[1400] While Claimants initially only produced to Mexico and the Tribunal the best quality recordings of each meeting, they have since produced to Respondent all recordings of Black Cube's meetings with Messrs. Rosenberg and Mayo.[1401]

528. In the meetings with Black Cube, Messrs. Rosenberg and Mayo spoke as to their personal and unique knowledge on the relevant subject matter. Moreover, Black Cube met with Messrs. Rosenberg and Mayo multiple times and on each occasion, they reaffirmed their impressions of the events.[1402] Respondent has provided no evidence that the individuals were untruthful, that they were biased, or that they furnished misleading information. Rather, Messrs. Rosenberg and Mayo spoke with great specificity and detail about the reasons for Mexico's revocation of Claimants' permit.[1403] Moreover, Respondent's theory that the individuals spoke untruthfully in order to gain employment is illogical and speculative. Respondent presents no specific information to support its assertion that Messrs. Rosenberg and Mayo spoke untruthfully. Moreover, both individuals had personal knowledge of the Claimants' situation in this case based upon their involvement with the Claimants and in the gaming industry.

529. Mr. Yanus, who is the CEO of Black Cube, was appropriately presented as a fact witness in this proceeding. Mr. Yanus himself is not an investigator—he did not meet with any of the individuals.[1404] His role is not to provide substantive testimony, but purely to explain Black Cube's

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[1400] First Black Cube Statement, **CWS-57**, ¶ 10; Second Black Cube Statement, **CWS-64**, ¶ 11.

[1401] Second Black Cube Statement, **CWS-64**, ¶ 13; Black Cube Recordings, **C-399**; Black Cube Recordings Transcripts, **Appendix B**.

[1402] First Black Cube Statement, **CWS-57**, ¶¶ 29–30, 41, 48; Second Black Cube Statement, **CWS-64**, ¶¶ 29-30.

[1403] First Black Cube Statement, **CWS-57**, ¶¶ 39-53; Black Cube Recordings, **C-399**; Black Cube Recordings Transcripts, **Appendix B**.

[1404] Second Black Cube Statement, **CWS-64**, ¶ 18.

investigation in this case, to explain Black Cube's investigative methods, to confirm the validity and authenticity of the recordings submitted in this case, and to confirm that the investigation was conducted in accordance with applicable law, all of which he has done in his witness statements.[1405] As such, there is no basis to exclude either the Black Cube evidence or Mr. Yanus' witness statements. Both are highly probative and do not fall under any of the reasons for the Tribunal to exclude evidence.

III. THE TRIBUNAL ALREADY DETERMINED THAT IT HAS JURISDICTION TO HEAR THIS DISPUTE AND THAT EACH OF CLAIMANTS' CLAIMS ARE ADMISSIBLE

530. Notwithstanding the Partial Award on Jurisdiction, in which the Tribunal held that "it has jurisdiction over the claims by the Claimants," Mexico appears to raise two additional objections to jurisdiction and/or admissibility in its Counter-Memorial: (A) an objection to jurisdiction (the "**Pre-Investment Objection**") as regards to Claimants' Cabo, Cancun and Online Gaming Projects (collectively, the "**Expansion Projects**") and (B) a suggestion that the Tribunal *may* lack jurisdiction and/or Claimants' claims *may* be inadmissible due to "unclean hands" concerns (the "**Illegality Suggestion**"). Neither, however, is a proper objection. As explained below, both objections fail on the facts and on the law.

A. Mexico's Pre-Investment Objection Must Fail

531. In its Counter-Memorial, Mexico alleges that Claimants' claims regarding the Expansion Projects involve only "pre-investment activities" that are outside the scope of protection afforded by the NAFTA.[1406] That argument, however, fails on three accounts. *First*, as a preliminary matter, this objection is untimely—as Mexico failed to raise it in the agreed jurisdiction phase—

[1405] First Black Cube Statement, **CWS-57**, ¶¶ 8-14; Second Black Cube Statement, **CWS-64**, ¶¶ 3-13.

[1406] Counter Memorial, ¶ 488.

and thus inadmissible. *Second*, the Expansion Projects are covered by other investments, *i.e.*, Claimants' investment in local companies and their permit to carry out gaming activities. *Finally*, even if the Tribunal were to consider the Expansion Projects separately, they would still qualify as an investment under the NAFTA.

1. Mexico's Pre-Investment Objection Is Untimely

532. As noted at paragraph 14.2 of Procedural Order No. 1, the Parties agreed to bifurcate proceedings into (1) a jurisdiction phase established for "addressing Respondent's jurisdictional objections" and (2) a merits phase.[1407] There was never any doubt that Mexico was required to present all objections to jurisdiction in the preliminary jurisdiction phase. If not, the jurisdiction phase would serve no real purpose. On this basis, the Tribunal found in the Partial Award of July 19, 2019 that "it has jurisdiction over the claims by the Claimants on their own behalf under Article 1116 of the Treaty and on behalf of the Juegos Companies and E-Games under Article 1117 of the Treaty, and that those claims are admissible."[1408] The Tribunal's statement, therefore, was not a simple rejection of Respondents' objections to jurisdiction, but a finding that, because Respondents' objections had been rejected (and no further objections could be made), it affirmatively "ha[d] jurisdiction over the claims by the Claimants" and that each of the claims "[was] admissible."

533. These claims necessarily included losses in relation to the Expansion Projects. Such losses were raised in the June 15, 2016 Request for Arbitration. In that submission, Claimants explained that (1) their protected investments included investments in the Cabo and Cancun Projects (in addition to the E-Games Independent Permit to operate seven different casino locations[1409]) and

[1407] Procedural Order No. 1, Section 14.2.

[1408] Partial Award, ¶ 273(e) (emphasis added).

[1409] Request for Arbitration, ¶¶ 20, 110.

that (2) the relevant facts underlying the breaches they claim include Mexico's unlawful revocation of the E-Games Independent Permit, which also destroyed any opportunity to operate the two hotel and casino ventures in Cabo (the "**Cabo Project**") and Cancun (the "**Cancun Project**") as well as Claimants' plans to operate "online gaming" business (the "**Online Gaming Project**").[1410] The Expansion Projects were again raised in Claimants' submissions on jurisdiction.[1411] Mexico made no objection related to the Expansion Projects until its December 4, 2020 Counter-Memorial.

534. Mexico cannot now belatedly object to jurisdiction over claims for damages in relation to the Expansion Projects. Not only is Mexico barred by its agreement to bifurcate and Procedural Order No. 1, but also by the applicable arbitration rules. Under Article 45(2) of the ICSID Additional Facility Rules, Mexico was obliged to submit any objection to jurisdiction "as soon as possible after the constitution of the Tribunal." Under Article 33(3) of those rules, any step taken by a party after the expiration of an applicable time limit "shall be disregarded."[1412] The tribunal in *Strabag v. Poland* confirmed that, under Article 45(3) of the Additional Facility Rules, an untimely objection will be admitted *only if* "the facts on which the objection is based are unknown to the party at that time."[1413] That, of course, is not the case for Mexico's objection to the Expansion Projects. Mexico has been fully aware of the facts on which this objection is based but failed to file its objection within the timeline agreed by the Parties. As in *Generation Ukraine v. Ukraine*, where an objection was rejected because it was raised only at the hearing on the merits even though the underlying facts of the objection were available "from a document filed with the

[1410] Request for Arbitration, ¶¶ 8-10, 20-21, 80, 110.

[1411] Counter-Memorial on Jurisdictional Objections, ¶¶ 270-277; *see also* First Erin Burr Statement, **CWS-2**, ¶¶ 50, 53-55; Right of First Refusal Agreement between Colorado Cancún, LLC and B-Mex II, LLC (Apr. 27, 2011), **C-88**; Investment/Loan Agreement between B-Cabo, LLC and Medano Beach Hotel (Apr. 5, 2013), **C-65**.

[1412] Additional Facility Rules, Article 33(3).

[1413] *Strabag SE, Raiffeisen Centrobank AG, Syrena Immobilien Holding AG v. The Republic of Poland*, ICSID Case No. ADHOC/15/1, Partial Award on Jurisdiction (Mar. 4, 2020), ¶ 8.93, **CL-273**.

Notice of Claim,"[1414] and *Autopista v. Venezuela*, where an objection was dismissed as "it was submitted well after the Decision on Jurisdiction,"[1415] Mexico's belated objection must be rejected.

535. Therefore, Mexico's Pre-Investment Objection must be dismissed as a preliminary matter. The Tribunal's analysis should stop here.

2. Claimants Have Made Protected Investments in the Expansion Projects

536. Mexico's Pre-Investment Objection fails even if the Tribunal were to consider the content of Mexico's objection. Mexico argues that the Tribunal lacks jurisdiction because "Claimant's pre-investment activities in relation to the casino projects in Cabo, Cancun, and the online casino . . . would not be included in the definition of 'investments' under Article 1139."[1416]

537. That argument relies on two misconceptions. First, Mexico assumes that the Expansion Projects are not covered by Claimants' other investments—such as, the Claimants' local companies and permit. They are. Second, Mexico assumes that, even if the Expansion Projects were considered separately, they would still not qualify as protected investments. They do.

(b) The Expansion Projects Are Covered by Protected Investments

538. As noted, Mexico's Pre-Investment Objection is based on the erroneous premise that "Claimants have not provided any evidence of any protected investment in relation with" the Expansion Projects.[1417] As further discussed below (and as established during the jurisdictional phase of this arbitration), Mexico's argument has no merit and is easily disproven by the evidence on record.

[1414] *Generation Ukraine, Inc. v. Ukraine,* ICSID Case No. ARB/00/9, Award (Sept. 16, 2003), ¶ 16.1, **CL-93**.

[1415] *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/00/5, Award (Sept. 23, 2003), ¶ 90, **CL-253**.

[1416] Counter-Memorial, ¶ 488.

[1417] Counter-Memorial, ¶ 481.

539. The E-Games Independent Permit and its attendant rights self-evidently are property rights of real value, and fall within the ambit of "investments" under the NAFTA, whether characterized as "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory" under NAFTA Article 1139(h), or "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes" under NAFTA Article 1139(g). The permit and its attendant rights carry value and includes the Expansion Projects.

540. In particular, granted in November 2012, the E-Games Independent Permit solidified Claimants' right to operate fourteen gaming establishments (seven remote gambling centers and seven lottery number rooms), or up to seven dual-function gaming facilities.[1418] When Mexico illegally shut down the Casinos in April 2014, Claimants were utilizing the E-Games Independent Permit to operate the five dual-function Casinos that they had been operating since 2006-2008. With the remaining two licenses under the E-Games Independent Permit, Claimants planned to develop casino and hotel ventures in Cabo and Cancun, as they considered that those resort communities in Mexico would have the maximum potential to realize the full value of the E-Games Independent Permit.[1419] While in 2013 and 2014 Claimants also operated a temporary location in Huixquilucan and were working on another temporary location in Veracruz (together with the Huixquilucan facility, the "**Temporary Locations**"),[1420] Claimants' plan was always to close the Temporary Locations and deploy the remaining licenses under the E-Games' Independent

[1418] *See* SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16**.

[1419] Fourth Gordon Burr Statement, **CWS-59**, ¶30; Fourth Erin Burr Statement, **CWS-60**, ¶ 45; Third Gordon Burr Statement, **CWS-50**, ¶ 65.

[1420] Fourth Gordon Burr Statement, **CWS-59**, ¶ 31; Fourth Erin Burr Statement, **CWS-60**, ¶ 45; Third Gordon Burr Statement, **CWS-50**, ¶ 87.

Permit—which had no geographic restrictions whatsoever—to the Cabo and Cancun Projects once they came into fruition.[1421]

541. As previously explained, Claimants put efforts into these Temporary Locations because at the time there was a proposed bill in the Mexican legislature that would have canceled licenses for locations that were not being used.[1422] Thus by operating the Temporary Locations, Claimants wanted to show the Mexican government that they were utilizing as many of the prescribed locations under the E-Games Independent Permit as possible (*i.e.*, 7 dual-function gaming facilities). Of course, this was done in order to preserve Claimants' ability to implement their plans to develop casino and hotel ventures in Cabo and Cancun with licenses under the E-Games Independent Permit, in light of the proposed legislative change.

542. Likewise, Claimants held the legally-secured right to operate an online gaming business under the E-Games Independent Permit.[1423] As Claimants previously explained, SEGOB granted the E-Games Independent Permit to E-Games subject to the same rights and obligations as E-Mex's permit DGJAS/SCEVF/P-06/2005 and its modifications.[1424] Mexico does not dispute this. E-Mex's permit expressly contained an authorization for online gaming, stating that: "In the Remote Gambling Centers, bets may be received via the internet, by telephone, or

[1421] Fourth Gordon Burr Statement, **CWS-59**, ¶ 31; Fourth Erin Burr Statement, **CWS-60**, ¶ 45; Third Gordon Burr Statement, **CWS-50**, ¶¶ 86-87.

[1422] Fourth Erin Burr Statement, **CWS-60**, ¶ 45; Third Gordon Burr Statement, **CWS-50**, ¶ 87.

[1423] *See Pope & Talbot, Inc. v. Canada* ("*Pope & Talbot*"), UNCITRAL, Interim Award (June 26, 2000), ¶ 96 (finding that an investor's access to the U.S. softwood lumber market as a property right protected by the NAFTA), **CL-85**.

[1424] *See* Memorial, ¶ 141; First Ezequiel González Matus Report, **CER-3**, ¶¶ 74, 75 (d); SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16**.

electronically."[1425] In this regard, Article 85 of the Gaming Regulations also provides: "The establishments will be able to receive bets via the internet, by telephone, or electronically."[1426]

543. In addition to the E-Games Independent Permit, Claimants have held multiple other investments in relation to the Expansion Projects, including, but not limited to: (i) E-Games, which was a holder of the Claimants' gaming permit and would have been an operator of the Expansion Projects had they not been thwarted by Mexico's illegal measures, and which undoubtedly qualifies as "enterprises" under NAFTA Article 1139(a); and (ii) shares in E-Games,[1427] which amply fall within the definition of "investment" as "an equity security of an enterprise" under Article 1139(b).

544. In sum, there can be no doubt that the Expansion Projects were covered by investments falling within the scope of NAFTA Article 1139. This fact alone is sufficient to refute and dispense with Mexico's misguided assertion that Claimants' Expansion Projects constitute mere "pre-investment activities."[1428] As stated by the tribunal in *Lemire v. Ukraine*, "[p]re-investment activities" are by definition "those which precede the actual investment."[1429] Hence, Mexico's Pre-Investment Objection is a misnomer and fails a matter of law, because the Expansion Projects consist of several forms of protected investments. In *Lemire*, the claimant sought damages in relation to more than 300 hundred applications for radio frequencies, all of which Ukraine had

[1425] E-Mex Permit No. DGAJS/SCEVF/P-06/2005 (May 25, 2005), **C-235** ("*En los Centros de Apuestas Remotas se podrán captar apuestas vía internet, telefónica o electrónica*."); Second Ezequiel González Matus Report, **CER-6**, ¶ 257.

[1426] Regulations of the Federal Law of Games and Draws, Article 85, **R-033**; Second Ezequiel González Matus Report, **CER-6**, ¶ 255.

[1427] As established during the jurisdictional phase of this arbitration, Claimants John Conley and Oaxaca Investments LLC (owned by Mr. and Ms. Burr) are the controlling shareholders of E-Games. *See* Partial Award, ¶ 238.

[1428] Counter-Memorial, ¶ 488.

[1429] *Joseph Charles Lemire v. Ukraine* ("*Lemire*"), ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (Jan. 14, 2010), ¶ 89, **CL-166**.

denied.[1430] While Ukraine argued that the "failure in tenders for additional frequencies" were "pre-investment activities,"[1431] the *Lemire* tribunal found that they were not mere "pre-investment activities" because the claimant had already made an investment in acquiring the initial radio station.[1432]

545. Similarly, the *PSEG v. Turkey* tribunal held that "[a]n investment can take many forms before actually reaching the construction stage, including most notably the cost of negotiations and other preparatory work leading to the materialization of the Project, even in connection with pre-investment expenditures."[1433] Turkey had argued that a concession project that it had cancelled could not qualify as a protected investment because it had not "moved off the drawing board."[1434] Yet the tribunal dismissed Turkey's pre-investment objection, finding that the fact that the valid concession contract exists "is sufficient to establish that the Tribunal has jurisdiction on the basis of an investment having been made in the form of a Concession Contract"[1435] and that the expenses incurred pursuing a mining project under the concession contract also amounted to a protected investment.[1436]

546. Likewise, in *Deutsche Telekom v. India*, the tribunal found that, even though the investment had not obtained the "necessary governmental approvals," it still had jurisdiction over a dispute in

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[1430] *Lemire*, Decision on Jurisdiction and Liability, ¶ 409, **CL-166**.

[1431] *Lemire*, Decision on Jurisdiction and Liability, ¶ 86, **CL-166**.

[1432] *Lemire*, Decision on Jurisdiction and Liability, ¶ 89, **CL-166**.

[1433] *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award (Jan. 19, 2007), ¶ 304, **CL-277**.

[1434] *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction (June 4, 2004), ¶ 54, **CL-278**.

[1435] *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction (June 4, 2004), ¶ 104, **CL-278**.

[1436] *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award (Jan. 19, 2007), ¶ 304, **CL-277**.

relation to India's repudiation of an agreement for the lease of satellite spectrum for telecommunications. The tribunal reasoned that the claimant had protective investments under the BIT because the local company in which the claimant held shares "had a binding agreement contemplating the lease of valuable satellite spectrum"[1437] and because the claimant had contributed substantial financial resources to obtain its indirect shareholding in Devas.[1438]

547. Here, in the words of the tribunal in *Generation Ukraine*, the rights Claimants held under the E-Games Independent Permit "established the [legal] and proprietary foundation for the Claimants' investment" in the Expansion Projects,[1439] which, unlike in *Deutsche Telekom*, did not require an additional license or permit to proceed. Moreover, as in *PSEG*, Claimants also made additional contributions of capital and resources in their "negotiations and other preparatory work leading to the materialization of [the Expansion Projects]."

548. In contrast, Mexico's attempts to find support in the case law get it nowhere. For example, Mexico claims that the *Generation Ukraine* tribunal "stated that an office building that has yet to be built is not protected by the treaty,"[1440] but the passage Mexico relies upon has nothing to do with whether the claimed investment was a covered investment. Instead, it addresses whether the respondent's measures amounted to indirect or creeping expropriation in violation of the U.S.-

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[1437] *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10, Interim Award (Dec. 13, 2017), ¶ 181, **CL-279**.

[1438] *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10, Interim Award (Dec. 13, 2017), ¶¶ 178-179 (further stating that "the Treaty's definition of "investment" is not restricted to going concerns holding all the relevant authorizations to carry out their business. If the Treaty applied only to businesses with all necessary permits and licenses, it would for instance leave out a valid concession contract until the concessionaire obtained the last authorization to commence its activity. Such restrictive interpretation would not be warranted in light of the text and the object and purpose of the Treaty"), **CL-279**.

[1439] *Generation Ukraine, Inc. v. Ukraine* ("*Generation Ukraine*"), ICSID Case No. ARB/00/9, Award (Sept. 16, 2003), ¶ 18.29, **CL-93**.

[1440] Counter Memorial, ¶ 487 (quoting *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (Sept. 16, 2003), ¶ 20.27, **CL-93**).

Ukraine BIT.[1441] Moreover, contrary to Mexico's suggestion, the tribunal in *Generation Ukraine* actually found that it *did* have jurisdiction over the claimant's claim involving an uncompleted project to develop a primer office block in downtown Kiev, even though "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."[1442] Here, the tribunal found that based upon a number of documents, including an order on land allocation, lease agreements, and construction permits, the claimants had established a bundle of rights that constituted a protected investment.[1443]

549. Therefore, the Tribunal has jurisdiction to decide on the claims made by Claimants in relation to these Expansion Projects, because, contrary to Mexico's erroneous assertion, Claimants have proven their protected investments in the Expansion Projects.

(c) Even Considered on Their Own, the Expansion Projects Constitute Investments Under Article 1139

550. As explained above, Claimants' Expansion Projects are comprised of several forms of investments protected under NAFTA Article 1139, including, but not limited to: (a) an enterprise; (b) an equity security of an enterprise . . . (d) an interest in an enterprise that entitled the owner to share in income or profits of the enterprise . . . (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes . . . . [and] (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory."

[1441] *Generation Ukraine*, Award, ¶ 20.26, **CL-93**.

[1442] *Generation Ukraine*, Award, ¶ 20.27, **CL-93**.

[1443] *Generation Ukraine*, Award, ¶¶ 18.29, 18.46, **CL-93**.

551. Mexico knows this and that its Pre-Investment Objection is doomed to fail as a result. Nonetheless, Mexico seeks to support its meritless argument by claiming that NAFTA "establishes a closed list of 10 specific categories that are considered a protected investment under the Treaty."[1444] Again, Mexico's contention in this regard does not advance its position, because Claimants' Expansion Projects, as demonstrated above, consist of Claimants' already-established investments in Mexico that squarely belong to that "closed list" of assets provided in NAFTA Article 1139.

552. To the extent that Mexico suggests that the Expansion Projects do not constitute, by themselves, "investments" under the NAFTA, it is equally wrong. They clearly qualify under NAFTA Article 1139(g) as "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 under NAFTA Article 1139(h) as "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory." This is particularly true because Claimants had not only made protected investments in the Expansion Projects in the forms of a gaming permit and local enterprises (as explained above), but also committed a substantial amount of capital and other resources in furtherance of the Expansion Projections (as explained in more detail in Section IV.A.5(a) below).[1445]

553. Further, a long line of investment arbitration case law confirms that an "investment" should be considered in an integrated fashion because it typically consists of several interrelated economic activities each of which should not be viewed in isolation. Thus, as the *CSOB v. Slovakia*

[1444] Counter-Memorial, ¶ 484.

[1445] *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award (Jan. 19, 2007), ¶ 304 ("An investment can take many forms before actually reaching the construction stage, including most notably the cost of negotiations and other preparatory work leading to the materialization of the Project, even in connection with pre-investment expenditures, particularly when, like in this case, there is a valid and binding Contract duly executed between the parties."), **CL-277**.

explained, "even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment."[1446] The NAFTA tribunal in *Grand River v. The United States* also agreed that "in assessing whether [the claimants] had an investment satisfying the requirements of NAFTA's Article 1139, the Tribunal should consider the totality of their activities and not weigh each element in isolation."[1447]

554. In this regard, the reasoning of the tribunal in *Lemire* is particularly instructive. As previously noted, the tribunal in *Lemire* found that the claimant's "claim related to tenders for frequencies and broadcasting licences does not refer to, and cannot be considered as, a pre-investment activity," because the claimant had already made an investment in acquiring the initial radio station, whose operations he sought to expand through applications for additional radio frequencies and broadcasting licenses.[1448] The tribunal further explained that "the applications were intended to defend and expand [the local company's] market share against growing competition and thus enhance the sustainability and profitability of Claimant's investment" and "formed an integral part of [the local company's] overall business operation."[1449]

[1446] *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to the Jurisdiction (May 24, 1999), ¶ 72, **CL-274**. *See also Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (Aug. 6, 2004), ¶ 54 ("[A] given element of a complex operation should not be examined in isolation because what matters is to assess the operation globally or as a whole . . . ."), **CL-275**; *ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal (Oct. 2, 2006), ¶ 331 ("In considering whether the present dispute falls within those which 'arise directly out of an investment' under the ICSID Convention, the Tribunal is entitled to, and does, look at the totality of the transaction as encompassed by the Project Agreements."), **CL-117**; *Mytilineos Holdings SA v. State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction (Sept. 8, 2006), ¶ 120 ("Even if one doubted whether the Agreements looked at in isolation would constitute investments by themselves, [it] seems clear that the combined effect of these agreements amounts to an investment."), **CL-276**.

[1447] *Grand River Enterprises Six Nations, Ltd., et. al. v. United States of America* ("*Grand River*"), UNCITRAL, Award (Jan. 12, 2011), ¶ 22, **CL-213**.

[1448] *Lemire*, Decision on Jurisdiction and Liability, ¶ 89, **CL-166**.

[1449] *Lemire*, Decision on Jurisdiction and Liability, ¶¶ 95-98, **CL-166**.

555. The *Lemire* tribunal's reasoning applies in this case. Claimants formed the Mexican Enterprises, successfully developed one of the most profitable casino operations in Mexico, and secured an independent permit that would have allowed Claimants to continue to operate their gaming business through 2037 (and then, conservatively, for at least one 15-year renewal of their permit). By the time Mexico illegally cancelled the E-Games Independent Permit and thwarted the further progress of the Expansion Projects, Claimants' Casino business was a going concern and the Expansion Projects were pursued as an integral part of Claimants' overall business undertaking in Mexican gaming industry.[1450] Under the reasoning of *Lemire*, Claimants have a protected investment in their efforts to expand their Casino operations pursuant to their legally secured right to operate two more dual-function gaming facilities and the online gaming site under the E-Games Independent Permit.

556. Lastly, Mexico claims that the Expansion Projects do not qualify as investments under the NAFTA because they had "yet to be established" and were "in the very early stages of planning"[1451], and because "[i]nvestors are not entitled to file claims for damages for . . . projects that have not materialized."[1452] Essentially, Mexico appears to believe that investment projects that were not going concerns somehow fall outside the scope of the Tribunal's jurisdiction. However, the fact that the Expansion Projects never became operational due to Mexico's breaches is no defense to jurisdiction.[1453]

[1450] *See* Fourth Gordon Burr Statement, **CWS-59**, ¶ 44; Fourth Erin Burr Statement, **CWS-60**, ¶¶ 42-43; Third Gordon Burr Statement, **CWS-50**, ¶ 87; Third Erin Burr Statement, **CWS-51**, ¶ 80.

[1451] Counter-Memorial, ¶ 481.

[1452] Counter-Memorial, ¶ 487.

[1453] *See PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award (Jan. 19, 2007), ¶¶ 302-304, **CL-277**.

557. As explained above, the Tribunal must only satisfy itself that Claimants made protected investments in the Expansion Projects. There is no doubt, on the basis of the evidence before the Tribunal, that they did. Therefore, the Tribunal must reject Mexico's Pre-Investment Objection.

3. The NAFTA Does Not Bar Pre-Investment Activity

558. That Claimants have made protected investments in the Expansion Projects renders Mexico's Pre-Investment Objection completely inapposite. But even assuming that certain of the business and investment activities undertaken by Claimants in furtherance of the Expansion Projects were to be regarded as "pre-investment activities" as alleged by Mexico (*quod non*),[1454] Mexico has failed to establish that the NAFTA does indeed bar claims relating to pre-investment activity.

559. Indeed, the NAFTA case law on which Mexico relies has nothing to do with "pre-investment activity." In *Grand River v. United States*, the tribunal found that claimants, a Canadian claimant engaged in the manufacture of cigarettes in Canada for export to the United States and a Canadian claimant who imported and distributed Canadian-manufactured cigarettes in the United States, had not made an investment in the United States, not that they had engaged in only "pre-investment activity."[1455] Likewise, in *Canadian Cattlemen v. United States*, the tribunal found that claimants, 109 Canadian farmers seeking to challenge trade measures had not made an investment in the United States because, at best, they had only engaged in "mere cross-border trade."[1456] The tribunal's holding therefore, had nothing to do with "pre-investment activities" as Mexico misleadingly argues.

[1454] Counter-Memorial, ¶ 488.

[1455] *Grand River*, Award, ¶¶ 122, **CL-213**.

[1456] *The Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Award on Jurisdiction (Jan. 28, 2008), **RL-044**.

560. Mexico also claims that "NAFTA does not extend Chapter 11 protection to just any 'commitment of capital,' but only to those that exhibit certain characteristics that give them this protected interest status."[1457] Mexico, however, does not specify what those purported "characteristics" are, nor does it explain how this assertion support its view that pre-investment activities *ipso facto* fall outside of the scope of NAFTA's Article 1139.

561. If anything, Mexico here seeks to write into Article 1139 of the NAFTA a requirement that an investment has the "characteristics of an investment." That, of course, would be contrary to the requirement to interpret the NAFTA's provisions "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" under Article 31 of the Vienna Convention on the Law of Treaties.[1458] NAFTA Article 1139 differs from the definitions of an "investment" in other treaties that either (1) expressly refer to the "characteristics of an investment" in the definition or (2) provide only an illustrative (not closed) list of assets that may constitute an investment. Article 14.1 of the USMCA, for example, does both. It defines an "investment" as "<u>every asset</u> that an investor owns or controls, directly or indirectly, that has the <u>characteristics of an investment</u>, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk" and provides that an "investment" "may include" a number of different types of assets.

562. Yet, NAFTA Article 1139 contains no such language. Had the NAFTA Contracting Parties wanted to include a bar to "pre-investment activity" in the NAFTA's definition of "investment," they would have done so. Indeed, that the same contracting parties included such language in the USMCA confirms that the correlative provision in NAFTA did not have it and cannot be read as

[1457] Counter-Memorial, ¶ 484.

[1458] Convention on the Law of Treaties ("VCLT"), Article 31, **CL-41**.

if it did. Again here, Claimants had already established protected investments in the Expansion Projects, and various other activities undertaken by Claimants in pursuit of the Expansion Projects, including "negotiations [with their partners in the Expansion Projects] and other preparatory work" which necessarily involved the dedication of a significant amount of financial and other resources,[1459] cannot be regarded as *pre*-investment activities. But even setting that aside, Mexico has failed to prove that the NAFTA bars claims relating to "pre-investment activities" as a matter of law.

4. Mexico's Misinformation Campaign Against the Expansion Projects Does Not Deprive the Tribunal's Jurisdiction

563. Again, Mexico knows that its Pre-Investment Objection—if not deemed precluded as untimely—finds no support in law or fact. For this reason, Mexico takes the extra (if equally futile) step of arguing that Claimants have "failed to prove the existence" of the Expansion Projects by essentially nonsensically arguing that these Projects never existed.[1460] Mexico's argument in this regard effectively relies on the purported lack of documents substantiating the progress of the Expansion Projects or expenses Claimants incurred in furtherance of said Projects.[1461] Those arguments should be ignored because Claimants have provided more than sufficient evidence to carry their burden, and the unavailability of additional evidence is a direct result of Mexico's actions. As Claimants have already explained, the Naucalpan Casino, where all hardcopy records and digital servers for all of the Mexican Enterprises were stored, was burned in May 2017 while under the custody of the Mexican government.[1462] Many of the documents that

[1459] *See PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award (Jan. 19, 2007), ¶¶ 302-304, **CL-277**.

[1460] *See* Counter-Memorial, ¶¶ 495, 519, 543, 898-899.

[1461] Counter-Memorial, ¶¶ 494, 519-520, 521-526, 528, 543.

[1462] First Erin Burr Statement, **CWS-2**, ¶ 23.

were lost or destroyed in the May 2017 fire could have been used by Claimants to further support their claims regarding the Expansion Projects in these proceedings. Mexico should bear responsibility for the destruction of these documents, because (i) the May 2017 fire itself occurred while the Naucalpan Casino was under Mexico's custody; (ii) even before the fire, Mexico persistently refused to grant Claimants access to their facilities after the illegal closures in April 2014, when Claimants and their representatives were forced by Mexico to leave the Casinos immediately and without the company documents or other materials; and (iii) even after the May 2017 fire, Mexico first gave landlords access to the Casinos, instead of Claimants.[1463]

564. Additionally, Claimants can no longer access their corporate email account (@kash.com), because following the illegal closures of the Casinos and Claimants' subsequent efforts to reopen the Casinos, which were rebuffed and obstructed by SEGOB at every turn, it became unfeasible for Claimants to continue paying for the email servers where all corporate emails were stored.[1464] Although certain documents are unavailable (and in the case of emails, unavailable as a direct result of Mexico's actions), Claimants have provided detailed witness statements,[1465] as well as documentary evidence that corroborates those statements.[1466]

565. In any event, the evidence on record conclusively disproves Mexico's disingenuous assertion that the Expansion Projects did not exist.[1467] To the contrary, Claimants have amply demonstrated that the Expansion Projects were in progress and would have become fully

[1463] Third Julio Gutiérrez Morales Statement, **CWS-9**, ¶ 11.

[1464] Fourth Erin Burr Statement, **CWS-60**, ¶ 84; Third José Ramón Moreno Statement, **CWS-63**, ¶ 18.

[1465] *See* Third Gordon Burr Statement, **CWS-50**; Third Erin Burr Statement, **CWS-51**; Second José Ramón Moreno Statement, **CWS-53**; Fourth Gordon Burr Statement, **CWS-59**; Fourth Erin Burr Statement, **CWS-60**; Third José Ramón Moreno Statement, **CWS-63**; First Miguel Romero Statement, **CWS-69**.

[1466] *See* Third Gordon Burr Statement, **CWS-50**; Third Erin Burr Statement, **CWS-51**; Second José Ramón Moreno Statement, **CWS-53**; Fourth Gordon Burr Statement, **CWS-59**; Fourth Erin Burr Statement, **CWS-60**; Third José Ramón Moreno Statement, **CWS-63**; First Miguel Romero Statement, **CWS-69**.

[1467] *See* Memorial, Sections IV. F and G.

operational had they not been irretrievably hindered by Mexico's illegal measures constituting its breaches of the NAFTA.[1468] Although not required to establish the viability of the Expansion Projects or to overcome Mexico's belated and feeble jurisdictional objection, in the interest of transparency and to ensure the Tribunal has the benefit of a full record, the following sections entirely debunk Mexico's attempt to mislead the Tribunal by interjecting its distorted and self-serving views on the nature, scope, and progress of the Expansion Projects.

566. As explained in Section III.A.2(a) above, the "combined effect" or "totality" of the interrelated investment and business activities that Claimants undertook in furtherance of the Expansion Projects should be weighed holistically in assessing the existence of protected investments.[1469] The following sections thus definitively establish that Claimants have made protected investments in the Expansion Projects, entitling them to seek the damages in the loss of the full value of the Expansion Projects.

(a) Claimants Dedicated a Substantial Amount of Capital and Other Resources To Expand Their Casino Operations into Cabo and Cancun and Were Confident that They Could and Would Have Developed the Cabo and Cancun Projects into Profitable Operations

567. When Mexico precipitously canceled the E-Games Independent Permit and later unlawfully closed the Casinos, Claimants had already made substantial investment in two projects,

[1468] *See* Memorial, Sections IV. F and G.

[1469] *Grand River,* Award, ¶ 22 ("[I]n assessing whether [the claimants] had an investment satisfying the requirements of NAFTA's Article 1139, the Tribunal should consider the totality of their activities and not weigh each element in isolation."), **CL-213**; *ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal (Oct. 2, 2006), ¶ 331 ("In considering whether the present dispute falls within those which 'arise directly out of an investment' under the ICSID Convention, the Tribunal is entitled to, and does, look at the totality of the transaction as encompassed by the Project Agreements."), **CL-117**; *Mytilineos Holdings SA v. State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction (Sept. 8, 2006), ¶ 120 ("Even if one doubted whether the Agreements looked at in isolation would constitute investments by themselves, [it] seems clear that the combined effect of these agreements amounts to an investment."), **CL-276**.

which were expected to open in mid-2016 (the Cabo Project) and in early 2017 (the Cancun Project).

568. In furtherance of Mr. Burr's desire to expand Casino operations to resort communities,[1470] B-Mex II made **an investment of USD 2.5 million to acquire the right to open two additional locations** from JEV Monterrey in 2006, as Mr. and Ms. Burr confirm.[1471] That interest alone, which transferred with B-Mex II when operation of the Casinos migrated to E-Mex's permit and then E-Games' own independent permit,[1472] qualifies as an investment under NAFTA Articles 1139(g) and (h). Tellingly, Mexico says nothing about this USD 2.5 million investment. As discussed in Claimants' Memorial and further below, after securing the right to open two additional locations, Claimants had quickly set their sights on developing and operating gaming facilities in resort communities in Mexico, in particular Cabo and Cancun, as the resort communities held potential far greater than the local casinos in Mexico.[1473]

569. Ultimately, Claimants formed **two Colorado limited liability companies, Colorado Cancun and B-Cabo**, in 2011 and 2013, respectively, to develop these two locations.[1474] In its Counter-Memorial, Mexico contends that there is no proof that Colorado Cancun was incorporated or funded[1475] (even though the Tribunal affirmed during the jurisdictional phase of this arbitration that both B-Cabo and Colorado Cancun are protected investors under the NAFTA to submit claims

[1470] Third Gordon Burr Statement, **CWS-50**, ¶ 64.

[1471] Third Gordon Burr Statement, **CWS-50**, ¶ 64; B-Mex II, LLC Tax Filings (2006), **C-487**.

[1472] First Erin Burr Witness Statement, **CWS-2**, ¶ 48; Counter-Memorial on Jurisdictional Objections, ¶¶ 47, 274; Third Gordon Burr Statement, **CWS-50**, ¶ 65.

[1473] Third Gordon Burr Statement, **CWS-50**, ¶ 66; Third Erin Burr Statement, **CWS-51**, ¶¶ 67-68.

[1474] Memorial, ¶ 62; Third Gordon Burr Statement, **CWS-50**, ¶ 66; Third Erin Burr Statement, **CWS-51**, ¶¶ 75, 77; First Erin Burr Witness Statement, **CWS-2**, ¶ 50.

[1475] Counter-Memorial, ¶ 519.

under Article 1116[1476]). That is wrong. Consent to Action In Lieu of Organizational Meeting of the Members of Colorado Cancun, LLC (effective April 27, 2011), which is hereby submitted as **Exhibit C-492** to this Reply, clearly shows that (1) Colorado Cancun was incorporated and (2) Mr. and Ms. Burr are the sole owners of Colorado Cancun.[1477] Thereafter, Colorado Cancun also acquired an **option to purchase a gaming license from B-Mex II (*i.e.*, the Right of First Refusal)** for USD 250,000.[1478] Mexico makes two misguided arguments in respect to this option.

570. *First*, Mexico alleges that there is no proof that the USD 250,000 purchase price was paid.[1479] That claim too has now been debunked. During document production, Claimants produced the bank statement of B-Mex II, which shows the company's receipt of USD 250,000 on April 27, 2011 and which is hereby submitted into the record as Claimants' **Exhibit C-454**.[1480] These funds were advanced by Mr. Taylor, a Claimant in these proceedings.[1481]

571. *Second*, Mexico argues that Claimants' plans for the Cancun Project "would have been both mistaken and illegal" because "the sale, transfer, or trade of a permit is forbidden under Article 31 of the [Gaming] Regulations" and because "it would have [also] constituted a violation of the terms of E-Mex's permit, which is penalized by the revocation of the permit."[1482] Yet, that is clearly wrong. The E-Games' Independent Permit (or E-Games' autonomous rights to operate

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[1476] Partial Award, ¶ 273(e).

[1477] Consent to Action in Lieu of Organizational Meeting of the Members of Colorado Cancun, LLC (Apr. 27, 2011), **C-492**; First Erin Burr Witness Statement, **CWS-2**, ¶ 50.

[1478] Right of First Refusal Agreement between Colorado Cancun, LLC and B-Mex II, LLC (Apr. 27, 2011), **C-88**; Fourth Gordon Burr Statement, **CWS-59**, ¶ 43; Fourth Erin Burr Statement, **CWS-60**, ¶ 67; First Erin Burr Statement, **CWS-2**, ¶ 54.

[1479] Counter-Memorial, ¶ 896.

[1480] Statement of Account of B-Mex II, LLC (Apr. 29, 2011), **C-454**.

[1481] Emails from E. Burr to R. Taylor re: Colorado Cancun, LLC's Right of First Refusal (Apr. 26 and 27, 2011), **C-455**; Fourth Erin Burr Statement, **CWS-60**, ¶ 67.

[1482] Counter-Memorial, ¶ 517.

gaming facilities under E-Mex's permit) was never up for sale or transfer. Rather, the option was an option on the right to capitalize, construct, and operate a new gaming facility under the same permit that Claimants had operated their Casino business in Mexico—*i.e.*, the E-Games Independent Permit (or prior to November 2012 when E-Games obtained its own permit, E-Mex's permit under which E-Games enjoyed the independent operator status).[1483] The plan was always for E-Games to operate (and thereby hold the permit to operate) the Cancun and Cabo Projects, although the Casinos themselves would be owned by Claimants Colorado Cancun and B-Cabo (and even though the business opportunity had initially originated with Claimant B-Mex II through its investment of USD 2.5 million).[1484] **Exhibit C-335**, which is the Claimants' business plan regarding the Cancun Project, also clearly notes that E-Games would "provide and own the gaming license, fund the start-up and run the facility,"[1485] thereby further refuting Mexico's disingenuous assertion that Claimants' Cancun Project contemplated the illegal sale of the E-Games Independent Permit.

572. As explained in the Memorial, as well as during the jurisdictional phase of this arbitration, in 2013, **B-Cabo also invested USD 600,000** through loans to a Mexican company called Medano Beach, S. de R.L. de C.V., which eventually used the majority of these funds to purchase property for the Cabo hotel and casino project.[1486] Altogether, B-Cabo and Colorado Cancun invested a

[1483] Fourth Gordon Burr Statement, **CWS-59**, ¶ 43; Fourth Erin Burr Statement, **CWS-60,** ¶ 68; Second Neil Ayervais Statement, **CWS-61**, ¶ 33.

[1484] Fourth Gordon Burr Statement, **CWS-59**, ¶ 43; Fourth Erin Burr Statement, **CWS-60,** ¶ 67; Second Neil Ayervais Statement, **CWS-61**, ¶ 34.

[1485] Cancun Presentation (Apr. 15, 2013), p. 3, **C-335**.

[1486] Memorial, ¶ 65; Third Gordon Burr Statement, **CWS-50**, ¶ 69; Third Erin Burr Statement, **CWS-51**, ¶ 76.

total of USD 850,000 in option payments and down payments on property with respect to the Claimants' expansion projects in Cabo and Cancun.[1487]

573. In furtherance of these projects, Claimants also incurred various capital expenditures and dedicated significant amount of time and efforts to conduct market research, prepare financial models, draft transaction documents, and to meet with prospective investors and partners to advance the expansion plans, as both Mr. and Ms. Burr confirm.[1488]

574. With respect to the **Cancun Project**, Mr. and Ms. Burr explain that, as early as in 2011, they began discussing various alternatives in Cancun with prominent developers who were eager to work with the Claimants' group, given its successful track record of developing, operating, and managing the five Casinos in Mexico with SEGOB's continued seal of approval.[1489] By April 2013, Claimants had solidified a business plan for the Cancun Project and were trying to find the right partner.[1490] Claimants (in particular, Mr. Burr) had conducted detailed negotiations with the Marcos family, a family of local real estate developers that planned to provide all capital required for the Cancun Project.[1491] Mexico makes a number of unpersuasive arguments in respect to Claimants' development of the Cancun Project.

575. *First*, Mexico contends that **C-245**, which it identifies as the business plan for the Cancun Project was actually from April 2011, and thus "[i]t seems that no progress was made in the three

[1487] Memorial, ¶ 65; Third Gordon Burr Statement, **CWS-50**, ¶ 69; Third Erin Burr Statement, **CWS-51**, ¶¶ 76-77.

[1488] Third Gordon Burr Statement, **CWS-50**, ¶ 67; Third Erin Burr Statement, **CWS-51**, ¶ 78; Fourth Gordon Burr Statement, **CWS-59**, ¶ 44; Fourth Erin Burr Statement, **CWS-60**, ¶¶ 58-60, 67-69; Second Neil Ayervais Statement, **CWS-61**, ¶¶ 25, 35.

[1489] Fourth Gordon Burr Statement, **CWS-59**, ¶ 11; Fourth Erin Burr Statement, **CWS-60**, ¶ 67; Third Gordon Burr Statement, **CWS-50**, ¶¶ 83-84; Third Erin Burr Statement, **CWS-51**, ¶ 78.

[1490] Cancun Presentation (Apr. 15, 2013), p. 3, **C-335**; *see also* Fourth Gordon Burr Statement, **CWS-59**, ¶ 41; Fourth Erin Burr Statement, **CWS-60**, ¶ 69; Third Gordon Burr Statement, **CWS-50**, ¶ 84; Third Erin Burr Statement, **CWS-51**, ¶¶ 79-80.

[1491] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 41-42; Fourth Erin Burr Statement, **CWS-60**, ¶ 69; Third Gordon Burr Statement, **CWS-50**, ¶ 84; Third Erin Burr Statement, **CWS-51**, ¶¶ 76-78.

years between that date and the date when the investment was allegedly expropriated."[1492] This is incorrect. While **Exhibit C-245** is dated April 14, 2011, Claimants also submitted with their Memorial **Exhibit C-335**, a presentation dated April 15, 2013, which details Claimants' plan to build a "premier casino in Cancún targeting high end tourists and wealthy local residents" along with information about the specific market and the management group, the proposed casino concept, financial projections, and analysis of competitors.[1493]

576. *Second*, Mexico alleges that there is no proof of communications with the Marcos family, a wealthy family and large landowner in Mexico, who wanted the Claimants to establish a casino in a new 5-star luxury hotel that they planned to build in Cancun.[1494] While much of the discussions with the Marcos family took place through face-to-face meetings,[1495] numerous emails on record confirm these communications:

- **Mr. Burr's June 2011 email exchange with Federico Carstens ("Mr. Carstens")** shows that Claimants were preparing to submit a formal proposal for the Cancun Project to the Marcos family.[1496] Mr. Carstens served on the board of the Marcos family companies as the only non-family member. He was also a co-founder of the Hamak Group—a hospitality group that he led along with the two other veteran developers and operators of luxury hotels in Mexico, Alberto Remirez ("**Mr. Remirez**") and Nicolas Dominguez ("**Mr. Dominguez**")—and served as a

[1492] Counter-Memorial, ¶ 518.

[1493] Cancun Presentation (Apr. 15, 2013), **C-335**; *see also* First Expert Report of Berkeley Research Group ("First Berkeley Research Group Report"), **CER-4**, ¶¶ 58-59.

[1494] Third Gordon Burr Statement, **CWS-50**, ¶ 84; Fourth Gordon Burr Statement, **CWS-59**, ¶ 42; Fourth Erin Burr Statement, **CWS-60**, ¶ 69.

[1495] Fourth Gordon Burr Statement, **CWS-59**, ¶ 42; Fourth Erin Burr Statement, **CWS-60**, ¶ 70.

[1496] Email from A. Remírez to G. Burr re: Cancun Casino (June 13, 2011), **C-471**; Fourth Gordon Burr Statement, **CWS-59**, ¶ 42; Fourth Erin Burr Statement, **CWS-60**, ¶ 71.

primary working partner for Mr. Burr's negotiations with the Marcos family.[1497] In the email communication dated June 13, 2011, Messrs. Carstens and Remirez asked Mr. Burr for details on his prior discussions with the Marcos family (including a pro-forma for the first five years of operation of the project and the timeline for the construction of a hotel and for the installation of gaming machines within the hotel to be built), so that they could jointly present the Marcos family with a formal proposal.[1498] Around this time, Claimants felt confident that SEGOB would soon issue an independent permit to E-Games so that they could proceed with the Cancun Project with the Marcos family.[1499] As explained above, earlier in February 2011, E-Games had applied with SEGOB for its own independent permit[1500] as SEGOB formally invited E-Games to do so.[1501] Despite that E-Games had complied with all requirements under Mexican law,[1502] the Calderón administration, however, unjustifiably delayed the issuance of the E-Games Independent Permit until November 2012 for political reasons.[1503] While this caused some interruptions in Claimants' expansion plan in Cancun, Claimants nonetheless legitimately believed that E-Games would ultimately obtain its own permit and continued their

[1497] Fourth Gordon Burr Statement, **CWS-59**, ¶ 42; Fourth Erin Burr Statement, **CWS-60**, ¶ 71.

[1498] Email from A. Remírez to G. Burr re: Cancun Casino (June 13, 2011), **C-471**; Fourth Gordon Burr Statement, **CWS-59**, ¶ 42; Fourth Erin Burr Statement, **CWS-60**, ¶ 71.

[1499] Fourth Gordon Burr Statement, **CWS-59**, ¶ 41-42.

[1500] *See* E-Games Permit Application (Feb. 22, 2011), **C-14**.

[1501] SEGOB Resolution No. DGAJS/SCEV/0550/2010 (Dec. 8, 2010), **C-13**; *see also* Third Erin Burr Statement, **CWS-51**, ¶¶ 51-62.

[1502] *See* Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 34.

[1503] *See also* Memorial, ¶ 133; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 34; *Ni un casino mas en el pais advierte Blake* (Sept. 29, 2011). Retrieved from https://www.proceso.com.mx/282783/ni-un-casino-mas-en-el-pais-advierte-blake, **C-366**.

discussions with the Marcos family and Mr. Carstens, while keeping them apprised of the developments in the E-Games Independent Permit application.[1504]

- Over the ensuing years, together with **the Marcos family and Mr. Carstens**, Mr. Burr selected a location for the Cancun Project that would have been just off the beach and in the midst of the prime hotel zone in Cancun.[1505] Then on November 13, 2012, Mr. Carstens provided Mr. Burr and Mr. José Ramon Moreno ("**Mr. Moreno**"), Director General of the Juegos Companies and Exciting Games, with architect renderings for the proposed hotel that they sought to build in the hotel zone of Cancun (**Exhibit C-374**, which was submitted with the Memorial).[1506] A few weeks afterwards, Mr. Burr held a meeting with Mr. Carstens and the architects.[1507] The hotel in Cancun was going to be built by the renowned architect, David Rockwell, who was also the architect for several hotels in Las Vegas.[1508] Mr. Burr and the Marcos family also discussed the location of the casino inside the hotel, as well as where the casino entry would be located.[1509] In March 2013, Mr. Moreno again discussed the Cancun Project with Mr. Carstens, who requested an

[1504] Fourth Erin Burr Statement, **CWS-60**, ¶ 71.

[1505] Google map showing proposed Cancun location, **C-246**; Third Gordon Burr Statement, **CWS-50**, ¶ 84; Third Erin Burr Statement, **CWS-51**, ¶ 74.

[1506] Email from F. Carstens to J. R. Moreno and G. Burr re: Render Schematic Design Hotel Casino Cancun (Nov. 13, 2013), **C-472**; Cancun Architect Rendering, **C-374**; *see also* Fourth Gordon Burr Statement, **CWS-59**, ¶ 42; Fourth Erin Burr Statement, **CWS-60**, ¶ 72.

[1507] Email from E. Burr to S. González re: meeting with Federico Carstens (Nov. 25, 2012), **C-473**; Fourth Gordon Burr Statement, **CWS-59**, ¶ 42; Fourth Erin Burr Statement, **CWS-60**, ¶ 72.

[1508] Fourth Gordon Burr Statement, **CWS-59**, ¶ 41; Fourth Erin Burr Statement, **CWS-60**, ¶ 69.

[1509] Third Gordon Burr Statement, **CWS-50**, ¶ 78; Fourth Gordon Burr Statement, **CWS-59**, ¶ 41; Fourth Erin Burr Statement, **CWS-60**, ¶ 72.

update on Claimants' expansion plan in Cancun, as the contemporaneous email submitted as **Exhibit C-493** confirms.[1510]

- As explained in Claimants' Memorial (and again below),[1511] the Marcos family also was interested in partnering with Claimants to develop a casino resort in Cabo, as they owned a piece of the marina, which was close to the property where Claimants had been working with Farzin Ferdosi ("**Mr. Ferdosi**") and Chris Erikson ("**Mr. Erikson**" and, together with Mr. Ferdosi, the "**Medano Beach Group**") to build a luxury hotel and casino in Cabo.[1512] **Mr. Burr's July 2013 exchange** with the Medano Beach Group again attests to the ongoing discussions between Mr. Burr and the Marcos family regarding Claimants' expansion plans. In this communication, Mr. Burr informs the Medano Beach Group of his discussions with the Marcos family, including the possibility of incorporating the property that Marcos family owned in Cabo's popular marina into the Cabo Project for the construction of the private yacht dock and to expand the beach area available to the Cabo Project.[1513]

[1510] Email from F. Carstens to J. R. Moreno re: Cancun Project financial projections (Mar. 19, 2013), **C-493**; Fourth Erin Burr Statement, **CWS-60**, ¶ 72.

[1511] Memorial, ¶ 66; Third Gordon Burr Statement, **CWS-50**, ¶ 84; Third Erin Burr Statement, **CWS-51**, ¶ 78.

[1512] *See also* Fourth Gordon Burr Statement, **CWS-59**, ¶ 33; Fourth Erin Burr Statement, **CWS-60**, ¶ 73.

[1513] Email from G. Burr to F. Ferdosi et al. re: Investment Agreement (July 13, 2013), **C-465**; Fourth Gordon Burr Statement, **CWS-59**, ¶ 42; Fourth Erin Burr Statement, **CWS-60**, ¶ 73; Second Neil Ayervais Statement, **CWS-61**, ¶ 26; *see also* Nondisclosure and Noncircumvention Agreement between F. Ferdosi, C. Erikson, G. Burr and E-Games (June 1, 2013), **C-527** ("The Company has discussed the Transactions with two groups of potential investors, the Marcos Group and the Beiruti Group (each, an 'Investor' and collectively, the 'Investors'), each of which is capable of providing all funds necessary for the Transactions. In the course of considering the Transactions, the Company will introduce Medano Beach to one or both of the Investors and provide confidential information about the Investors, their finances, investment history and strategy, negotiating terms and other Confidential Information (all as defined below).").

577. These contemporaneous communications conclusively show that Mr. Burr's discussions with the Marcos family began as early as in 2011 and continued until Mexico shuttered the Casinos. Mr. Burr also confirms that, throughout 2013 and 2014, he met with Mr. Carstens and other members of the Marcos family on several occasions in Cabo, Cancun, and Mexico City to discuss the expansion projects.[1514]

578. While Mexico blames Claimants for not making further progress with their expansion plans in Cabo and Cancun for the years preceding 2013,[1515] Claimants have explained already that. at the time, they needed to prioritize obtaining the E-Games' Independent Permit over expanding their business into resort communities. That said, as noted above, with respect to **the Cancun Project**, Mr. and Ms. Burr persistently sought to advance the project by incorporating Colorado Cancun in 2011, which in turn invested USD 250,000 to contractually secure the business opportunity in Cancun to develop a gaming facility under Claimants' operating authority; and by continuing discussions with potential partners for the project from 2011 onwards. Then following SEGOB's grant of the E-Games' Independent Permit in November 2012, which solidified the Claimants' legal rights to pursue the expansion projects, Claimants developed a detailed business plan and engaged in advanced negotiations with the Marcos family and Mr. Carstens to move forward with their plan to build a premiere casino in the prime hotel zone of Cancun which would target high-end tourists and wealthy local residents.[1516]

579. *Third*, and even though it claims that no communications with the Marcos family took place, Mexico contends that "it is highly probable that the Marcos family would have had an

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[1514] Fourth Gordon Burr Statement, **CWS-59**, ¶ 42; Fourth Erin Burr Statement, **CWS-60**, ¶¶ 72-73.

[1515] Counter-Memorial, ¶ 518.

[1516] Cancun Presentation (Apr. 15, 2013), **C-335**; *see also* Third Gordon Burr Statement, **CWS-50**, ¶¶ 81, 84; Third Erin Burr Statement, **CWS-51**, ¶¶ 78-79.

important participation in Cancun Company" and thus "it is not even certain that the future casino could have qualified as an investment protected by the NAFTA."[1517] That argument is speculative, contradictory, and simply wrong. While the Marcos family indeed planned to raise all necessary funds for the construction of a casino resort in Cancun,[1518] they would have been entitled only to a portion of the profits, but not an ownership stake in Claimants' casino operations, as clearly indicated in the Claimants' business plan: "Cancún Property Owner [*e.g.*, the Marcos family] will contribute casino design, build out and rent in exchange for 35% of the Net Profits."[1519]

580. Likewise, by the time Mexico thwarted any further progress, Claimants had expended considerable resources to develop the **Cabo Project**. They were in the process of finalizing terms with their partners (*i.e.*, the Medano Beach Group) so that Claimants could begin accepting capital, when Mexico began interfering with and ultimately unlawfully revoked the E-Games Independent Permit.[1520]

581. In its Counter-Memorial, Mexico alleges that Claimants have failed to explain why the Cabo Project did not materialize in the five years between 2007 and 2012.[1521] This is easily explained by the course of commercial discussions with potential partners on the Project, not the non-existence of this Project, as Mexico suggests.

582. Mr. and Ms. Burr confirm the course of these discussions in their evidence. In 2007, Claimants entered into a Nondisclosure and Noncircumvention Agreement with Discovery Land

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[1517] Counter-Memorial, ¶ 519.

[1518] Third Gordon Burr Statement, **CWS-50**, ¶ 84; Third Erin Burr Statement, **CWS-51**, ¶ 78.

[1519] Cancun Presentation (Apr. 15, 2013), p. 3, **C-335**; *see also* Third Gordon Burr Statement, **CWS-50**, ¶ 84.

[1520] Third Gordon Burr Statement, **CWS-50**, ¶¶ 75-80; Third Erin Burr Statement, **CWS-51**, ¶¶ 75-76; Fourth Gordon Burr Statement, **CWS-59**, ¶ 44; Fourth Erin Burr Statement, **CWS-60**, ¶¶ 65-66.

[1521] Counter-Memorial, ¶ 490.

Company ("**Discovery**") and began negotiation in relation to the Cabo Project.[1522] The discussions with Discovery were temporarily paused in 2008, as Claimants were in the process of negotiating the proposed transaction with BlueCrest and Advent, and through this proposed transaction were transitioning their operating authority from Monterrey's Resolution to E-Mex's permit.[1523] The Claimants wanted to finalize the proposed transaction and to have their operating authority on solid ground before entering into an agreement with Discovery.[1524] As explained in Section II.B. above, Claimants were then working with two billion-dollar private equity companies, BlueCrest and Advent, to acquire E-Mex (and thus its permit to operate 50 dual-function gaming facilities in Mexico). Even in this context, however, Claimants kept moving towards their goal of opening a casino in Cabo. As Mr. and Ms. Burr explain, while the proposed transaction with BlueCrest and Advent was being negotiated, Claimants introduced the private equity companies to Discovery.[1525] Advent and BlueCrest were very interested in the proposed project with Discovery, and they agreed that one dual-function license under E-Mex's permit would be reserved for the joint venture with Discovery.[1526] This again shows how deeply committed Claimants were to the expansion project in Cabo.

583. As detailed in Section II.B above, the proposed transaction with BlueCrest and Advent ultimately did not come to fruition in 2009, which made Claimants embark on a multi-year journey to separate their operations from E-Mex and eventually to obtain an independent permit. As Mr.

[1522] Third Gordon Burr Statement, **CWS-50**, ¶ 71; Third Erin Burr Statement, **CWS-51**, ¶ 70; Fourth Gordon Burr Statement, **CWS-59**, ¶ 32; Fourth Erin Burr Statement, **CWS-60**, ¶ 46.

[1523] Fourth Gordon Burr Statement, **CWS-59**, ¶ 32; Fourth Erin Burr Statement, **CWS-60**, ¶ 47.

[1524] Fourth Gordon Burr Statement, **CWS-59**, ¶ 32; Fourth Erin Burr Statement, **CWS-60**, ¶ 48.

[1525] Fourth Gordon Burr Statement, **CWS-59**, ¶ 32; Fourth Erin Burr Statement, **CWS-60**, ¶ 48.

[1526] Fourth Gordon Burr Statement, **CWS-59**, ¶ 32; Fourth Erin Burr Statement, **CWS-60**, ¶ 48; Third Gordon Burr Statement, **CWS-50**, ¶ 72.

and Ms. Burr explain, during the 2008-2009 period, the biggest delay in working with Discovery to advance the Cabo Project was uncertainty regarding Claimants' operating authority.[1527]

584. After E-Games was invited to apply for an autonomous independent permit in December 2010[1528] and E-Games submitted its application to that effect in February 2011,[1529] Claimants resumed their discussions with Discovery.[1530] In these discussions, it was agreed that Discovery would be in charge of financing the project while Claimants would be in charge of operating the casino facility.[1531] In parallel, the parties identified the property for the proposed project, created floor layouts, conducted extensive due diligence, and prepared detailed financial projections and financing plans.[1532] All throughout this process, Claimants were fully transparent with Discovery on developments involving the E-Games Independent Permit.[1533]

585. As more fully explained in Claimants' Memorial,[1534] in the fall of 2012, Mr. Burr was introduced to **the Medano Beach Group**. At the time, Messrs. Ferdosi and Erikson had already been working together to build a luxury hotel and casino in Cabo that was to be called the Medano Beach Hotel.[1535] Messrs. Ferdosi and Erikson were interested in incorporating a casino on the

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[1527] Third Gordon Burr Statement, **CWS-50**, ¶ 73; Third Erin Burr Statement, **CWS-51**, ¶ 72; Fourth Gordon Burr Statement, **CWS-59**, ¶ 32; Fourth Erin Burr Statement, **CWS-60**, ¶ 48.

[1528] *See* SEGOB Resolution No. DGAJS/SCEV/0550/2010 (Dec. 8, 2010) (emphasis added), **C-13**.

[1529] *See* E-Games Permit Application (Feb. 22, 2011), **C-14**; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 30.

[1530] Third Gordon Burr Statement, **CWS-50**, ¶ 73.

[1531] Third Gordon Burr Statement, **CWS-50**, ¶ 73.

[1532] Memorial, ¶ 68; Third Gordon Burr Statement, **CWS-50**, ¶ 73; Third Erin Burr Statement, **CWS-51**, ¶ 71.

[1533] Third Gordon Burr Statement, **CWS-50**, ¶ 73; Third Erin Burr Statement, **CWS-51**, ¶ 70; Fourth Gordon Burr Statement, **CWS-59**, ¶ 32; Fourth Erin Burr Statement, **CWS-60**, ¶ 48; *see also* Letter from J. R. Moreno to G. Burr discussing Discovery's due diligence work on E-Games' operating authority (Jan. 28, 2011), **C-488**.

[1534] Memorial, ¶¶ 69-70; Third Gordon Burr Statement, **CWS-50**, ¶ 75; Third Erin Burr Statement, **CWS-51**, ¶ 73.

[1535] Medano Beach Project Booklet (Sept. 19, 2012), **C-248**.

property to enhance its attraction, and they had been looking for a casino operator/permit holder who could fill in the missing part in their contemplated hotel-casino venture.[1536]

586. This was an opportunity independent of what Claimants had been discussing with Discovery, and different in the sense that Discovery was looking to test the market with a stand-alone casino before investing in a full-scale resort and casino.[1537] As Mr. Burr explains, he viewed the Medano Beach Group as a good partner prospect because its vision for the proposed hotel-casino complex matched with Claimants' long-held dream to open a luxury casino resort in Cabo.[1538]

587. Hence, in October 2012, Mr. Burr and Mr. Ferdosi executed a **Letter of Intent** to enter into negotiations for the construction and operation of a hotel and casino in Cabo.[1539] Shortly thereafter, in January 2013, Mr. and Ms. Burr formed B-Cabo to pursue the opening of a gaming and hotel facility in Cabo and began contacting potential investors for the project, as a contemporaneous email confirms.[1540] Throughout 2013 and into 2014, the parties continued negotiations and exchanged numerous drafts of the **Investment Agreement** and, as Claimants explained in their Memorial, the parties were in the process of finalizing the terms of the Investment Agreement when Mexico unlawfully shut down the Casinos in April 2014.[1541]

[1536] Third Gordon Burr Statement, **CWS-50**, ¶ 75; Third Erin Burr Statement, **CWS-51**, ¶ 73; Fourth Gordon Burr Statement, **CWS-59**, ¶ 31; Fourth Erin Burr Statement, **CWS-60**, ¶ 51.

[1537] Third Gordon Burr Statement, **CWS-50**, ¶ 76; Third Erin Burr Statement, **CWS-51**, ¶ 74.

[1538] Fourth Gordon Burr Statement, **CWS-59**, ¶ 31.

[1539] Letter of Intent between F. Ferdosi and G. Burr (Oct. 12, 2012), **C-460**; Fourth Gordon Burr Statement, **CWS-59**, ¶ 33; Fourth Erin Burr Statement, **CWS-60**, ¶ 51; Second Neil Ayervais Statement, **CWS-61**, ¶ 20.

[1540] Email from N. Ayervais to F. Ferdosi Attaching Investment Agreement, Promissory Note, and Letter Agreement (Feb. 27, 2013), **C-461**; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 34, 44; Fourth Erin Burr Statement, **CWS-60**, ¶ 58.

[1541] Memorial, ¶ 71; Third Gordon Burr Statement, **CWS-50**, ¶ 87; Third Erin Burr Statement, **CWS-51**, ¶ 80; *see also* Fourth Gordon Burr Statement, **CWS-59**, ¶ 40; Fourth Erin Burr Statement, **CWS-60**, ¶ 66.

588. As detailed in Claimants' Memorial, the Cabo Project presented an invaluable business opportunity, because, similar to the Cancun Project, the hotel-casino complex that Claimants sought to build in Cabo (located right next to Cabo's popular marina) was to be the first of its kind. None of the casino operators/permit holders in Mexico had developed (or were in the process of developing) casinos within resorts like Claimants were planning to do in Cabo and Cancun.[1542] Further, the expansion projects in Cabo and Cancun would have appealed to very wealthy part-time residents and tourists, thereby providing a tremendous opportunity for growth and economic return.[1543]

589. For these reasons, in addition to the Medano Beach Group, many other premier real estate developers were eager to find a way to work together with Claimants to build a gaming facility tailored to the wealthy clientele base of Cabo. For instance, Discovery, after being apprised of the Claimants' discussions with the Medano Beach Group, wanted to participate in the project, as they have always wanted to develop private poker rooms with Claimants in order to expand the type of entertainment available to its wealthy residents.[1544] Also, George Santo Pietro, a rich real estate developer/restauranteur in Beverly Hills, met with Mr. Burr and expressed his interest in partnering with Claimants to open an exclusive private poker room with a high buy in, if Claimants could host it at the casino in Cabo.[1545]

[1542] Memorial, ¶ 71; Third Gordon Burr Statement, **CWS-50**, ¶ 87; Third Erin Burr Statement, **CWS-51**, ¶ 80; *see also* Fourth Erin Burr Statement, **CWS-60**, ¶ 43.

[1543] Memorial, ¶ 71; Third Gordon Burr Statement, **CWS-50**, ¶¶ 77, 87; Third Erin Burr Statement, **CWS-51**, ¶¶ 79-80; Fourth Erin Burr Statement, **CWS-60**, ¶ 54.

[1544] Third Gordon Burr Statement, **CWS-50**, ¶ 74; Fourth Gordon Burr Statement, **CWS-59**, ¶ 32; Fourth Erin Burr Statement, **CWS-60**, ¶ 49.

[1545] Third Gordon Burr Statement, **CWS-50**, ¶ 68.

590. The evidence, therefore, is conclusive: the Cabo Project *did* exist and would have become an extremely lucrative business but for Mexico's illegal measures. Mexico once again raises a number of ultimately futile arguments seeking to discredit this reality.

591. First, Mexico incorrectly claims that "[t]he evidence shows" that Claimants only "were planning to develop a luxury hotel, and not a casino."[1546] The evidence, however, establishes without any doubt that Claimants planned to construct a hotel and a casino.

592. **The October 12, 2012 LOI:** While Mexico claimed in the Counter-Memorial that the October 12, 2012 Letter of Intent (the "**LOI"**) "demonstrates that Mr. Burr's intention was to undertake two separate investments,"[1547] that is wrong. Mexico conveniently omitted that the LOI provides that "Mexican company (the "Casino Company") will be organized and capitalized by us [referring to Claimants] to construct a casino facility at the hotel" and that "[t]he casino will be operated under the Permit by the Operator [referring to E-Games] and will offer all legal games allowed by the Permit and Mexican law, as well as food and entertainment."[1548]

593. **The Draft Subscription Agreement**: The draft Subscription Agreement that Mr. Ayervais, corporate counsel to B-Cabo (and the B-Mex Companies), prepared for the funding of B-Cabo and exchanged with the Medano Beach Group in April 2013 also expressly contemplates a casino.[1549] It provides that "for the purposes of . . . (2) capitalizing and controlling the operation of a Mexican SRL (the "Mexican Subsidiary"), that we will form and capitalize to construct and own a casino (the "Casino") located in the Hotel, for the conduct of legal gaming

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[1546] Counter-Memorial, ¶ 495.

[1547] Counter-Memorial, ¶ 502.

[1548] Letter of Intent between F. Ferdosi and G. Burr (Oct. 12, 2012) (emphasis added), **C-460**; Fourth Gordon Burr Statement, **CWS-59**, ¶ 43; Fourth Erin Burr Statement, **CWS-60**, ¶ 51.

[1549] Draft Subscription Agreement between B-Cabo, LLC and Medano Beach Hotel, S. de R.L. de C.V. (Apr. 16, 2013), **C-466**; Second Neil Ayervais Statement, **CWS-61**, ¶ 33; Fourth Gordon Burr Statement, **CWS-59**, ¶ 36; Fourth Erin Burr Statement, **CWS-60**, ¶ 51.

and entertainment"[1550] and lays out the project in detail, including the size of the casino, the number of machines, as well as the target market for the casino.[1551]

594. **Claimants' April 2013 exchange** with Mr. Ferdosi: In this email, Mr. Ferdosi states: "I am most excited about this opportunity to be working with Gordon and his Team and creating a World Class Destination Resort and Casino that will be second to none."[1552]

595. **Nondisclosure and Noncircumvention Agreement**, executed in June 2013, again explains that the subject of the parties' negotiations was a hotel-casino venture: "Medano Beach and the Company [E-Games and its affiliates] are considering entering into an arrangement by which the Company may provide funding, by equity and/or debt, to fund the construction, opening and operation of a high-end boutique hotel (the 'Hotel') and a casino (the 'Casino') to be constructed and operated in the Hotel, as well as all related and ancillary transactions . . . ."[1553]

596. **The Draft Investment Agreement**: Mexico claims that the draft Investment Agreement circulated in October 2013 "does not refer to a casino or to future plans to build a casino."[1554] That, of course, was no coincidence. Claimants' uncertainty regarding their permit was the result of Mexico's improper actions against Claimants' permit. Moreover, this agreement was prepared *after* SEGOB improperly rescinded the November 16, 2012 Resolution in August 2013.[1555]

[1550] Draft Subscription Agreement between B-Cabo, LLC and Medano Beach Hotel, S. de R.L. de C.V. (Apr. 16, 2013) (emphasis added), **C-466**.

[1551] Draft Subscription Agreement between B-Cabo, LLC and Medano Beach Hotel, S. de R.L. de C.V. (Apr. 16, 2013), **C-466**.

[1552] Email from F. Ferdosi to G. Burr, N. Ayervais et al. attaching the Hotel Investment/Loan Agreement between B-Cabo, LLC and Medano Beach Hotel, S. de R.L. de C.V. (Apr. 5, 2013), **C-462**.

[1553] Nondisclosure and Noncircumvention Agreement between F. Ferdosi, C. Erikson, G. Burr and E-Games (June 1, 2013), **C-527**.

[1554] Counter-Memorial, ¶¶ 513-514 (citing to Exhibit **BRG-032**).

[1555] Fourth Erin Burr Statement, **CWS-60**, ¶ 54.

597. Yet, Mexico ignores that the draft Investment Agreement on which it relies is not the *only* draft Investment Agreement, which is only logical as discussions were ongoing. Indeed, along with their Counter-Memorial on Jurisdictional Objections, Claimants have already submitted **Exhibit C-65**, which is a draft Investment Agreement circulated in *April 2013* (thus prior to SEGOB's rescission of the November 16, 2012 Resolution on August 28, 2013). This draft agreement clearly indicates the parties' intention and plan was to construct and operate a casino *within* the hotel to be built, stating: "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 [referring to Medano Beach Hotel, S. de R.L. de C.V.]."[1556]

598. That said, beginning in the summer of 2013, when there was growing uncertainty surrounding the E-Games Independent Permit in connection with the ongoing *amparo*, Mr. Burr, on July 16, 2013, wrote to Messrs. Ferdosi and Erikson, explaining that this issue "needs to be address[ed] quickly before I raise any additional funding over and above the $600,000 I've already provided."[1557] This correspondence again demonstrates that the operation of a casino was an integral and inseparable component of the Cabo Project that Claimants pursued along with the Medano Beach Group.

599. As noted earlier, subsequent to SEGOB's rescission of the E-Games Independent Permit in August 2013, the parties discussed the possibility of removing the casino from the deal documents, with the understanding that it would be added back in as soon as the E-Games

[1556] Investment/Loan Agreement between B-Cabo, LLC and Medano Beach Hotel (Apr. 5, 2013), **C-65**.

[1557] Email from G. Burr to F. Ferdosi et al. re: Investment Agreement (July 13, 2013), **C-465**; Fourth Gordon Burr Statement, **CWS-59**, ¶ 35; Fourth Erin Burr Statement, **CWS-60**, ¶ 53.

Independent Permit was on solid footing in the eyes of the Mexican government.[1558] As Mr. Ayervais, who drafted various agreements with the Medano Beach Group as corporate counsel to B-Cabo, explains, the only reason that this was done was to protect Claimants from any potential liability due to the Mexican government's ongoing assaults on the E-Games Independent Permit.[1559] If B-Cabo signed transaction documents agreeing to establish a casino in a hotel in Cabo, an agreement on which the other parties would rely in committing to the transaction and in incurring obligations based on that agreement, and then the government revoked the E-Games Independent Permit, B-Cabo would have committed to a deal that it could not carry out (due to Mexico's illegal actions) and potentially would have been liable for damages for breach of the agreement and for inducing others to invest in reliance on Claimants' ability to provide the authority to operate a casino in the hotel.[1560]

600. **Exhibit BRG-32, the October 2013 Draft Investment Agreement** that Mexico relies upon, was prepared in this context. But even then, Claimants remained fully committed to the plan to construct and operate a casino within the hotel to be built, and specifically negotiated with the Medano Beach Group to preserve their ability to do so since they firmly believed that the E-Games Independent Permit was validly issued and legal under the Gaming Regulation, and that the Mexican judiciary would restore the E-Games Independent Permit should it decide the case in accordance with the law.[1561] As detailed in Section II.L.5 above, Claimants' legal challenges in

[1558] Second Neil Ayervais Statement, **CWS-61**, ¶ 28.

[1559] Second Neil Ayervais Statement, **CWS-61**, ¶ 28; Fourth Gordon Burr Statement, **CWS-59**, ¶ 27; Fourth Erin Burr Statement, **CWS-60**, ¶ 53.

[1560] Second Neil Ayervais Statement, **CWS-61**, ¶ 28; Fourth Gordon Burr Statement, **CWS-59**, ¶ 37; Fourth Erin Burr Statement, **CWS-60**, ¶ 53.

[1561] Third Erin Burr Statement, **CWS-51**, ¶ 129; Fourth Erin Burr Statement, **CWS-60**, ¶¶ 56-57.

the *Amparo* 1168/2011 Proceedings continued until Claimants exhausted all possible avenues for appeal in January 2015.

601. In this regard, on October 21, 2013, Mr. Ferdosi sent an email to Mr. and Ms. Burr and Mr. Ayervais, stating that pursuant to their discussions that day, the draft Investment Agreement would need to be further revised to provide Claimants with the exclusive right for one year to place a casino at the hotel with a 25,000 sq/ft of total space, subject to Claimants' obtaining a casino permit.[1562] The reason that this right was subject to obtaining a casino permit was obviously because of SEGOB's illegal actions in rescinding the November 16, 2012 Resolution.

602. Then, on October 28, 2013, Mr. Ayervais sent an email to Mr. Ferdosi attaching a revised draft Investment Agreement and informed Mr. Ferdosi that at Mr. Burr's instruction, he removed all references to the casino from the draft. Even then, Mr. Ayervais separately prepared a letter agreement memorizing the parties' understanding that "if operating authority can be obtained, the Casino Company will be formed and will construct and own the Casino in the Hotel, subject to a lease agreement (the 'Lease') with the Company [*i.e.*, Medano Beach Hotel, S. de R.L. de C.V.] . . . which shall provide for 25,000 square feet of contiguous space on the street level or one floor below street level [within the Hotel]."[1563]

603. All these communications and negotiation documents exchanged between Claimants and the Medano Beach Group unequivocally confirm that the Cabo Project involved a hotel *and* casino, and to the extent there was any doubt regarding the addition of the casino, it was only due to Mexico's improper actions against Claimants' permit.

[1562] Email from F. Ferdosi to G. Burr attaching investment agreement (Oct. 21, 2013), **C-469**; Second Neil Ayervais Statement, **CWS-61**, ¶ 29; Fourth Gordon Burr Statement, **CWS-59**, ¶ 38; Fourth Erin Burr Statement, **CWS-60**, ¶ 55.

[1563] Email exchange between N. Ayervais, F. Ferdosi and G. Burr attaching the Revised Investment Agreement and Letter Agreement (Oct. 28, 2013), **C-489**; Second Neil Ayervais Statement, **CWS-61**, ¶ 29; Fourth Gordon Burr Statement, **CWS-59**, ¶ 38; Fourth Erin Burr Statement, **CWS-60**, ¶ 56.

604. Second, Mexico claims that Claimants have failed to adduce evidence proving the investment of USD 600,000 that B-Cabo made to purchase the property for the Cabo hotel and casino project.[1564] Yet, as the wire transfer records now on record shows, and Mr. and Ms. Burr confirm, the USD 600,000 was sent via two different transfers: USD 100,000 on January 25, 2013,[1565] and USD 500,000 on May 17, 2013.[1566] The USD 600,000 was initially transferred from B-Cabo to Stanhope LLC, a company affiliated with Mr. Ferdosi and his associate, Time Brasel ("**Mr. Brasel**"),[1567] which then released these funds to Medano Beach Hotel, S. de R.L. de C.V. ("**Medano Beach Hotel**") so that the latter could acquire a property near Mr. Erikson's timeshare project, whose acquisition was required for the Cabo Project and other related purposes.[1568] The adjacent property was held by another Mexican company named Inversiones Medano S. de R.L. de C.V. ("**Inversiones**"), and the Medano Beach Hotel applied those funds advanced by B-Cabo towards the acquisition of Inversiones (and thus the adjacent property held by Inversiones).[1569]

605. The parties' exchanges during the course of their negotiations also conclusively establish B-Cabo's provision of USD 600,000 to the Medano Beach Group, as well as their use in purchase of Inversiones:

- **February 4, 2013 Email from Mr. Ferdosi to Mr. Ayervais**: This email shows that Mr. Burr, on behalf of B-Cabo, had already provided USD 100,000 and that

[1564] Counter-Memorial, ¶ 511.

[1565] Bank Statement Guaranty B-Cabo, LLC (Jan. 31, 2013), **C-463**; Fourth Gordon Burr Statement, **CWS-59**, ¶ 34; Fourth Erin Burr Statement, **CWS-60**, ¶ 58.

[1566] Deposit Slip re B-Cabo, LLC's $ 500,000 loan (Mar. 17, 2013), **C-456**; Fourth Gordon Burr Statement, **CWS-59**, ¶ 34; Fourth Erin Burr Statement, **CWS-60**, ¶ 60.

[1567] Second Neil Ayervais Statement, **CWS-61**, ¶ 19; Fourth Erin Burr Statement, **CWS-60**, ¶ 58; Bank Statement Guaranty B-Cabo, LLC (Jan. 31, 2013), **C-463**; Deposit Slip re B-Cabo, LLC's $ 500,000 loan (Mar. 17, 2013), **C-456**.

[1568] Second Neil Ayervais Statement, **CWS-61**, ¶¶ 22-23; Fourth Erin Burr Statement, **CWS-60**, ¶ 59.

[1569] Second Neil Ayervais Statement, **CWS-61**, ¶ 23; Fourth Erin Burr Statement, **CWS-60**, ¶ 59.

Mr. Burr and Mr. Ferdosi were discussing B-Cabo's plan to provide additional funds in the amount of USD 500,000.[1570]

- **March 18, 2013 Email from Mr. Ferdosi to Mr. and Ms. Burr and Mr. Ayervais**: In the email, Mr. Ferdosi informed Claimants that Inversiones was given notice of upcoming deposit in the amount of "another $500K."[1571] Subsequently on March 21, 2013, Randall Taylor ("**Mr. Taylor**")—who is also a Claimant in these proceedings—advanced USD 450,000 to B-Cabo so that B-Cabo could provide these funds to the Medano Beach Group.[1572]
- **May 16, 2013 Letter Agreement**: On May 16, 2013, Mr. Burr and Messrs. Ferdosi and Brasel formally entered into an agreement in which Mr. Burr, on behalf of B-Cabo, agreed to provide USD 500,000 "to be applied towards the purchase price for the Inversiones interests."[1573] A day after, B-Cabo transferred USD 500,000 to the Medano Beach Group, as provided in the Letter Agreement. By the time B-Cabo released USD 500,000 on May 17, 2013, B-Cabo had returned USD 50,000 to Mr. Taylor, and JyV Mexico provided the remaining funds (*i.e.*, USD 50,000) to B-Cabo so that it could advance the full USD 500,000 to Medano Beach Hotel, as agreed in the May 16, 2013 Letter Agreement.[1574] Of note, JyV Mexico also

[1570] Email thread between N. Ayervais, F. Ferdosi, G. Burr and E. Burr re: Cabo Project Investment Agreement (Feb. 3 to Feb. 5, 2013), **C-457**.

[1571] Email from F. Ferdosi to N. Ayervais, G. Burr and E. Burr re: B-Cabo, LLC's $ 500,000 loan (Mar. 18, 2013), **C-458**.

[1572] B-Cabo, LLC Account Statement (Mar. 21, 2013), **C-459**; Fourth Erin Burr Statement, **CWS-60**, ¶ 60; Second Neil Ayervais Statement, **CWS-61**, ¶ 24.

[1573] Letter from Gordon Burr to Farzin Ferdosi and Tim Brasel (May 16, 2013), **C-66**.

[1574] Fourth Erin Burr Statement, **CWS-60**, ¶ 60; Letter from Gordon Burr to Farzin Ferdosi and Tim Brasel (May 16, 2013), **C-66**.

provided B-Cabo with the initial sum of USD 100,000, which was provided to the Medano Beach Group in January 2013, as explained above.[1575]

- **July 16, 2013 Email from Mr. Burr to Messrs. Ferdosi and Erikson**: As discussed above, in this email, Mr. Burr informed the Cabo partners that he wouldn't be providing "any additional funding over and above the $600,00 [he had] already provided" before the issues regarding the ongoing *amparo* and the E-Games Independent Permit were resolved. [1576]

606. Again, these contemporaneous communications between the parties clearly refute Mexico's allegation that there is no evidence that B-Cabo invested USD 600,000 towards the purchase price of the land where the Cabo Project was to be built.

607. Relatedly, Mexico also argues that even if Claimants could prove the existence of these loans—which Claimants did—those funds were irrelevant to the present proceedings because they "were meant to acquire a participation in the Medano Beach company independently from the casino that was to be built within the hotel."[1577] This argument is equally unavailing. As the evidence discussed above clearly demonstrates, B-Cabo advanced the USD 600,000 funds to Medano Beach Hotel for the purchase of the land where the hotel *and* casino was to be built. Further, the construction of the casino was ultimately dependent upon the construction of the hotel, as the latter is a required step in executing the Claimants' plan to build out a casino within the hotel. Moreover, as explained above, the Medano Beach Group specifically sought to partner with Claimants because Claimants not only had successfully developed five profitable casinos in Mexico, but also had expertise in the Mexican gaming industry and, more importantly, the legal

[1575] Fourth Erin Burr Statement, **CWS-60**, ¶ 60; Bank Statement Guaranty B-Cabo, LLC (Jan. 31, 2013), **C-463**.

[1576] Email from G. Burr to F. Ferdosi et al. re: Investment Agreement (July 13, 2013), **C-465**.

[1577] Counter-Memorial, ¶ 511.

right to establish a new casino location within Medano Beach Hotel, utilizing the E-Games Independent Permit. As Mr. Ayervais explains, the Medano Beach Group would never have granted B-Cabo an interest in the hotel without their constructing and operating a casino which the Medano Beach Group was eager to incorporate on the hotel to enhance its attraction. The respective consideration for both aspects of the project was thus inextricably linked, and notwithstanding Mexico's hostile actions against the E-Games Independent Permit created additional complications in the parties' negotiations—as reflected in Mr. Burr's email of July 16, 2012 and various revisions to the Investment Agreement—the parties continued the negotiations for the Cabo Project throughout the latter half of 2013 and into 2014, with an ultimate goal of creating a hotel-casino complex in Cabo.

608. *Lastly*, Mexico seeks to muddy the waters by arguing that "the lack of payment of this [USD 500,000] loan" made pursuant to the May 16, 2013 Letter Agreement is not an issue that Mexico could be held "accountable for."[1578] In this arbitration, Mexico's obligations and liability under the NAFTA and international law require it to compensate the Claimants for the full value of the Cabo Project, which Claimants legitimately expected to realize but for Mexico's illegal measures that irrevocably put an end to Claimants' expansion plans in Cabo (as well as in Cancun and online gaming). Mexico's bid to convert Claimants' claim into a dispute over unrecovered loans thus does not hold water.

609. In any event, the parties' negotiation history over the USD 600,000 funds that B-Cabo provided to the Medano Beach Group in furtherance of the Cabo Project again confirms that, at all relevant times, they remained fully committed to the development of the hotel-casino venture in Cabo and that they made a substantial progress to that end when Mexico shuttered Claimants'

[1578] Counter-Memorial, ¶ 512.

Casinos in April 2014. As explained above, Claimants' negotiations with the Medano Beach Group continued throughout the year of 2013 and into 2014. As also explained, B-Cabo advanced a total of USD 600,000 in loans to the Medano Beach Group in January and May of 2013 in a good faith gesture to allow the Cabo Project to move forward while the parties continued to negotiate the terms of the Investment Agreement.[1579] The loans were structured in a way that, if the Investment Agreement was not executed, their repayment was personally guaranteed by Messrs. Ferdosi and Brasel and collateralized by their interests in Medano Beach Hotel and Inversiones. This was done to further incentivize the Cabo partners to finalize and sign the Investment Agreement so that Mr. Burr, on behalf of B-Cabo, could begin raising additional capital from investors and lenders.[1580]

610. During the course of negotiations, the Medano Beach Group ultimately returned all but USD 100,000 of the USD 600,000 advanced by B-Cabo, and Mr. Taylor was reimbursed USD 350,000 through B-Cabo.[1581] But, for the avoidance of doubt, the return of funds to B-Cabo does not suggest that the parties' discussions were faltering.

611. For instance, in the Letter Agreement of May 16, 2013, Messrs. Ferdosi and Brasel agreed to return the USD 500,000, if, within 30 days from the date of the Letter Agreement, B-Cabo and Medano Beach Hotel did not execute a binding Investment Agreement. However, on May 30, 2013, the parties reached an agreement to extend the 30-day period for return of these funds because as of May 30, 2013 they were "making good progress towards the end goal of obtaining

[1579] Fourth Gordon Burr Statement, **CWS-59**, ¶ 34; Second Neil Ayervais Statement, **CWS-61**, ¶¶ 22-23; Fourth Erin Burr Statement, **CWS-60**, ¶ 58.

[1580] Fourth Gordon Burr Statement, **CWS-59**, ¶ 44; Fourth Erin Burr Statement, **CWS-60**, ¶ 61; Second Neil Ayervais Statement, **CWS-61**, ¶¶ 22, 29.

[1581] Fourth Gordon Burr Statement, **CWS-59**, ¶ 39; Second Neil Ayervais Statement, **CWS-61**, ¶ 24; Fourth Erin Burr Statement, **CWS-60**, ¶ 61.

financing and building the Hotel and Casino."[1582] In consideration of this extension agreement, Messrs. Ferdosi and Brasel also returned USD 100,000 to B-Cabo.[1583] Then, on August 6, 2013, despite the absence of an executed Investment Agreement, the parties made another agreement in good faith by which Messrs. Ferdosi and Brasel agreed to return another USD 100,000 to B-Cabo, while B-Cabo agreed to extend the return date of the remaining funds.[1584] As noted above, the terms of the Investment Agreement underwent further revisions beginning in the summer of 2013 because, among other reasons, the uncertainty surrounding the E-Games Independent Permit began to grow. Given the pendency of a final agreement, the Medano Beach Group returned the additional sum of USD 200,000 to B-Cabo in October 2013, which in turn remitted said sum to Mr. Taylor who was an original lender.[1585]

612. In parallel, Mr. Ayervais negotiated with Messrs. Ferdosi and Brasel for an agreement that would have allowed Mr. Taylor to receive a 1% equity stake in Medano Beach Hotel upon the execution of the Investment Agreement.[1586] Mr. Taylor's equity interest, if granted, would have been in recognition of the remaining USD 100,000 still owed by Medano Beach Group to B-Cabo (and eventually to Mr. Taylor) at the time. Through this agreement, Messrs. Ferdosi and Brasel also agreed to the return of the USD 100,000 in the event that the Investment Agreement did not get executed.[1587] The QEU&S Claimants understand that Mr. Taylor sought this deal as the equity

[1582] Letter Agreement between T. Brasel and G. Burr (May 30, 2013), **C-464**.

[1583] Letter Agreement between T. Brasel and G. Burr (May 30, 2013), **C-464**.

[1584] Letter Agreement between G. Burr, F. Ferdosi and T. Brasel (Aug. 6, 2013), **C-490** (noting again that the parties were "making good progress towards the end goal of obtaining financing and building the Hotel and Casino").

[1585] *See* 1% Letter Agreement between B-Cabo and F. Ferdosi (Nov. 1, 2013), **C-532**; Second Neil Ayervais Statement, **CWS-61**, ¶ 24; Fourth Erin Burr Statement, **CWS-60**, ¶ 61.

[1586] 1% Letter Agreement between G. Burr and F. Ferdosi (Oct. 17, 2013), **C-531**; 1% Letter Agreement between B-Cabo and F. Ferdosi (Nov. 1, 2013), **C-532**.

[1587] 1% Letter Agreement between G. Burr and F. Ferdosi (Oct. 17, 2013), **C-531**; 1% Letter Agreement between B-Cabo and F. Ferdosi (Nov. 1, 2013), **C-532**; Second Neil Ayervais Statement, **CWS-61**, ¶ 31.

interest provided for a greater economic return than the repayment of the outstanding sum in the event that the Cabo project came to fruition, which the parties legitimately believed and expected would happen.[1588] At this point, Mr. Burr had already secured verbal commitments from various investors who wanted to participate in the equity raise for the project. These potential investors included B-Mex investor, Doug Moreland, who came to see the Cabo property where Claimants' hotel-casino complex was planned to be built.[1589] Several other shareholders of the B-Mex Companies also expressed their interests in contributing the funds for the Cabo Project.[1590]

613. In this regard, B-Cabo sought to close the deal sooner, while the Medano Beach Group asked for an additional time to execute the Investment Agreement in order to be prepared to fulfil the obligations that they would have assumed under the Investment Agreement, including securing the construction loan of the hotel.[1591] Given the level of interest showed in the Cabo Project by potential investors that Mr. Burr had contacted, and based on Claimants' successful experience of financing and constructing five state of the art Casinos, Mr. and Ms. Burr viewed that their increased role in the aspect of the hotel construction could help the project move forward more expeditiously, which in any event was a prerequisite step in developing a casino operations within the hotel once the E-Games Independent Permit was back on solid footing in the eyes of the Mexican government.[1592]

614. In this context, on January 9, 2014, Mr. Ayervais emailed Mr. Ferdosi's lawyer and offered him another proposal to advance the deal by allowing Mr. Burr to take a more leading role in

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[1588] Second Neil Ayervais Statement, **CWS-61**, ¶ 31.

[1589] Fourth Gordon Burr Statement, **CWS-59**, ¶ 44; Fourth Erin Burr Statement, **CWS-60**, ¶ 65.

[1590] Fourth Gordon Burr Statement, **CWS-59**, ¶ 44; Fourth Erin Burr Statement, **CWS-60**, ¶ 65.

[1591] Fourth Erin Burr Statement, **CWS-60**, ¶ 65.

[1592] Fourth Erin Burr Statement, **CWS-60**, ¶ 63.

pursuing the Cabo Project.[1593] The Medano Beach Group did not agree to this proposal.[1594] Simultaneously, Mr. Burr and Mr. Ayervais were negotiating with the Medano Beach Group to try to recover the unpaid loans for Mr. Taylor as he insisted upon prompt repayment.[1595] As Mr. Ayervais explained in his January 9, 2014 email to Mr. Ferdosi's lawyer, Claimants' interest was ultimately in "the proposed venture" not in the unrecovered "funds."[1596]

615. Mr. Burr and Mr. Ayervais also saw that the unpaid loans could be used to incentivize the Medano Beach Group to execute the final Investment Agreement.[1597] To this end, and upon Mr. Taylor's request, B-Cabo filed a complaint against Messrs. Ferdosi and Brasel on January 21, 2014, alleging that they had failed to return the USD 100,000 in funds to B-Cabo.[1598] Shortly thereafter, on February 4, 2014, B-Cabo voluntarily dismissed the complaint, as it indeed to spur Messrs. Ferdosi and Brasel to reach finalizing the terms of the transaction. Mr. Taylor was kept appraised of and approved all actions being taken in connection with this lawsuit, including B-Cabo's decision to withdraw the complaint.[1599]

[1593] Email from N. Ayervais to J. Sawyer re: Cabo project (Jan. 9, 2014), **C-470** ("In a related matter, we wish to reiterate that our interest was never in these funds but in the proposed venture, and we remain interested in moving it forward. To that end, Mr. Burr proposes a transaction by which his interests would purchase controlling interest in Stanhope, with Messrs. Brasel and Ferdosi remaining as minority owners, with the intent of undertaking and completing the Cabo project."); *see also* Fourth Gordon Burr Statement, **CWS-59**, ¶ 39; Second Neil Ayervais Statement, **CWS-61**, ¶ 32; Fourth Erin Burr Statement, **CWS-60**, ¶ 63.

[1594] Fourth Gordon Burr Statement, **CWS-59**, ¶ 39; Fourth Erin Burr Statement, **CWS-60**, ¶ 64.

[1595] Second Neil Ayervais Statement, **CWS-61**, ¶ 32.

[1596] Email from N. Ayervais to J. Sawyer re: Cabo project (Jan. 9, 2014), **C-470** ("In a related matter, we wish to reiterate that our interest was never in these funds but in the proposed venture, and we remain interested in moving it forward. To that end, Mr. Burr proposes a transaction by which his interests would purchase controlling interest in Stanhope, with Messrs. Brasel and Ferdosi remaining as minority owners, with the intent of undertaking and completing the Cabo project."). Fourth Gordon Burr Statement, **CWS-59**, n. 44; Second Neil Ayervais Statement, **CWS-61**, n. 39; Fourth Erin Burr Statement, **CWS-60**, ¶ 63.

[1597] Fourth Gordon Burr Statement, **CWS-59**, ¶ 39; Second Neil Ayervais Statement, **CWS-61**, ¶ 31; Fourth Erin Burr Statement, **CWS-60**, ¶ 62.

[1598] Fourth Gordon Burr Statement, **CWS-59**, ¶ 39; Second Neil Ayervais Statement, **CWS-61**, ¶ 32; Fourth Erin Burr Statement, **CWS-60**, ¶ 64.

[1599] Second Neil Ayervais Statement, **CWS-61**, ¶ 32.

616. Ultimately, the transaction in Cabo did not come to fruition because Mexico abruptly shut down the Casinos on April 24, 2014, thus permanently depriving Claimants of the ability to operate their Casinos in Mexico by revoking the E-Games Independent Permit.

(b) The Online Gaming Project Demonstrated Great Potential and Claimants Were Well Positioned To Launch Their Online Gaming Project Within a Few Months of the Illegal Closures of the Casinos

617. When Mexico unlawfully closed the Casinos on April 24, 2014, Claimants had been working for about a year on the development of an online gaming business and planned to launch online gaming by mid-2014 in partnership with Bally Technologies, Inc. ("**Bally**"), a major U.S. manufacturer of slot machines and other gaming technology.[1600] Given that Bally's online gaming platform offered everything that Claimants needed for purposes of running their online gaming, all that remained for Claimants to do to have their online gaming site up and running was to set up and install servers in Querétaro, after which Claimants could have used Bally's platform. As previously explained in Claimants' Memorial,[1601] and as numerous witnesses reaffirm,[1602] Claimants were ready to install the servers when the Casinos were shut down in April 2014, and therefore could not complete the final step in realizing their Online Gaming Project. Since 2014, online gaming has expanded in Mexico and has become very popular, as well as very lucrative, with most of the major players with brick-and-mortar casino operations in Mexico participating in the online gaming market.[1603] Had Mexico not forcibly shut down Claimants' business, Claimants

[1600] Memorial, ¶¶ 73-74; Third Gordon Burr Statement, **CWS-50**, ¶¶ 88-91; Third Erin Burr Statement, **CWS-51**, ¶ 83; Second José Ramón Moreno Statement, **CWS-53**, ¶¶ 25-26.

[1601] Memorial, ¶ 74; Third Gordon Burr Statement, **CWS-50**, ¶ 91; Third Erin Burr Statement, **CWS-51**, ¶ 83; Second José Ramón Moreno Statement, **CWS-53**, ¶¶ 25-27.

[1602] Fourth Gordon Burr Statement, **CWS-59**, ¶ 53; Fourth Erin Burr Statement, **CWS-60**, ¶ 77; First Miguel Romero Statement, **CWS-69**, ¶¶ 24-29; Third José Ramón Moreno Statement, **CWS-63**, ¶ 18.

[1603] Memorial, ¶ 76; Third Gordon Burr Statement, **CWS-50**, ¶ 91; Third Erin Burr Statement, **CWS-51**, ¶ 83; Second José Ramón Moreno Statement, **CWS-53**, ¶¶ 34-35; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 45, 47; Fourth Erin Burr Statement, **CWS-60**, ¶ 76.

would become one of the first movers in the field in Mexico, but they had to forego this extremely valuable opportunity due to Mexico's breaches of the NAFTA.

618. Mexico again seeks to dispute these well-established facts on several spurious grounds.

619. *First*, Mexico alleges that Claimants' claims in respect to the Online Gaming Project "stand exclusively" on witness evidence.[1604] However, Mexico itself was a contributing factor to the unavailability of the additional evidence it claims is necessary. As Claimants have already explained, the Naucalpan Casino, where all hardcopy records for all of the Mexican Enterprises were stored, was burned in June 2017 while the premises were under the full control and custody of Mexico. Furthermore, prior to the fire, Mexico had unjustifiably refused Claimants' access to their Casinos, even to retrieve their corporate records.[1605] Additionally, because of Mexico's actions, Claimants further were not financially able to continue maintaining their servers, and therefore they lost access to a bulk of electronic communications and negotiations documents they exchanged with their partners in the Expansion Projects.[1606] As the Tribunal found in the Partial Award in relation to evidence of Claimants' shareholding, given the destruction of evidence (which is squarely attributable to Mexico), "Claimants should therefore be afforded a fair opportunity to adduce evidence . . . through other means."[1607]

620. In any event, contrary to Mexico's allegation, Claimants, along with their Memorial, had already submitted sufficient documentary evidence in support of their claims regarding the Online Gaming Project. Moreover, as discussed in detail below, since their submission of the Memorial,

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[1604] Counter-Memorial, ¶ 521.

[1605] *See* Rejoinder on Mexico's Jurisdictional Objections, ¶¶ 98-99; Third Julio Gutiérrez Morales Witness Statement, **CWS-9**, ¶¶ 11-13.

[1606] *See* Section II.O.2 *supra*; *see also* Fourth Erin Burr Statement, **CWS-60**, ¶ 84; Third José Ramón Moreno Statement, **CWS-63**, ¶ 18.

[1607] Partial Award, ¶ 170.

Claimants have further endeavored to locate the documents concerning Claimants' negotiations with Bally, which again proves that the parties planned to launch online gaming by July 2014 and would have been able to do so but for Mexico's illegal closures of the Casinos.[1608]

- **Biweekly Meetings Between Claimants and Bally**: In its Counter-Memorial, Mexico claims that no record of Mr. Burr's meetings with Bally's representatives was produced.[1609] As Mr. Burr reaffirms, he participated in several meetings with Carlos Engel ("**Mr. Engel**"), Bally Sales Director, and Ramiro Salazar, Bally Director for Latin America.[1610] Further, as the evidence now on record shows, beginning in March 2014, Claimants even held biweekly meetings with key representatives from Bally. As Moreno, who, along with Mr. Burr, oversaw negotiations and planning discussions with Bally, explains, by early 2014 Claimants and Bally were able to configure and agree upon all important aspects of the Online Gaming Project as a result of their extensive discussions that spanned across over a year. In this regard, the biweekly meetings began to take place in March 2014 so that the parties could effectively coordinate their efforts and discuss any remaining items to roll out the Online Gaming Project by July 2014.[1611] Participants from Bally in these meetings included: Mr. Engel (Director of Sales); Raman Poyapakkam (Senior Director Client Services); Leon Lemus (Project

[1608] As explained above, the 2017 fire at the Naucalpan Casino had greatly undermined Claimants' access to the corporate records (both hard and electronic copies) of the Mexican Enterprises. The documents Claimants have been able to collect are those that were backed up on personal devises. *See* Fourth Erin Burr Statement, **CWS-60**, ¶ 77; Third José Ramón Moreno Statement, **CWS-63**, ¶¶ 21, 32.

[1609] Counter Memorial, ¶ 522.

[1610] Fourth Gordon Burr Statement, **CWS-59**, ¶ 49; Third José Ramón Moreno Statement, **CWS-63**, ¶¶ 5-6.

[1611] Email from A. Araujo to A. Rendón, M. Romero, C. Engel, R. Poyapakkam, L. Lemus and M. Robson re: biweekly meetings (Mar. 27, 2014), **C-552**; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 49-50; Third José Ramón Moreno Statement, **CWS-63**, ¶ 7.

Manager); Antonio Araujo (Client Services Manager); and Mark Robson (Director of Global Management for IGaming Platform).[1612] From the Juegos Companies' side, Alfonso Rendón ("**Mr. Rendón**"), Marketing Director for the Juegos Companies, and Miguel Romero ("**Mr. Romero**"), Director of Information and Technology for the Juegos Companies and E-Games, attended these meetings, as they were in charge of the day-to-day planning related to the Online Gaming Project.[1613] Messrs. Rendón and Romero regularly reported their discussions with Bally to Mr. Burr.[1614] These biweekly meetings normally took place at the corporate offices of E-Games located in the Naucalpan Casino.[1615] These meetings continued until Mexico shut down Claimants' Casinos on April 24, 2014, as just a few days after the closure of the Casinos, Bally's representatives informed Claimants that "[b]ased on the recent events, this meeting series is cancelled until further notice."[1616]

- **Exciting Games Project Plan** dated March 10, 2013[1617]: As part of these biweekly discussions with Bally, Mr. Lemus, Bally's Project Manager, prepared a detailed project plan for the Online Gaming Project with a launch date of, at the latest, July

[1612] Third José Ramón Moreno Statement, **CWS-63**, ¶ 6; First Miguel Romero Statement, **CWS-69**, ¶ 19.

[1613] First Miguel Romero Statement, **CWS-69**, ¶ 19; Third José Ramón Moreno Statement, **CWS-63**, ¶¶ 5-7; Email from A. Araujo to A. Rendón, M. Romero, C. Engel, R. Poyapakkam, L. Lemus and M. Robson re: biweekly meetings (Mar. 27, 2014), **C-552**.

[1614] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 49-50.

[1615] First Miguel Romero Statement, **CWS-69**, ¶ 19; Third José Ramón Moreno Statement, **CWS-63**, ¶ 5; Email from A. Araujo to A. Rendón, M. Romero, C. Engel, R. Poyapakkam, L. Lemus and M. Robson re: biweekly meetings (Mar. 27, 2014), **C-552**.

[1616] Email from A. Araujo re: Canceled: Exciting Games – iGaming Bi-Weekly meeting (May 5, 2014), **C-476** ("Based on the recent events, this meeting series is cancelled until further notice.").

[1617] Email from L. Lemus to A. Rendón re: Exciting Games Project Update (Mar. 6-10, 2014), **C-477**; Exciting Games Project Plan with Bally (Mar. 10, 2014), **C-479**.

2014.[1618] The Exciting Games Project Plan was drafted in the form of a checklist with various tasks that the parties were in the process of accomplishing together in order to roll out the project by mid-July 2014, including, *among others*, obtaining regulatory approvals, building out and testing the model ("mock ups") for the operation of the online casino system, the configuration of domain names, the creation of a website for the online casino (which would have named "Kashbet"[1619]), and the integration of external providers, such as payment processors and customer support tool, the pilot launch (*i.e.*, "soft launch"), staff training, marketing, and promotion campaigns.[1620] As Mr. Moreno explains, because the Exciting Games Project Plan was prepared in early March of 2013, it fails to reflect all material progress that the parties made afterwards (and prior to the illegal closure of the Casinos on April 24, 2014).[1621] For instance, during the April 10, 2014 biweekly meeting, the parties discussed the selection of payment processing vendor and reviewed the materials furnished by one such vendor (Teleplay).[1622] Led by Mr. Rendón, prior to the closure of the Casinos, Claimants were also working on various evolving tasks, such as marketing and hiring and

[1618] Email from L. Lemus to A. Rendon re: Exciting Games – Project Update (Mar. 6, 2014), **C-478**; Email from L. Lemus to A. Rendon re: Exciting Games – Project Update (Mar 6-10, 2014), **C-477**; Exciting Games Project Plan with Bally (Mar. 10, 2014), **C-479**.

[1619] Feature Requirements for the online casino platform (Jan. 2014), p. 2, **C-554**; First Miguel Romero Statement, **CWS-69**, ¶¶ 10-11; Third José Ramón Moreno Statement, **CWS-63**, ¶¶ 9-10.

[1620] Email from L. Lemus to A. Rendón re: Exciting Games Project Update (Mar. 6-10, 2014), **C-477**; Exciting Games Project Plan with Bally (Mar. 10, 2014), **C-479**.

[1621] Third José Ramón Moreno Statement, **CWS-63**, ¶¶ 10.

[1622] Telepay Presentation (Feb. 2014), **C-553**; Email from A. Araujo re: Exciting Games - iGaming bi-weekly update (Apr. 10, 2014), **C-475**; First Miguel Romero Statement, **CWS-69**, ¶ 19; Third José Ramón Moreno Statement, **CWS-63**, ¶ 11.

training staff to support the platform, amongst other things.[1623] The Exciting Games Project Plan clearly demonstrates that not only Claimants, but also Bally, a globally renowned gaming company with extensive experience in the online gaming industry, was committed and reasonably expecting to accomplish all necessary steps to successfully launch the online gaming site by July 2014.

621. Mexico also contends that there is no evidence (other than witness statements) to support that Claimants were ready to install the servers to host Bally's online gaming platform when the Casinos were shut down in April 2014.[1624] Mr. Romero, who led the discussions with Bally regarding the technological aspects of the Online Gaming Project, explains that Bally was already operating a very similar online gaming system in New Jersey at the time, which was to be used as a model for the Claimants' project.[1625] Bally therefore knew precisely what servers, equipment, data storage, and other technical features were required to operate the Online Gaming Project, and the parties were able to define the technical specifications of the Online Gaming Project very early on.[1626] Accordingly in May 2013, Mr. Romero drew up a preliminary budget plan reflecting the main expenses associated with the installation of the servers and equipment,[1627] as well as other expenses to maintain and support the online gaming system, such as fees for internet service line and electricity and hiring of four computer analysists. Mr. Romero's budget also accounts for travel expenses that Claimants were incurring (and expected to incur going forward), as they were

[1623] Fourth Gordon Burr Statement, **CWS-59**, ¶ 50; First Miguel Romero Statement, **CWS-69**, ¶ 20; Third José Ramón Moreno Statement, **CWS-63**, ¶ 18.

[1624] Counter-Memorial, ¶¶ 524-525.

[1625] First Miguel Romero Statement, **CWS-69**, ¶ 21.

[1626] Email thread between C. Engel and M. Romero re: servers technical specifications (June 27 to June 28, 2013), **C-564**.

[1627] Online Casino Budget (May 31, 2013), **C-480**; First Miguel Romero Statement, **CWS-69**, ¶ 26.

in the process of identifying potential hosting space for the servers.[1628] As previously explained, Claimants eventually decided to install their servers in the State of Querétaro for tax reasons; and through their further searches, Claimants identified a suitable hosting space in Querétaro, for which Claimants were about to sign a lease agreement when the Casinos were closed.

622. Further, as noted above, based on Bally's experience in New Jersey, the parties were able to determine the configuration of the servers to host Bally's platform as early as in mid-2013. As the planned launch date approached, Bally, on February 28, 2014, sent two documents to Mr. Romero, containing Bally's detailed recommendations on equipment specifications and other technical features of the Claimant's online casino server system, depending on whether its desired capacity is to support 500 or 1,000 concurrent players.[1629] As Mr. Romero explains, all that Claimants had to do was purchase the equipment as specified in Bally's documents.

623. *Second*, Mexico alleges that "[t]here is no proof that the Claimants requested authorization from SEGOB to run a virtual casino," suggesting that E-Games would have required an additional permit for the Online Gaming Project.[1630] Yet, as Claimants' legal expert Mr. Ezequiel González explains, Claimants, as a valid permit holder, did not have to request a new permit in order to launch its online business.[1631] Rather, Claimants would only need (1) a gaming permit (which E-Games already had); (2) a system of control for internet transactions (which would be covered by Bally[1632]); and (3) SEGOB's technical approval of the bet-taking technology (which would be

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[1628] Online Casino Budget (May 31, 2013), **C-480**; First Miguel Romero Statement, **CWS-69**, ¶¶ 26-28; Third Gordon Burr Statement, **CWS-50**, ¶ 91; Third Erin Burr Statement, **CWS-51**, ¶ 83; Second José Ramón Moreno Statement, **CWS-53**, ¶¶ 29-30.

[1629] Bally, Server System Architecture, 500 Concurrent Player System (Feb. 18, 2014), **C-565**; Bally, Server System Architecture, 1000 Concurrent Player System (Feb. 18, 2014), **C-566**.

[1630] Counter-Memorial, ¶ 531.

[1631] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 259, 267.

[1632] First Miguel Romero Statement, **CWS-69**, ¶ 10; Third José Ramón Moreno Statement, **CWS-63**, ¶ 18; Third Gordon Burr Statement, **CWS-50**, ¶ 90; Third Erin Burr Statement, **CWS-51**, ¶ 83; Second José Ramón Moreno

covered by Bally,[1633] but which was, in any event, a routine procedure that is required under Mexican law to take no more than 90 days to complete, as Claimants' expert confirms.[1634] Thus, Claimants had met all technical requirements.

624. *Third*, Mexico alleges that the Online Gaming Project would have been illegal because it would have required the sale of the E-Games Independent Permit.[1635] As Claimants already explained in response to Mexico's similar contention regarding the Cancun Project, E-Games never intended to sell its permit to third parties. In fact, all relevant documents and correspondences between the parties equally show that E-Games would be the operator for Claimants' online gaming site. [1636]

625. *Fourth*, with respect to the Interactive Gaming Proposal, a March 21, 2013 business model for the Online Gaming Project, Mexico argues (1) that the pricing in the document had already expired when Claimants were prepared to sign the document and (2) that there is no evidence that Bally accepted the handwritten annotations of Mr. Moreno, Director General of the Juegos Companies and Exciting Games, which reduced monthly fee payments.[1637] Along with this Reply, Claimants introduce into record the draft Online Gaming Agreement shared between the parties to that contract on July 22, 2013 (**Exhibit C-555**), which confirms, consistent with Claimants' prior

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Statement, **CWS-53**, ¶ 27. *See also* Feature Requirements for the online casino platform (Jan. 2014), **C-554**; Proposal of Juego Interactivo de Bally a Exciting Games (Mar. 21, 2013), p. 12, **C-337**.

[1633] First Miguel Romero Statement, **CWS-69**, ¶ 10; Third José Ramón Moreno Statement, **CWS-63**, ¶ 17; Third Gordon Burr Statement, **CWS-50**, ¶ 90; Third Erin Burr Statement, **CWS-51**, ¶ 83; Second José Ramón Moreno Statement, **CWS-53**, ¶ 27. *See also* Feature Requirements for the online casino platform (Jan. 2014), **C-554**; Proposal of Juego Interactivo de Bally a Exciting Games (Mar. 21, 2013), p. 12, **C-337**.

[1634] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 268-269.

[1635] Counter-Memorial, ¶ 538.

[1636] *See, e.g.*, Feature Requirements for the online casino platform (Jan. 2014) ("Exciting Games is the owner of Kashbet."), **C-554**; Proposal of Juego Interactivo de Bally a Exciting Games (Mar. 21, 2013) **C-337**; Online Gaming Contract between Bally and Exciting Games (July 2013), **C-555**; Email thread between C. Engel, A. Rendón, C. Coro, C. Hernández, M. Moreno and J. M. Ramírez re: Bally Contract (July 19 to July 22, 2013), **C-556**.

[1637] Counter-Memorial, ¶¶ 534-535.

assertions, that Mr. Moreno's annotated pricing terms in the Interactive Gaming Proposal were indeed agreed upon by Bally. As Mr. Moreno explains, as of July 2013, the parties were already in the fifth round of revisions to their contract, and they expected that this draft circulated on July 22, 2013 to be the final, or near final, version of the contract.[1638] Claimants were not able to locate later versions of the agreement. It is very likely that they were destroyed in the Naucalpan Casino fire, and even if they were still residing in the Naucalpan Casino, Mexico has denied Claimants access to it since the Casinos were shut down by SEGOB in April 2014. As Mr. Moreno confirms, however, the pricing terms indicated in **Exhibit C-555** remained the same during the parties' subsequent negotiations, and as of April 2014, the parties practically had a definitive, final agreement, which just needed to be signed by the parties. Again, absent such understanding, Bally would not have been committed to the launch date of July 2014 for the Online Gaming Project.

626. *Fifth*, Mexico alleges that Claimants have offered no evidence (other than witness statements) to prove their due diligence efforts to launch the online gaming business or to substantiate various expenses incurred in negotiations and other preparatory work for the project.[1639] Yet, Claimants' **Exhibit C-338** contains a detailed proposal ("**Investment Project Online Casino**") prepared towards the end of 2013, which also demonstrates that Claimants conducted extensive due diligence and research on various topics, including the percentage of smartphone users with internet connection in Mexico; the value of Mexico's online gaming e-commerce market (which Claimants estimated at USD 317 million in 2013); and the number of

[1638] As Mr. Moreno explains, this draft mistakenly states that E-Games conducts business under the permit of CIA Operadora Megasport S.A. De C.V. This was an obvious error to be fixed before a final agreement was executed between E-Games and Bally, as E-Games held its own independent permit. Third José Ramón Moreno Statement, **CWS-63**, ¶ 18.

[1639] Counter-Memorial, ¶ 524.

potential clients Claimants could expect based on online gaming investments, amongst others.[1640] The Investment Project Online Casino also estimates a total cost of approximately USD 2.5 million to get the Online Gaming Project up and running.

627. *Sixth*, Mexico claims that there is no proof that Claimants had actually invested USD 2.5 million in the online gaming project.[1641] The USD 2.5 million was based upon a combination of expenses that were incurred for the online gaming project before April 2014, as well as expenses that Claimants planned to incur in order to complete the project by July 2014.[1642] When the Casinos were shut down in April 2014, Claimants had already incurred expenses for travel, legal opinions/guidance, and salaries to work on the online gaming project.[1643] Also, as explained above, a detailed budget plan prepared by Mr. Romero in May 2013 also documents the expenditure incurred in connection with Claimants' efforts to identify potential hosting space for the servers to install Bally's platform.[1644]

628. *Lastly*, Mexico disputes that when the Casinos were closed, Claimants were also in the advanced stages of negotiations with PokerStars.[1645] Absurdly, Mexico points out that **Exhibit C-339** is a memorandum for the transaction between E-Games and Rational Group,"[1646] and claims that it "is not sure of the relationship between the latter and PokerStars."[1647] As a quick Internet

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[1640] Online Gaming Investment Project, **C-338**.

[1641] Counter-Memorial, ¶¶ 536-538.

[1642] Fourth Gordon Burr Statement, **CWS-59**, ¶ 51; Fourth Erin Burr Statement, **CWS-60**, ¶ 79; First Miguel Romero Statement, **CWS-69**, ¶¶ 26-28; Third José Ramón Moreno Statement, **CWS-63**, ¶¶ 8-10.

[1643] Fourth Gordon Burr Statement, **CWS-59**, ¶ 51; Fourth Erin Burr Statement, **CWS-60**, ¶ 80.

[1644] Online Casino Budget (May 31, 2013), **C-480**; Fourth Gordon Burr Statement, **CWS-59**, ¶ 51; Fourth Erin Burr Statement, **CWS-60**, ¶ 80.

[1645] Counter-Memorial, ¶¶ 527-529.

[1646] Third José Ramón Moreno Statement, **CWS-63**, ¶ 18; Fourth Gordon Burr Statement, **CWS-59**, ¶ 54.

[1647] Counter-Memorial, ¶ 540.

search shows, and Messrs. Burr and Moreno confirm, Rational Group is an owner and the operator of PokerStars, a brand that runs the largest real money online poker site in the world.[1648]

629. As explained in the Memorial, under the proposed agreement contemplated under **Exhibit C-339**, PokerStars was going to use Claimants' online gaming platform to offer online poker in Mexico.[1649] Beginning in 2013, the team lead by Mr. Moreno had regular calls and conversations with PokerStars to discuss the project.[1650] Their discussions continued until the Casinos were closed and some of the key issues that the parties discussed included the strategy for poker, the tax model that would need to be implemented, and the internet requirements for online poker.[1651] As early as in January 2014, Claimants were already providing their comments and edits on the contract to be signed with PokerStars.[1652] In addition, **Exhibit C-558** shows that Claimants had a concrete plan of action regarding their discussions with PokerStars, having even set the deadlines for various issues that had to be resolved for the signing of the contract with PokerStars.[1653]

630. In sum, contrary to Mexico's assertions, and despite Claimants' impaired ability to gather documentary evidence in support of their claims due to Mexico's actions, Claimants have amply

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[1648] Third José Ramón Moreno Statement, **CWS-63**, ¶ 18; Fourth Gordon Burr Statement, **CWS-59**, ¶ 47.

[1649] Structure and Transaction between Exciting Games and Grupo Rational Memorandum (Feb. 23, 2014), **C-339**; Third José Ramón Moreno Statement, **CWS-63**, ¶ 18; Fourth Gordon Burr Statement, **CWS-59**, ¶ 54.

[1650] Third José Ramón Moreno Statement, **CWS-63**, ¶ 18; Fourth Gordon Burr Statement, **CWS-59**, ¶ 54; Email thread between J. Carreño, J. R. Moreno, J. M. Ramírez et al. re: PokerStars (Jan. 14 to Jan. 21, 2014), p. 1, **C-557**; Email thread between C. Hernández Ramos, J. Carreño, J. R. Moreno, J. M. Ramírez et al. re: PokerStars (Jan. 24 to Jan. 28, 2014), pp. 1-2, **C-558**.

[1651] Third José Ramón Moreno Statement, **CWS-63**, ¶ 18; Fourth Gordon Burr Statement, **CWS-59**, ¶ 54; Email thread between J. Carreño, J. R. Moreno, J. M. Ramírez et al. re: PokerStars (Jan. 14 to Jan. 21, 2014), p. 1, **C-557**; Email thread between C. Hernández Ramos, J. Carreño, J. R. Moreno, J. M. Ramírez et al. re: PokerStars (Jan. 24 to Jan. 28, 2014), pp. 1-2, **C-558**.

[1652] Third José Ramón Moreno Statement, **CWS-63**, ¶ 18; Fourth Gordon Burr Statement, **CWS-59**, ¶ 54; Email thread between J. Carreño, J. R. Moreno, J. M. Ramírez et al. re: PokerStars (Jan. 14 to Jan. 21, 2014), p. 1, **C-557**; Email thread between C. Hernández Ramos, J. Carreño, J. R. Moreno, J. M. Ramírez et al. re: PokerStars (Jan. 24 to Jan. 28, 2014), pp. 1-2, **C-558**.

[1653] Third José Ramón Moreno Statement, **CWS-63**, ¶ 18; E-mail thread between J. Carreño, J. R. Moreno, J. M. Ramírez et al. re: delivery dates for pending matters (Feb. 25 to Mar. 7, 2014), pp. 1-2, **C-559**.

shown that their Online Gaming Project not only *did* exist, but also was substantially developed enough to go live by July 2014. Again, by permanently shutting down Claimants' successful Casino business in April 2014, Mexico irrevocably thwarted the project.

B. Mexico's "Unclean Hands" Suggestion Must Fail

631. In its Counter-Memorial, Mexico suggests—for the first time—that the Claimants' claims may be defeated by application of the so-called "*manos limpias*" ("clean hands doctrine")—a concept that it does not even bother to fully define.[1654] Yet nowhere does Mexico actually assert that the Claimants' claims are defeated by application of that principle. Rather, it suggests that allegations made in a statement filed in an unrelated matter *may be* true and that, if they are true, they *may* suggest that there was illegality in the operation of the Claimants' investments.

632. Mexico's "clean hands" suggestion (it cannot be called a "claim," "defense," or "objection to jurisdiction") rests on one document, Exhibit R-75—an affidavit filed in unrelated proceedings by Claimant Randall Taylor ("**Mr. Taylor**"), who is an unreliable narrator who has readily admitted no personal knowledge of the underlying allegations.[1655] On the basis of this document, which is based on false information propagated by Messrs. Moreno Quijano and Chow, Mexico seeks to flip the burden to require that Claimants prove that they did not engage in illegal activity.

633. As explained below, Mexico bears the burden of proving the factual allegations that it invokes in support of such an objection and falls far short of that burden on any standard. Mexico argues that its mere suggestion of wrongdoing requires that Claimants disprove suspect allegations that are clearly false. Yet, even if Mexico's allegations were true (and as Claimants' witnesses unequivocally attest, they are not), Mexico could still not defeat the Claimants' claims because the

[1654] *See* Counter-Memorial, ¶¶ 863-880.

[1655] This statement was prepared by Reed Smith, Conflicts Counsel to the Claimants.

allegations relate neither to the making of the Claimants' investments, nor to the substantive breaches of the NAFTA by Mexico.

1. Mexico Cannot Meet Its Burden of Proof

634. With its "clean hands" suggestion, Mexico asks the Tribunal to infer what Mexico has failed to prove. It uses Exhibit R-75 to suggest that "*serious issues*"[1656]—but not illegality—occurred in the operation—but not the making—of the Claimants' investments. However, Mexico also admits that it cannot prove its wild allegations: "it is not possible for the Respondent to assess the veracity of these allegations."[1657]

635. This cannot excuse Mexico from satisfying its burden to prove the factual allegations on which it relies. Mexico's attempt to force the Claimants to carry Mexico's burden is unrecognized in international law. Moreover, even if such a rule could be said to exist, Mexico's arguments arising from Exhibit R-75 are demonstrably false and fall far short of any standard of proof under international law.

(a) Under International Law, Mexico Must Prove its Allegations with Clear and Convincing Evidence

636. Mexico's "clean hands" suggestion rests on a novel approach to the rules of evidence. Mexico claims that Exhibit R-75 is "circumstantial evidence" and that "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.'"[1658] Of course, that statement comes from no source (and Mexico cites none).

[1656] Counter-Memorial, ¶ 860.

[1657] Counter-Memorial, ¶ 861 ("*no es posible para la Demandada determinar la veracidad de estas alegaciones"*).

[1658] Counter-Memorial, ¶ 872 ("*[U]na vez que la Demandada haya aportado pruebas circunstanciales que demuestran que hubo 'banderas rojas' sobre la conducta de las Demandantes, se invierte la carga de la prueba y les corresponde a las Demandantes probar que conducta no estuvo manchada por ilegalidad o 'manos sucias'*").

637. Mexico cannot escape the reality that, in order to succeed on a claim of illegality or even simply "serious issues with respect to the conduct of the Claimants,"[1659] it must meet its standard of proof (in this case, clear and convincing evidence of its allegations). This is an established principle under international law and Mexico has not and simply cannot meet this standard.

638. *First*, under international law, each party has the burden of proving the facts on which it relies.[1660] The tribunal in *Metal Tech*, a decision on which Mexico itself relies, explains that the principle that "each party has the burden of proving the facts on which it relies is widely recognized and applied by international courts and tribunals" and is recognized "as a general principle of law."[1661] This is also true where a party claims illegality. As the *Quiborax* tribunal explained, "[T]he party alleging a breach of the legality requirement, *i.e.* the host State, bears the burden of proof," because "the burden of proof must naturally rest with the party alleging a breach of the legality requirement."[1662] Similarly, the *Gavrilovic* tribunal explained that "the Respondent bears the burden of proving illegality," since "the party making an allegation bears the burden of proving it."[1663]

639. Here, Mexico makes the very serious suggestion that its fanciful allegations arising from Exhibit R-75 *might be* true. It does not seek to evidence them, however, but simply suggests that submitting Exhibit R-75 is enough to put the Claimants to proof that they are false, which, as

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[1659] Counter-Memorial, ¶ 860 ("*[G]raves problemas en relación con la conducta de las Demandantes*").

[1660] Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals (first published 1953, CUP 2006), p. 327, **CL-280**.

[1661] *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (Oct. 4, 2013), ¶ 237 (emphasis added), **RL-077**.

[1662] *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction (Sept. 27, 2012), ¶ 259, **CL-281**.

[1663] *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award (July 26, 2018), ¶¶ 229-230, **CL-282**; *see also Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award (Aug. 31, 2018), ¶ 7.113 ("The legal burden of proving corruption rests upon the party alleging corruption; and it is not discharged by placing the burden on the adverse party to prove the absence of corruption."), **CL-283**.

explained below, they are. However, even if no evidence existed on record showing that its accusations arising from Exhibit R-75 were false, Mexico would still need to prove the allegations it makes. As the tribunal in *Ampal-American v. Egypt* explained, "whatever standard is applied, in all cases, the tribunals have concluded that they needed to be satisfied that, after having taken into account all of the evidence presented, the burden of proof had been met."[1664]

640. *Second*, Mexico must prove with "clear and convincing evidence" its suggestion that its fanciful accusations arising from Exhibit R-75 are not only true, but that they amount to illegal conduct. Illegality, in the words of numerous tribunals and scholars is a "very serious allegation" that requires not simply a preponderance of evidence or a balance of probabilities, but "clear and convincing evidence."[1665] The *Inceysa v. El Salvador* decision—on which Mexico also relies—confirms that this standard of proof applies where an allegation of illegality by the investor is made.[1666] The tribunal in that case relied on "clear and obvious evidence" that the investor "committed a chain of clearly illegal acts" in obtaining its investment.[1667] Similarly, the tribunal in *Hamester v. Ghana* rejected the respondent's allegation of illegality because there was "no conclusive evidence" that the investment would not have been made but for the alleged illegality.[1668] The tribunal held that it could "only decide [the illegality allegation] on substantiated

[1664] *Ampal-American and others v. Egypt*, ICSID, Decision on Jurisdiction (Feb. 1, 2016), ¶ 305 (emphasis added), **CL-284**.

[1665] Redfern, Hunter, Blackaby, and Partasides, Law and Practice of International Commercial Arbitration (n 10), p. 388, **CL-285**; O'Malley, Rules of Evidence in International Arbitration (n 12), 210–11, **CL-286**.

[1666] *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, CIADI Case, No. ARB/03/26, Award (Aug. 2, 2006), ¶ 244, **RL-073**.

[1667] *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, CIADI Case, No. ARB/03/26, Award (Aug. 2, 2006), ¶ 244, **RL-073**; *see Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award (Excerpts) (June 22, 2010), ¶ 194, **CL-287**.

[1668] *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, (June 18, 2010) ¶ 135, **CL-52**.

facts, and cannot base itself on inferences."[1669] Likewise, the *Quiborax* tribunal explained that the Respondent "must prove to the satisfaction of the Tribunal that the Claimants' investment breached the legality requirement."[1670]

641. *Third*, even where tribunals have found that "red flags" may provide probative evidence of illegality, they have not suggested that such evidence would allow a party to avoid meeting its evidentiary burden, much less shift the burden of proof to the other party. To be clear, Exhibit R-75 is not a red flag. As will be explained, Mexico's submission falls far short of the evidence of alleged illegality put before any tribunal before this one, both the majority of tribunals that have rejected allegations of illegality and the minority that have found the evidence before it sufficient to draw a conclusion of illegality.

642. In order to prevail even on a circumstantial or "red flags" standard of evidence, Mexico would need to present actual evidence indicative of illegality. In *Union Fenosa*, for example, the tribunal explained that "with a case dependent upon circumstantial evidence (as in the present case), it is often joining up the dots," but found, in that case, that "there are insufficient dots; and the red flags are outnumbered by neutral black flags."[1671] Similarly, the *Krederi* tribunal rejected allegations of illegality on basis of alleged red flags because they were "vague and unsubstantiated."[1672] Exhibit R-75 does not satisfy even that more lenient (and inapplicable) standard.

[1669] *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, (June 18, 2010) ¶ 134, **CL-52**.

[1670] *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, (Sept. 27, 2012), ¶ 262, **CL-281**.

[1671] *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award (Aug. 31, 2018), ¶ 7.114, **CL-283**.

[1672] *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award (July 2, 2018), ¶ 338, **RL-061**.

643. Here, Mexico's reliance on the *Metal-Tech* and *Glencore* cases (the only two on which it rests for any standard of proof) get it nowhere.

644. *First,* Mexico wrongly alleges that, in *Metal-Tech*, "the tribunal found that the circumstantial evidence submitted by the investor contributed to the finding of illegality and 'unclean hands.'"[1673] In reality, however, the tribunal did not resort to any burden-shifting as it found the evidence before it to be sufficient to determine any allegation of illegality ("the Tribunal finds that it does not require the application of the rules on burden of proof or presumptions to resolve the present dispute"[1674]).

645. *Second,* in *Glencore*, far from emphasizing "the importance of circumstantial evidence as indicia of 'unclean hands'" (or their ability to shift the burden of proof), the tribunal actually rejected an objection to jurisdiction based on illegality on grounds that "[i]n international law, the general principle is *actori incumbit probatio*: the party who alleges a certain fact has the burden to prove it" and that, as Colombia was alleging that the claimant had engaged in illegal conduct in making an investment, "it is for Colombia to marshal the appropriate evidence."[1675] Just as Mexico lacks any evidence in this case as to this "unclean hands suggestion," Colombia also lacked evidence and therefore its objection failed.

646. Yet, even where tribunals have referred to "red flags," they have not found that "red flags" lower the standard of proof or release a party from its burden of proving the allegations it makes. In *Union Fenosa*, for instance, the tribunal found that "even the reddest of red flags does not suffice

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[1673] Counter-Memorial, ¶ 878 (*"el tribunal determinó que las pruebas circunstanciales presentadas por el inversionista contribuyen a la conclusión de ilegalidad y 'manos sucias'."*).

[1674] *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (Oct. 4, 2013), ¶ 239 (emphasis added), **RL-077**.

[1675] *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award (Aug. 27, 2019), ¶ 668 (emphasis added), **RL-078**.

without proof of corruption before the tribunal. […] Suspicion is not equivalent to proof. Unanswered queries may have innocent explanations, not amounting (in the absence of explanations) to proof of corruption. […] The legal burden of proving corruption rests upon the party alleging corruption; and it is not discharged by placing the burden on the adverse party to prove the absence of corruption.[1676]

(b) Exhibit R-75, and Mexico's Arguments Arising from the Same, Are Far from Clear and Convincing Evidence—or Even Probative Circumstantial Evidence

647. Mexico's allegations fail under *any* standard of proof. As noted, Mexico's "clean hands" suggestion relies on assertions arising from a single exhibit, Exhibit R-75. As a preliminary matter, Mexico's allegations are wholly unsubstantiated. These allegations were never raised in the nine years the Casinos were open and as Mr. Burr explains, were raised for the first time—without any proof—over one year after the Casinos were closed, by parties intent on facilitating the sale of the Juegos Companies' assets for personal financial gain and trying to undermine the NAFTA Arbitration.[1677] The allegations were investigated by independent counsel, hired by Claimant John Conley, who did not report any irregularities.[1678] The allegations were also investigated by the B-Mex Companies and their counsel, who also found no irregularities.[1679]

648. The false allegations Mexico raises based on Exhibit R-75 derive from false information shared by Messrs. Chow and Moreno Quijano with Claimants John Conley and Daniel Rudden

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[1676] *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award (Aug. 31, 2018), ¶ 7.113 (emphasis added), **CL-283**.

[1677] Fourth Gordon Burr Statement, **CWS-59**, ¶ 55; Fourth Erin Burr Statement, **CWS-60**, ¶¶ 93-95; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 4-8.

[1678] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 63, 73; Fourth Erin Burr Statement, **CWS-60**, ¶ 119; Second Daniel Rudden Statement, **CWS-65**, ¶ 21; Second John Conley Statement, **CWS-70**, ¶ 18; Second Neil Ayervais Statement, **CWS-61**, ¶¶ 44-45.

[1679] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 63, 73; Fourth Erin Burr Statement, **CWS-60**, ¶ 119; Second Daniel Rudden Statement, **CWS-65**, ¶ 21; Second John Conley Statement, **CWS-70**, ¶ 18; Second Neil Ayervais Statement, **CWS-61**, ¶ 45.

over one year after Mexico illegally shut down the Casinos.[1680] Messrs. Chow and Moreno Quijano spread this disinformation in an attempt to divide the Claimant group, sabotage this NAFTA Arbitration, and reap as much profit as possible for themselves.[1681] Mr. Taylor subsequently further disseminated the false allegations to try to get a greater personal recovery in the NAFTA Arbitration for himself and when that was unsuccessful, to try to undermine the NAFTA Arbitration in retaliation.[1682] For their part, Messrs. Conley and Rudden have explained that they never had any personal knowledge of these allegations and only repeated the false information that had been conveyed to them by Messrs. Chow and Moreno Quijano. Messrs. Conley and Rudden have fully retracted and disavowed any suggestion that Claimants committed any illegality in their investment and have confirmed that to their knowledge, there was no illegality surrounding the Claimants' investments.[1683]

649. What is striking about Mexico's arguments, however, is that Mexico does not even allege any *evidence* of wrongdoing. Mexico, in reliance on Exhibit R-75, only declares that it has raised "accusations" of illegality, but does not attempt to substantiate the unsupported allegations therein. As Claimants' witnesses explain, Mexico's allegations are false. Moreover, Messrs. Moreno Quijano and Chow spread the allegations to Messrs. Conley and Rudden, in order to try to undermine the NAFTA Arbitration. Mr. Taylor then weaponized the allegations based upon a personal vendetta against Mr. and Ms. Burr, which ultimately resulted in Mexico's use of the document in this arbitration.[1684]

[1680] Second John Conley Statement, **CWS-70**, ¶ 9; Second Daniel Rudden Statement, **CWS-65**, ¶ 23.

[1681] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 63, 73; Fourth Erin Burr Statement, **CWS-60**, ¶ 135; Second Neil Ayerva is Statement, **CWS-61**, ¶ 48; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 176.

[1682] This statement was prepared by Reed Smith, Conflicts Counsel to the Claimants.

[1683] Second John Conley Statement, **CWS-70**, ¶¶ 10-11; Second Daniel Rudden Statement, **CWS-65**, ¶ 23.

[1684] This statement was prepared by Reed Smith, Conflicts Counsel to the Claimants.

650. Mexico's allegations ultimately derive only from two documents created by or under the direction of Mr. Moreno Quijano, both of which are demonstrably fraudulent.

651. "Summary of Out of the Books Amounts" ("**Fraudulent Document #1**"): Fraudulent Document #1 purports to show that certain cash was not recorded in the company's accounting records, and that payments were made to vendors either for services that were not performed or based on invoices that reflect inflated amounts beyond the value of the services that were actually performed. This document was purportedly created by Mr. Ventura, the Juegos Companies' Finance Director, but Mr. Ventura has confirmed, in a sworn statement, that he never prepared the document.[1685] Moreover, and importantly, Mr. Ventura does not even speak or write in English.[1686] An individual using Mr. Ventura's identity sent Fraudulent Document #1 to Mr. Conley on May 18, 2015, and then to Mr. Moreno Quijano minutes later.[1687] Mr. Moreno Quijano subsequently sent this document to a person ostensibly named "Bernie Walker" (email address wbernie1976@yahoo.com).[1688] All of Claimants' witnesses have affirmed that they are unaware of anyone who worked for the Casinos by the name of "Bernie Walker" or any name similar to this.[1689] At some point after Fraudulent Document #1 was sent to Mr. Conley, it was also shared with Mr. Rudden.[1690] Fraudulent Document #1 was sent to Ms. Burr in September 2016, by the

[1685] *See* J. Ventura Declaration (Oct. 6, 2016), ¶¶ 3-8, **C-442**; Fourth Gordon Burr Statement, **CWS-59**, ¶ 57; Fourth Erin Burr Statement, **CWS-60**, ¶ 101; Second Daniel Rudden Statement, **CWS-65**, ¶ 19; Second John Conley Statement, **CWS-70**, ¶ 16; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 149.

[1686] Fourth Gordon Burr Statement, **CWS-59**, ¶ 59; Fourth Erin Burr Statement, **CWS-60**, ¶ 102; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 102; Second Neil Ayervais Statement, **CWS-61**, ¶ 51.

[1687] Fourth Gordon Burr Statement, **CWS-59**, ¶ 59; Fourth Erin Burr Statement, **CWS-60**, ¶ 97; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 178; Second Neil Ayervais Statement, **CWS-61**, ¶ 49.

[1688] Summary of Out of the Books Amounts (Fraudulent Document #1) (Sept. 14, 2016), **C-440**.

[1689] Fourth Gordon Burr Statement, **CWS-59**, ¶ 67; Fourth Erin Burr Statement, **CWS-60**, ¶ 97; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 178.

[1690] Second Daniel Rudden Statement, **CWS-65**, ¶ 19.

"Bernie Walker" persona.[1691] When the document was sent to Ms. Burr, Mr. Burr had been speaking to Mr. Moreno Quijano by phone. Mr. Moreno Quijano told Mr. Burr he knew of Fraudulent Document #1 and that he would send it to Ms. Burr, but that it would come from an alias email address, specifically from a "Bernie Walker."[1692]

652. Besides the fact that the document was prepared in English by someone who does not even speak or write English, Fraudulent Document #1 is nonsensical on its face. The Juegos Companies were regularly audited by auditors approved by the Mexican government, and no irregularities (much less illegality) was found.[1693] Moreover, various of the allegations in the document are completely inaccurate. For example, the document asserts that amounts coming from table games were not properly reported.[1694] However, nearly all of the tables in the Casinos were managed electronically, meaning they did not have a dealer, were not even operated with cash, and were not manipulable.[1695] Similarly, with respect to the allegation that cash from sports book was not handled properly, the Juegos Companies did not even manage the sports book portion of the Casinos, as it was completely outsourced to and managed by a third-party company called BetCris.[1696] Additionally, all of the Casinos had an elaborate video surveillance system, so it would have been impossible for someone to siphon off cash without being noticed.[1697]

[1691] Fourth Gordon Burr Statement, **CWS-59**, ¶ 65; Fourth Erin Burr Statement, **CWS-60**, ¶ 99.

[1692] Fourth Gordon Burr Statement, **CWS-59**, ¶ 65; Fourth Erin Burr Statement, **CWS-60**, ¶ 99.

[1693] Fourth Gordon Burr Statement, **CWS-59**, ¶ 68; Fourth Erin Burr Statement, **CWS-60**, ¶ 103; Second Daniel Rudden Statement, **CWS-65**, ¶ 19; Second John Conley Statement, **CWS-70**, ¶ 16.

[1694] Fourth Gordon Burr Statement, **CWS-59**, ¶ 68; Fourth Erin Burr Statement, **CWS-60**, ¶ 104.

[1695] Fourth Gordon Burr Statement, **CWS-59**, ¶ 68; Fourth Erin Burr Statement, **CWS-60**, ¶ 104.

[1696] Fourth Gordon Burr Statement, **CWS-59**, ¶ 68; Fourth Erin Burr Statement, **CWS-60**, ¶ 105.

[1697] Fourth Gordon Burr Statement, **CWS-59**, ¶ 68; Fourth Erin Burr Statement, **CWS-60**, ¶ 105; Third José Ramón Moreno Statement, **CWS-63**, ¶ 28.

653. Thus, the Claimants' all evidence points to the conclusion Fraudulent Document #1 was created by Mr. Moreno Quijano, or those under his direction, acting under the alias of "Bernie Walker," to sow division among the B-Mex boards regarding the decision to pursue this NAFTA Arbitration.[1698]

654. Email from pekerroberts@gmail.com dated September 23, 2015 ("**Fraudulent Document #2**"): This email, which was sent to Mr. Rudden and Mr. Conley, purports to show that "GB" (presumably Gordon Burr) improperly removed money from the vaults to pay a "singer" at the Casinos.[1699] The document also references a singer's manager, and a singer's bodyguard named Antonino. The Claimants never knew anybody named "Peker Roberts" who worked for the Juegos Companies or the B-Mex Companies, and they are unfamiliar with this email address.[1700] More than one of Claimants' witnesses confirms, however, that "Peker Roberts" was another alias that Mr. Moreno Quijano used.[1701] However, Claimants' witnesses confirm Mr. Burr never removed money from the Casino vaults for any purpose, let alone to pay a singer or personnel working for her.[1702] As she confirms in her witness statement, Aneeka was paid hourly when she performed at the Casinos.[1703] This hourly wage was the only payment she received from the Juegos Companies,

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[1698] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 150; Fourth Gordon Burr Statement, **CWS-59**, ¶ 59; Fourth Erin Burr Statement, **CWS-60**, ¶ 115; Second Daniel Rudden Statement, **CWS-65**, ¶ 19; Second John Conley Statement, **CWS-70**, ¶ 16.

[1699] G. Burr Information from Arturo Velasco ("Fraudulent Document #2") (Sept. 23, 2015), **C-444**; Fourth Gordon Burr Statement, **CWS-59**, ¶ 60; Fourth Erin Burr Statement, **CWS-60**, ¶ 111; Second Daniel Rudden Statement, **CWS-65**, ¶ 20; Second John Conley Statement, **CWS-70**, ¶ 17.

[1700] Fourth Gordon Burr Statement, **CWS-59**, ¶ 60; Fourth Erin Burr Statement, **CWS-60**, ¶ 106; Second Daniel Rudden Statement, **CWS-65**, ¶ 20; Second John Conley Statement, **CWS-70**, ¶ 17; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 151.

[1701] Fourth Gordon Burr Statement, **CWS-59**, ¶ 72; Fourth Erin Burr Statement, **CWS-60**, ¶ 106; Second John Conley Statement, **CWS-70**, ¶ 18.

[1702] Fourth Gordon Burr Statement, **CWS-59**, ¶ 60; Fourth Erin Burr Statement, **CWS-60**, ¶ 107; Second Daniel Rudden Statement, **CWS-65**, ¶ 20; Second John Conley Statement, **CWS-70**, ¶ 17; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 151; Aneeka Statement, **CWS-71**, ¶ 9.

[1703] Aneeka Statement, **CWS-71**, ¶ 9; Fourth Gordon Burr Statement, **CWS-59**, ¶ 61; Fourth Erin Burr Statement, **CWS-60**, ¶ 111; Second Daniel Rudden Statement, **CWS-65**, ¶ 20; Second John Conley Statement, **CWS-70**, ¶ 17.

and she never received cash.[1704] To receive payment, she submitted invoices for the hours she performed at the Casinos, and was paid by direct transfer into her bank account.[1705] Given Aneeka's talent, Mr. Burr, Ms. Burr, and others, established and funded a limited liability company called EIG, LLC to help fund the advancement of Aneeka's singing career.[1706] Other Claimants, including Mr. Taylor, also provided funds to EIG.[1707] EIG negotiated a contract with Aneeka, and she was paid, via direct deposit with taxes removed, pursuant to the contract.[1708] EIG helped Aneeka hire a manager/agent named Miguel Trujillo who had previously worked for SONY's music division in Mexico, and EIG hired a bodyguard for Aneeka following a dangerous incident.[1709] However, Aneeka's bodyguard was named Giovanni, not Antonino, and neither he nor Aneeka was ever paid in cash.[1710] Rather, EIG paid Aneeka's manager and bodyguard by direct transfer.[1711] While Giovani also worked for the Casinos, EIG would pay directly for any

[1704] Aneeka Statement, **CWS-71**, ¶¶ 9, 16; Fourth Gordon Burr Statement, **CWS-59**, ¶ 61; Fourth Erin Burr Statement, **CWS-60**, ¶ 111; Second Daniel Rudden Statement, **CWS-65**, ¶ 20; Second John Conley Statement, **CWS-70**, ¶ 17.

[1705] Aneeka Statement, **CWS-71**, ¶¶ 10-11; Fourth Gordon Burr Statement, **CWS-59**, ¶ 61; Fourth Erin Burr Statement, **CWS-60**, ¶ 111; Second Daniel Rudden Statement, **CWS-65**, ¶ 20; Second John Conley Statement, **CWS-70**, ¶ 17.

[1706] EIG, LLC Articles of Organization (Jan. 24, 2011), **C-483**.

[1707] *See* K-1 for R. Taylor reflecting 20% ownership in EIG, LLC, **C-484**.

[1708] G. Burr Information from Arturo Velasco ("Fraudulent Document #2") (Sept. 23, 2015), **C-444**.

[1709] Aneeka Statement, **CWS-71**, ¶ 16; Fourth Gordon Burr Statement, **CWS-59**, ¶ 70; Fourth Erin Burr Statement, **CWS-60**, ¶ 113.

[1710] Aneeka Statement, **CWS-71**, ¶¶ 14-16; Fourth Gordon Burr Statement, **CWS-59**, ¶ 70; Fourth Erin Burr Statement, **CWS-60**, ¶ 113.

[1711] Aneeka Statement, **CWS-71**, ¶ 16; Fourth Gordon Burr Statement, **CWS-59**, ¶ 70; Fourth Erin Burr Statement, **CWS-60**, ¶ 113.

work he did for Aneeka.[1712] Thus, all evidence points to the conclusion that Fraudulent Document #2 also was created by Mr. Moreno Quijano in his attempt to sabotage this NAFTA Arbitration.[1713]

655. The appearance of Fraudulent Documents #1 and #2 coincided with key events related to Claimants' advancement of the NAFTA Arbitration: the initiation of discussions with Quinn Emanuel in May 2015[1714] (coinciding with Fraudulent Document #1) and an initial meeting between Mr. Orta, Mr. Gutiérrez, and the Claimants in September 2015[1715] (coinciding with Fraudulent Document #2). Moreover, Mr. Gutiérrez explains how, shortly after the meeting with the Claimants in Denver, Mr. Moreno Quijano, Mr. Gabriel Velasco, and three other Mexican shareholders of the Juegos Companies came to his office and threatened him with Fraudulent Document #1.[1716] They told him that they would sue Mr. Burr using the document if he did not abandon the NAFTA Arbitration.[1717] Mr. Moreno Quijano also explained that he stood to profit handsomely from an asset sale to Televisa and did not want the Claimants doing anything that could undermine his ability to profit from the asset sale.[1718]

656. The members of the B-Mex Companies' Boards discussed and investigated the allegations contained in these fraudulent documents in conjunction with counsel.[1719] This investigation, as

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[1712] Fourth Gordon Burr Statement, **CWS-59**, ¶ 70; Fourth Erin Burr Statement, **CWS-60**, ¶ 113.

[1713] Fourth Gordon Burr Statement, **CWS-59**, ¶ 60; Fourth Erin Burr Statement, **CWS-60**, ¶ 115; Second Daniel Rudden Statement, **CWS-65**, ¶ 20; Second John Conley Statement, **CWS-70**, ¶ 17; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 151.

[1714] Fourth Gordon Burr Statement, **CWS-59**, ¶ 59; Fourth Erin Burr Statement, **CWS-60**, ¶ 115.

[1715] *See* J. Gutiérrez Declaration (July 16, 2018), **C-441**.

[1716] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 150; Fourth Gordon Burr Statement, **CWS-59**, ¶ 65; Fourth Erin Burr Statement, **CWS-60**, ¶ 98.

[1717] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 150; Fourth Gordon Burr Statement, **CWS-59**, ¶ 65; Fourth Erin Burr Statement, **CWS-60**, ¶ 98.

[1718] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 160; Fourth Gordon Burr Statement, **CWS-59**, ¶ 65; Fourth Erin Burr Statement, **CWS-60**, ¶ 98.

[1719] Fourth Gordon Burr Statement, **CWS-59**, ¶ 62; Fourth Erin Burr Statement, **CWS-60**, ¶ 115; Second Daniel Rudden Statement, **CWS-65**, ¶ 21; Second John Conley Statement, **CWS-70**, ¶ 18.

well as the one that Mr. Conley's counsel initiated, did not reveal any evidence to confirm the allegations in these fraudulent documents.[1720]

657. Despite the fact that Mexico allowed Claimants' corporate records stored in the Naucalpan Casino to be destroyed in a fire in May 2017,[1721] Claimants' witnesses confirm that the allegations in Exhibit R-75, which largely are derivative of those in the Fraudulent Documents, are entirely false. To briefly recap, there was no evidence of embezzlement[1722] by managers nor any misuse of funds by managers.[1723] Any family members of managers on the payroll actually did work.[1724] Mr. Burr did not remove any funds from the vault; access to vaults was fingerprint-protected and required a special access card.[1725] Mr. Burr did not have access to the vaults.[1726] No cash was

[1720] Fourth Gordon Burr Statement, **CWS-59**, ¶ 62; Fourth Erin Burr Statement, **CWS-60**, ¶ 115; Second Daniel Rudden Statement, **CWS-65**, ¶ 21; Second John Conley Statement, **CWS-70**, ¶ 18.

[1721] *See* Claimants' Response to the Tribunal's Decision on Respondent's Document Requests (Oct. 31, 2017) (explaining that relevant records were destroyed in the fire); *Incendio en tela de juicio*. Retrieved from https://elinsurgente.mx/incendioentela-de-juicio/amp/, **C-119**; *Grupo Kash exige se investigue incendio de casino en Naucalpan* (May 15, 2017). Retrieved from https://noticiasenlamira.com/grupo-kash-exigeseinvestigue-incendio-casino-en-naucalpan/, **C-120**; Letter from Claimants in Response to the United Mexican States' Objection to Claimant's Request for Approval to Access the ICSID Additional Facility and Request for Arbitration (July 21, 2016), **C-121**.

[1722] Fourth Gordon Burr Statement, **CWS-59**, ¶ 41; Fourth Erin Burr Statement, **CWS-60**, ¶ 121; Second Daniel Rudden Statement, **CWS-65**, ¶ 24-25, Second John Conley Statement, **CWS-70**, ¶¶ 8-9; Second Neil Ayervais Statement, **CWS-61**, ¶ 56; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 134.

[1723] Fourth Gordon Burr Statement, **CWS-59**, ¶ 66; Fourth Erin Burr Statement, **CWS-60**, ¶ 122; Second Neil Ayervais Statement, **CWS-61**, ¶ 57; Second Daniel Rudden Statement, **CWS-65**, ¶¶ 24-25; Second John Conley Statement, **CWS-70**, ¶¶ 8-9.

[1724] Third José Ramón Moreno Statement, **CWS-63**, ¶ 30; Fourth Gordon Burr Statement, **CWS-59**, ¶ 43; Fourth Erin Burr Statement, **CWS-60**, ¶ 123; Second Neil Ayervais Statement, **CWS-61**, ¶ 58; Second Daniel Rudden Statement, **CWS-65**, ¶ 22; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 135.

[1725] Fourth Gordon Burr Statement, **CWS-59**, ¶ 44; Fourth Erin Burr Statement, **CWS-60**, ¶ 125; Third José Ramón Moreno Statement, **CWS-63**, ¶¶ 27-28; Second Neil Ayervais Statement, **CWS-61**, ¶ 53; Second Daniel Rudden Statement, **CWS-65**, ¶ 27; Second John Conley Statement, **CWS-70**, ¶¶ 12, 17; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 136.

[1726] Fourth Gordon Burr Statement, **CWS-59**, ¶ 68; Fourth Erin Burr Statement, **CWS-60**, ¶ 125; Third José Ramón Moreno Statement, **CWS-63**, ¶¶ 28-29; Second Neil Ayervais Statement, **CWS-61**, ¶ 53.

removed from the vault to pay millions of dollars to third parties without proper controls[1727] or to pay for construction projects;[1728] construction expenses came from the Mexican Enterprises' profits and was properly documented and recorded.[1729] No accounting records were removed from the vaults, nor could they have been because accounting records were not even kept in the vaults.[1730] There was no separate set of accounting records, only accounting records and books at the U.S. level and at the Mexican level.[1731] The U.S. and Mexican Enterprises' financials were audited annually both in Mexico and the U.S., and the auditors never raised any issues or concerns about the companies' accounting practices.[1732] Moreover, the Mexican Enterprises were audited annually by auditors approved by the Mexican Government.[1733] There was no improper payment or payola;[1734] all revenue was reported to the Mexican Government and taxes were properly

[1727] Third José Ramón Moreno Statement, **CWS-63**, ¶¶ 26-27; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 45-46; Fourth Erin Burr Statement, **CWS-60**, ¶ 128; Second Neil Ayervais Statement, **CWS-61**, ¶ 60; Second Daniel Rudden Statement, **CWS-65**, ¶¶ 34-35.

[1728] Fourth Gordon Burr Statement, **CWS-59**, ¶ 79; Fourth Erin Burr Statement, **CWS-60**, ¶ 128.

[1729] Fourth Gordon Burr Statement, **CWS-59**, ¶ 68; Fourth Erin Burr Statement, **CWS-60**, ¶ 128; Third José Ramón Moreno Statement, **CWS-63**, ¶ 28; Second Neil Ayervais Statement, **CWS-61**, ¶ 60; Second Daniel Rudden Statement, **CWS-65**, ¶ 23.

[1730] Third José Ramón Moreno Statement, **CWS-63**, ¶¶ 29, 32; First Patricio Chávez Statement, **CWS-54**, ¶¶ 19-20; Fourth Gordon Burr Statement, **CWS-59**, ¶ 47; Fourth Erin Burr Statement, **CWS-60**, ¶ 129; Second Neil Ayervais Statement, **CWS-61**, ¶ 61; Second Daniel Rudden Statement, **CWS-65**, ¶ 29; Second John Conley Statement, **CWS-70**, ¶¶ 8-9; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 137.

[1731] Fourth Gordon Burr Statement, **CWS-59**, ¶ 74; Fourth Erin Burr Statement, **CWS-60**, ¶ 132; Second Daniel Rudden Statement, **CWS-65**, ¶¶ 32-34; Third José Ramón Moreno Statement, **CWS-63**, ¶ 26; Second Neil Ayervais Statement, **CWS-61**, ¶ 62; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 26.

[1732] Third José Ramón Moreno Statement, **CWS-63**, ¶¶ 26-27; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 59, 65, 71, 74; Fourth Erin Burr Statement, **CWS-60**, ¶ 129; Second Neil Ayervais Statement, **CWS-61**, ¶ 62; Second Daniel Rudden Statement, **CWS-65**, ¶¶ 29, 33.

[1733] Second José Ramón Moreno Statement, **CWS-53**, ¶¶ 26-27; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 45-46, 48; Fourth Erin Burr Statement, **CWS-60**, ¶ 130; Second Neil Ayervais Statement, **CWS-61**, ¶ 61; Second Daniel Rudden Statement, **CWS-65**, ¶ 27-28; Fifth Julio Gutierrez Statement, **CWS-62**, ¶¶ 136-138.

[1734] Fourth Gordon Burr Statement, **CWS-59**, ¶ 75; Fourth Erin Burr Statement, **CWS-60**, ¶ 133.

paid.[1735] Cash was not commingled with company money.[1736] Notes were properly collateralized and issued by Mr. Burr—who had full authority to do so—in order to pay rent and other expenses.[1737] Neither Mr. Conley, Mr. Rudden, nor any Claimant conspired against the Claimants,[1738] and neither Mr. Conley nor any other Claimant stole gaming machines from the Casinos[1739] or worked to open competing Casinos with assets from the Claimants.[1740] Mr. Rudden did not defraud B-Mex investor Doug Moreland.[1741] In sum, the allegations of illegality in Exhibit R-75 are false and unsupported by any evidence whatsoever.

658. Putting the veracity of Mexico's allegations to one side, it is also abundantly clear that Mexico cannot meet its burden of proof on any standard.

659. *First*, the hollow accusations Mexico makes arising from Exhibit R-75 fall far short of "clear and convincing evidence." In *Inceysa*, for example, demonstrably false financial statements submitted with a tender,[1742] a "fully proven" falsehood in Inceysa's bid documents (in relation to

[1735] Second José Ramón Moreno Statement, **CWS-53**, ¶¶ 26-27; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 45-46, 48; Fourth Erin Burr Statement, **CWS-60**, ¶ 133; Second Neil Ayervais Statement, **CWS-61**, ¶ 61; Second Daniel Rudden Statement, **CWS-65**, ¶ 27-28; Fifth Julio Gutierrez Statement, **CWS-62**, ¶¶ 136-138.

[1736] Fourth Gordon Burr Statement, **CWS-59**, ¶ 75; Second Daniel Rudden Statement, **CWS-65**, ¶ 40.

[1737] Second John Conley Statement, **CWS-70**, ¶¶ 8-9; Fourth Gordon Burr Statement, **CWS-59**, ¶ 76; Fourth Erin Burr Statement, **CWS-60**, ¶ 134; Second Daniel Rudden Statement, **CWS-65**, ¶ 42; Second Neil Ayervais Statement, **CWS-61**, ¶ 63.

[1738] Fourth Gordon Burr Statement, **CWS-59**, ¶ 53; Fourth Erin Burr Statement, **CWS-60**, ¶ 135; Second Neil Ayervais Statement, **CWS-61**, ¶ 64; Second Daniel Rudden Statement, **CWS-65**, ¶ 39.

[1739] Second John Conley Statement, **CWS-70**, ¶¶ 8-9; Fourth Gordon Burr Statement, **CWS-59**, ¶ 78; Fourth Erin Burr Statement, **CWS-60**, ¶ 136; Second Neil Ayervais Statement, **CWS-61**, ¶ 65; Second Daniel Rudden Statement, **CWS-65**, ¶ 44.

[1740] Fourth Gordon Burr Statement, **CWS-59**, ¶ 79; Fourth Erin Burr Statement, **CWS-60**, ¶ 137; Second Neil Ayervais Statement, **CWS-61**, ¶ 66; Second Daniel Rudden Statement, **CWS-65**, ¶ 45; Second John Conley Statement, **CWS-70**, ¶¶ 8-9.

[1741] Fourth Gordon Burr Statement, **CWS-59**, ¶ 53; Fourth Erin Burr Statement, **CWS-60**, ¶ 89; Second Daniel Rudden Statement, **CWS-65**, ¶ 46; Second John Conley Statement, **CWS-70**, ¶¶ 8-9.

[1742] *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (Aug. 2, 2006), ¶¶ 103-110, **RL-073**.

its "strategic partner"),[1743] the "clearly proven" reality that a letter purporting to attest to a manager's credentials was a forgery,[1744] amongst others, were "clear and obvious evidence of the violations committed by Inceysa during the bidding process"[1745]—a far cry from the baseless and *ad hominem* accusations in an attachment to a document submitted by Mexico.

660. *Second*, Mexico cannot make out any illegality even on a "balance of probabilities." In the *Copper Mesa Mining* case, for example, the respondent suggested that the claimant's acquisition was "a 'classic case of tender-rigging'" given that the claimant was the only bidder in a tender for which its proposal was a "more ambitious more risky acquisition."[1746] The tribunal, however, found that such facts "could only allege that something possibly awry with the original tender," but even this allegation was "not proven on the evidence before this Tribunal."[1747]

661. In the *Ampal* case, the respondent alleged that the claimants' investment was procured by illegality because it was the result of a "long-standing relationship with the President of Egypt" and "friendship with government officials,"[1748] which resulted in a number of procedural illegalities in the tendering process (allegedly forged meeting minutes, violation of Egyptian law, and an unexplained salary of one employee[1749]). In that case, the tribunal found that "whether the

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[1743] *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (Aug. 2, 2006), ¶¶ 111-118, **RL-073**.

[1744] *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (Aug. 2, 2006), ¶¶ 119-122, **RL-073**.

[1745] *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (Aug. 2, 2006), ¶ 244, **RL-073**.

[1746] *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2 (UNCITRAL), Award (March 15, 2016), ¶ 1.86, **RL-090**.

[1747] *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2 (UNCITRAL), Award (March 15, 2016), ¶ 5.59, **RL-090**.

[1748] *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award (Aug. 31, 2018), ¶ 276, **CL-283**.

[1749] *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award (Aug. 31, 2018), ¶ 276-289, **CL-283**.

Tribunal applies a high standard of clear and convincing evidence or even a less demanding one or a combination thereof, in the circumstances, the Tribunal is not persuaded that the Claimants' investment was procured illegally" because the "Respondent's allegations are all based on innuendos."[1750] As noted above, the tribunal in *Hamester* echoed this conclusion: "The Tribunal can only decide on substantiated facts, and cannot base itself on inferences."[1751] Here, Mexico's unsubstantiated allegations do not even rise to the level of inferences.

662. *Third*, application of a "red flags" or circumstantial evidence standard leads to no different result. For starters, a set of vague, uncorroborated and unsubstantiated and accusations—without any evidence—are not "red flags." In the *Metal-Tech* case, on which Mexico relies, the "red flags" were substantiated facts:

> *(1) "an Adviser has a lack of experience in the sector;" (2) "non-residence of an Adviser in the country where the customer or the project is located;" (3) "no significant business presence of the Adviser within the country; (4) "an Adviser requests 'urgent' payments or unusually high commissions;" (5) "an Adviser requests payments be paid in cash, use of a corporate vehicle such as equity, or be paid in a third country, to a numbered bank account, or to some other person or entity;" (6) "an Adviser has a close personal/professional relationship to the government or customers that could improperly influence the customer's decision."*[1752]

663. In the present case, none of the allegations from R-75 has been substantiated (and in fact, Claimants have proved these allegations to be false). Likewise, in *Glencore* (relied upon by Mexico), the "red flags" were proven facts: that payment had been to a third party who was a former employee just before the assignment of a concession was registered and that knowledge of

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[1750] *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award (Aug. 31, 2018), ¶ 306, **CL-283**.

[1751] *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (June 18, 2010), ¶ 134, **CL-52**.

[1752] *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (Oct. 4, 2013), ¶ 293, **RL-077**.

this payment was restricted to top management.[1753] However, even these proven facts were not enough for the *Glencore* tribunal to infer any illegality.[1754]

664. Similarly, in the *Krederi* case, the tribunal held that the supposed "red flags"—the purchase price, speed, and other features of property transactions and individuals involved as well as failure to conduct adequate due diligence—were "vague and unsubstantiated" and not enough to prove unclean hands.[1755] Even the *Union Fenosa* tribunal, which found that "[c]ircumstantial evidence of corruption is as good as direct evidence in proving corruption,"[1756] also found that "a succession of inferences drawn from contemporary documentation"[1757] that the claimant obtained a concession through bribery failed because "there have first to be dots in the evidence adduced before the tribunal," but, in that case, there were "insufficient dots."[1758]

665. Moreover, in order to prove illegality, Mexico would actually need to show that its factual allegations, if proven, would amount to a breach of local law. In *Phoenix v. Czech Republic*, the tribunal dismissed an illegality defense because "[i]n the present case, there is no violation of a rule of the Czech Republic legal order, and not even of the principle of good faith as embodied in the national legal order."[1759] Yet, Mexico does not even show how any of its allegations could be

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[1753] *See Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award (Aug. 27, 2019), ¶¶ 676-722, **RL-078**.

[1754] *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award (Aug. 27, 2019), ¶ 723, **RL-078**.

[1755] *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award (July 2, 2018), ¶ 388, **RL-061**.

[1756] *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award (Aug. 31, 2018), ¶ 7.52, **CL-283**.

[1757] *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award (Aug. 31, 2018), ¶ 7.73, **CL-283**.

[1758] *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award (Aug. 31, 2018), ¶ 7.114, **CL-283**.

[1759] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (Apr. 15, 2009), ¶ 134, **RL-075**. *See also SAUR International v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability (June 6, 2012), ¶ 311, **CL-289**.

a violation of Mexican law, because none of those allegations is pled with sufficient detail to allow it to do so.

2. Even If Mexico's Allegations Arising from Exhibit R-75 Were True, They Could Not Defeat the Claimants' Claims

666. Beyond the factual flaws in Mexico's allegations, however, on the law, Mexico's argument is inchoate. Although it never claims to have made out any allegations of illegality (and could not), Mexico confusingly suggests that the Tribunal apply the "legality requirement," which, it says, is a manifestation of the "clean hands" doctrine, but also suggests that the Tribunal apply the "clean hands" doctrine itself, in order to defeat the Claimants' claims.[1760] Mexico did not even seek to identify the content of such an "illegality requirement" or the "clean hands" doctrine and never states on what basis these principles could defeat the Claimants' claims (*i.e.*, on jurisdiction, admissibility, or merits).

667. That approach is deeply flawed. As all of the sources on which Mexico relies confirm, only illegality in the "making" of an investment may lead to a finding that the Tribunal lacks jurisdiction or the Claimants' claims are inadmissible. Illegality may still be relevant on the merits, but only in so far as it could provide a defense to one of the Claimants' claims.

(d) The Sources that Mexico Relies Upon Confirm that at Best, Only Illegality in the Making of an Investment Can Defeat Claims on Grounds of Jurisdiction or Admissibility

668. Each and every one of the sources relied upon by Mexico refers to a defense of illegality in the making of an investment. Where such illegality is proven and a treaty expressly provides that an investment must be made in accordance with the laws of a State (which the NAFTA does not), a tribunal may find that it lacks jurisdiction or that the claims of the claimant are inadmissible.

[1760] Counter-Memorial, ¶ 864.

669. The *Hamester* tribunal found that "[a]n 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."[1761] The *Inceysa* tribunal explained that "the foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts."[1762] In *Plama*, the tribunal held that "the substantive protections of the ECT cannot apply to investments that are made contrary to law."[1763] The *Phoenix* tribunal explained that "States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws."[1764]

670. However, none of Mexico's allegations arising from Exhibit R-75 go to the making of an investment. They do not suggest, for example, that either the Claimants' independent permit or the independent operator authorization were illegal. Nor do they suggest that the Mexican Enterprises or the Casinos or any of the materials within them were obtained by corruption, fraud, bribery, or any other illegality. At best, they suggest that certain Claimants used the Mexican Companies to their personal benefit. Those allegations are unsupported, debunked by Claimants' witnesses, and simply false. Even if they were true, however, they could not make out a jurisdictional or admissibility defense on "illegality" grounds, which, in any event would be barred as the Tribunal has already decided on its jurisdiction.[1765]

[1761] *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (June 18, 2010), ¶ 123, **CL-52**. *See* Counter-Memorial, ¶ 865.

[1762] *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (Aug. 2, 2006), ¶ 242, **RL-073**. *See* Counter-Memorial, ¶ 866.

[1763] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (Aug. 27, 2008), ¶¶ 138-139, **RL-074**. *See* Counter-Memorial, ¶ 867.

[1764] *Phoenix Action, Ltd. v. The Czech Republic*, Caso CIADI No. ARB/06/5, Award (Apr. 15, 2009), ¶ 101, citing *Plama*, ¶¶ 138-139, **RL-075**. *See* Counter-Memorial, ¶ 869.

[1765] *See supra*, Section II.A.2.

(e) Illegality in the Operation of an Investment Can Act Only as a Defense

671. Mexico fails to explain in its vague and unsubstantiated allegations that, in order to succeed on its "clean hands" suggestion, Mexico would need to show that alleged illegality in the operation of the investment was a justification for an action that Mexico took.

672. In the *Yukos* case, for example, the tribunal found that it was "not persuaded that there exists a 'general principle of law recognized by civilized nations' within the meaning of Article 38(1)(c) of the ICJ Statute that would bar an investor from making a claim before an arbitral tribunal under an investment treaty because it has so-called 'unclean hands.'"[1766] It did find, however, that evidence of "unclean hands" "could have an impact on the Tribunal's assessment of liability and damages."[1767] Similarly, the *Quiborax* tribunal found that "[t]he extent that the Respondent's allegations refer to the operation or performance of the investment [. . .] they are not relevant to the ability of the BIT's substantive protections," but instead "matters which the Tribunal will address when determining whether the Respondent breached its BIT obligations."[1768]

673. In the present case, Mexico's allegations arising from Exhibit R-75 have nothing to do with any of Mexico's substantive defenses in this arbitration. Even if they were true (and they are not), these allegations could not provide a justification for Mexico's actions, nor could they defeat liability.

674. Thus, Mexico's suggestion of a "clean hands" objection fails. It does not specify the content of the "clean hands" doctrine or the basis on which the Claimants claims should be dismissed. In reality, Mexico's "clean hands" suggestion is nothing more than an attempt to cast

[1766] Counter-Memorial, ¶ 1358.

[1767] Counter-Memorial, ¶ 1358.

[1768] *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award (Sept. 16, 2015), ¶ 129, **CL-290**.

aspersions upon the Claimants and their witnesses. The Tribunal should not be moved by such unsupported and unparticularized accusations. These accusations are nothing more than a distraction from Mexico's unlawful conduct in this case.

IV. MEIXCO BREACHED ITS OBLIGATIONS UNDER THE NAFTA AND INTERNATIONAL LAW

A. Expropriation (Article 1110): Mexico Expropriated Claimants' Investments, Including the E-Games' Independent Permit

675. As Claimants explained in their Memorial, Mexico expropriated Claimants' investments through, *inter alia*, SEGOB's revocation of the November 16, 2012 Resolution granting the E-Games Independent Permit, culminating in the permanent closure of the Claimants' Casinos, and later made irreversible by Mexico's refusal of E-Games' new permit applications, and its permitting third parties to loot the Casinos. These actions permanently deprived Claimants of their investments in Mexico—their independent permit, their Casinos, the costly machines and other fixtures within the Casinos, their ability to obtain a different, new permit, and their gaming business in Mexico.

676. Claimants have shown that this expropriation was carried out for purely political and illegitimate reasons, not any legitimate or reasonable regulatory purpose, in a non-transparent manner, frustrating all of Claimants' legitimate expectations in relation to their gaming business in Mexico. This much is clear from *inter alia* (1) Ms. Salas' public threat to revoke the E-Games Independent Permit, calling it "illegal" just days after assuming her role as Director of the Games and Raffles Division; (2) SEGOB's *volte face* once the PRI party, including SEGOB's new head, Ms. Salas, came to power, whereby it sought at all costs to revoke the E-Games Independent Permit just months after it had approved the permit after confirming that Claimants met all of the legal and other requirements to obtain one; (3) the confirmations by SEGOB's former deputy Director, Mr. Ávila Mayo, and a competitor of E-Games that the incoming administration sought to revoke

the E-Games Independent Permit to favor domestic investors and punish a political enemy; and (4) the multiple examples of improper political influence in the revocation of the E-Games Independent Permit, including not only undue and improper influence over SEGOB's decisions but also over the those of the judiciary, rending Claimants' efforts to obtain justice within Mexico futile and meaningless.

677. Mexico's defense to Claimants' expropriation claim hinges on patent misapprehensions: "there was no expropriation because the measures that allegedly constitute an expropriation were adopted as a consequence of a judicial order" and the NAFTA "does not recognize the notion of 'judicial expropriation.'"[1769] Mexico adds that "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."[1770] All of these arguments fail.

678. In reality, nowhere in the Memorial on the Merits did Claimants suggest that the taking of their investments was merely a "consequence of a judicial order." Mexico's characterization of Claimants' argument in this fashion, and as a claim for "judicial expropriation," ignores the heavy involvement of SEGOB and political figures in the expropriation of Claimants' investments. To be clear, this case is *not* one in which Claimants have alleged that only actions of the judiciary resulted in the expropriation of their investments. There are illegal acts of the judiciary implicated, as Claimants have alleged and proven, but also acts by SEGOB, by the Office of President Peña

[1769] Counter-Memorial, ¶ 745.

[1770] Counter-Memorial, ¶ 747 ("*los precedentes en los que se basan las Demandantes son en gran medida irrelevantes para efectos de este procedimiento porque los tratados subyacentes en esas controversias contienen diferentes estándares de protección y no son compatibles con los principios generales aplicables*").

Nieto through his personal attorney, the federal police, and the federal tax authorities, among others.

679. In fact, as explained above, in the *Amparo* 1668/2011 proceeding, the legality of the November 16, 2012 Resolution was not even at issue, but SEGOB, through its August 28, 2013 Resolution, unlawfully introduced into, and invalidated the November 16, 2012 Resolution during, the enforcement stage of the *Amparo* 1668/2011 proceeding. That allowed SEGOB to unlawfully revoke the E-Games Independent Permit, based in part on SEGOB's incorrect (and contradictory) position that the E-Games Independent Permit legally flowed from E-Games' prior independent operator status and the May 27, 2009 Resolution that granted E-Games that status. SEGOB took that incorrect administrative action (i) to consummate a political payback to the Hank family, (ii) to strike back against supporters of the prior PAN administration as E-Games was viewed within the Peña Nieto administration as being allied with the PAN because E-Mex's owner was a known PAN supporter, and (iii) to further Mexico's own arbitrary, nontransparent, and nonformalized *executive*—not judicial—policy of not increasing the number of additional gaming permits, a policy that both the PAN and PRI parties informally pursued as a pretext to favor local, influential casino owners, such as the Hank family and Televisa. Mexico, astonishingly and helpfully for Claimants' liability case, admits that this informal policy existed and i) that this is why SEGOB did not grant E-Games its gaming permit for over a year and a half after it requested one to then belatedly grant the E-Games Independent Permit *only after* E-Mex formally declared bankruptcy.[1771]

680. SEGOB's astonishing, rapid, and unwarranted *volte face* in revoking the November 16, 2012 Resolution thus finds its basis in the new PRI administration's pre-ordained and politically-

[1771] *See* Counter-Memorial, ¶ 159; *supra* Sections II.J and K.

motivated desire to invalidate the E-Games Independent Permit—and not in "a judicial order," as Mexico alleges. SEGOB then permanently forced Claimants out of the Mexican gaming sector, destroying their investment, by shutting down their Casinos on April 24, 2014.

681. SEGOB undertook these closures in direct contravention of judicial orders and applicable Mexican law despite that E-Games, on September 2, 2013 had sought and obtained a judicial injunction barring the government, including SEGOB, 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.[1772] In other words, SEGOB was legally prevented from closing down the Casinos by virtue of "a judicial order," but nevertheless shut down Claimants' successful Casino business in Mexico, completely depriving them of all use, benefits, and enjoyment of Claimants' investments in Mexico. Thus, Mexico's argument that this is a case of a "judicial expropriation" defies reality.

682. The expropriation was consummated by (i) SEGOB's illegal invalidation of Claimants' permit, (ii) its illegal closure of Claimants' Casinos and refusal to allow them to reopen; (iii) its refusal to properly consider and grant Claimants' new request for a gaming permit in 2014; and (iv) its actions to prevent Claimants from selling its casino assets to others so as to mitigate its damages. The judiciary, who should then have been there to "right" this clear "wrong," failed to provide Claimants access to meaningful justice, through the gross irregularities that Claimants have alleged and proven that took place in the various judicial cases at issue, including not only the various instances of violations of due process, and blatant failures of the judiciary to apply Mexican law, but, importantly, by allowing its decisions to be dictated and influenced by corrupt actors (*e.g.*, E-Mex) and by political directives (*e.g.*, the influence exerted by the Peña Nieto

[1772] Injunctive Relief (Sept. 2, 2013), **C-299**.

administration). This is classic failure of a State to treat a foreign investor in accordance with accepted norms of public international law and a classic case of indirect expropriation.

683. As a matter of international law, Mexico cannot avoid liability by hiding behind the illegitimate and compromised acts of its judiciary. The involvement of the judiciary does not convert an expropriation into a "judicial expropriation." And in any event, as explained in Claimants' Memorial, expropriation can occur through judicial measures. Here, the Mexican judiciary—acting through compromised judges bent on executing a political vendetta—doubled down on the illegality of the expropriation consummated by Mexico's executive branch (namely, SEGOB), by unjustifiably rejecting E-Games' recourse against SEGOB's illegal recission of the November 16, 2012 Resolution and legitimizing the executive acts of the PRI administration that effectuated the complete destruction of Claimants' investments in Mexico.

684. Further, contrary to Mexico's assertion, the NAFTA *does* recognize the notion of "judicial expropriation."[1773] And to the extent that the concept of "judicial expropriation" is found applicable to the present case, Claimants have proven their claim and established Mexico's liability under Article 1110, as discussed in Section IV.A below.

1. Mexico, Acting Through SEGOB, Permanently Deprived Claimants of the Use and Economic Benefits of Their Investments

685. In their Memorial, Claimants demonstrated how Mexico's executive measures, implemented through SEGOB, were expropriatory by reference to the criteria set out under NAFTA Article 1110 and that such expropriation was unlawful.

[1773] *Eli Lilly & Co. v. Government of Canada* ("*Eli Lilly*"), ICSID Case No. UNCT/14/2, Final Award (Mar. 16, 2017), ¶ 221 ("[T]he judiciary is an organ of the State. Judicial acts will therefore in principle be attributable to the State by reference to uncontroversial principles of attribution under the law of State responsibility. As a matter of broad proposition, therefore, it is possible to contemplate circumstances in which a judicial act (or omission) may engage questions of expropriation under NAFTA Article 1110, such as, perhaps, in circumstances in which a judicial decision crystallizes a taking alleged to be contrary to NAFTA Article 1110."), **CL-112**.

686. In response, Mexico claims that SEGOB's acts and omissions may be excused because—in its view—they are simply "a consequence of a judicial order" and NAFTA does not recognize a concept of "judicial expropriation."[1774] As noted above, Mexico has it wrong. It cannot cloak this case with the "judicial expropriation" mantra. This ignores the actions and responsibility of SEGOB and of the lieutenants of President Peña Nieto that caused the expropriation of Claimants' investments, as Claimants have alleged and proven. It defies reality for Mexico to suggest that a series of acts and omissions of *SEGOB*—which Claimants have shown to be expropriatory and unlawful—are judicial measures that, according to Mexico, cannot amount to an expropriation under NAFTA Article 1110 as a matter of law. This is because there can be no doubt that SEGOB's acts and omissions at issue here are the acts and omissions of Mexico's executive and administrative organs, and they are the actions that caused the expropriation of Claimants' investments. Mexico appears to believe that these executive measures could be recast as judicial measures, if they supposedly are "a consequence of a judicial order."[1775] However, Mexico provides no authority for this absurd contention. Further, as discussed below, this argument rests on a false factual premise that SEGOB's acts and omissions—which substantially deprived Claimants of the use and economic benefits of their investments—were adopted as a result of and/or due to "a judicial order." That is not what occurred here, and Claimants have alleged and proven otherwise.

687. First, Mexico, acting through SEGOB, expropriated the E-Games Independent Permit when SEGOB revoked all resolutions granted in favor of E-Games, including the November 16, 2012 Resolution granting the E-Games Independent Permit, on August 28, 2013.

[1774] As discussed below in Section IV.A.3, actions or omissions by a State's judiciary, like the acts of any other State organ, can give rise to an expropriation.

[1775] Counter-Memorial, ¶ 745.

688. This was not "a consequence of a judicial order." It was the result of SEGOB's discretionary and unlawful actions, done in large part to further political objectives, paybacks and cronyism, and directly contradicting its own prior resolutions that it had granted in favor of E-Games. It was also the result of SEGOB's advancement of Mexico's now-admitted arbitrary, nontransparent, and nonformalized policy of not increasing the number of additional gaming permits so as to favor local casino benefactors who do not want the competition.

689. On August 26, 2013, the Sixteenth District Judge, Judge Gallardo, ordered SEGOB to revoke all resolutions that legally resulted from the May 27, 2009 Resolution (*i.e.*, which granted E-Games the status of Independent Operator on which E-Games no longer relied for operation of its Casinos).[1776] SEGOB seized on that decision (*importantly, a move that it had opposed in the Amparo 1668/2011 proceeding until the Peña Nieto administration took over*) to justify its already-formed decision to revoke the November 16, 2012 Resolution (granting the E-Games Independent Permit, on which E-Games *did* rely).

690. Judge Gallardo's August 26, 2013 Order, of course, did not require SEGOB to rescind the November 16, 2012 Resolution (E-Games' Independent Permit), nor did it even mention the November 16, 2012 Resolution. Rather, Judge Gallardo simply stated that "having revoked the [May 27, 2009 Resolution], [SEGOB] is also obligated to revoke any other action or actions issued as a result of [the May 27, 2009 Resolution]."[1777] As fully explained above at Section II.F, the November 16, 2012 Resolution was *not* issued as a result of the May 27, 2009 Resolution.[1778]

[1776] Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Aug. 26, 2013), **C-23**.

[1777] First Omar Guerrero Report, **CER-2**, ¶ 190; Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Aug. 26, 2013), **C-23** (emphasis added).

[1778] First Ezequiel González Matus Report , **CER-3**, ¶¶ 115.

691. Instead, by November 16, 2012, E-Games had independently complied with all of the requirements under Mexican law to become a permitholder, and therefore, obtained its Independent Permit from SEGOB through the November 16, 2012 Resolution. E-Games' prior status as an independent operator under E-Mex's permit (granted through the May 27, 2009 resolution) was, as Judge Gallardo himself put it, "not related in any way"[1779] to E-Games' more recent status as a permit holder of E-Games' Independent Permit (granted through the November 16, 2012 Resolution).[1780] Thus, SEGOB's decision to revoke the November 16, 2012 Resolution, and consequently, the E-Games Independent Permit, was unlawful, and, because it eliminated E-Games' authorization to operate its Casinos, expropriatory.

692. SEGOB's own internal and contemporaneous memoranda[1781] show that SEGOB's purported revocation of the November 16, 2012 Resolution was not the result of a "judicial order," as Mexico now argues. Rather, it was the result of SEGOB's own politically motivated desire, from the beginning of the PRI administration, to stop E-Games from operating in Mexico, allegedly because the E-Games Independent Permit was granted in an "irregular" manner at the end of the preceding PAN administration. These SEGOB memoranda produced by Mexico in this case also prove that SEGOB intended to use the courts to destroy Claimants' investments *before the legality of the E-Games Independent Permit* was even before the courts.

693. As explained above, during document production in this NAFTA Arbitration, Mexico produced an email and corresponding attachment from Ms. Rayo, a member of Mexico's legal team in this arbitration.[1782] The document appears to be notes that Ms. Rayo took during a meeting

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[1779] Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), **C-24** (emphasis added).

[1780] First Ezequiel González Matus Report , **CER-3**, ¶¶ 3, 136; Memorial; ¶¶ 178-181.

[1781] *See* Email from C. Rayo Zapata re: Meeting and Notes with M. Salas re: E-Games (Feb. 22, 2013), **C-401**;

[1782] Email from C. Rayo Zapata re: Meeting and Notes with M. Salas re: E-Games (Feb. 22, 2013), **C-401**.

with Ms. Salas on or around February 22, 2013, and then transmitted to herself from her personal Gmail to her work email on that date.[1783] The notes describe the history of E-Mex's permit and the granting of the E-Games Independent Permit. The notes also state that "*Exciting [E-Games] is in a proceeding before the court, if it declares that they were given irregularly, then they will be revoked*."[1784] That language mirrors Ms. Salas' then-recent statement to the press that E-Games Independent Permit was "illegal" and granted "irregularly."[1785]

694. However, at the time of that meeting February 2013, the legality of the E-Games Independent Permit was *not* a live legal question "before the [or any] court." While the November 16, 2012 Resolution was mentioned in the Second *Amparo* proceeding, *Amparo* 1151/2012, filed by E-Mex on December 18, 2012, that *amparo* initially challenged the lack of notice regarding the permits granted to E-Games and Producciones Moviles, and not the legality of the E-Games Independent Permit, as Mexico concedes in its Counter-Memorial.[1786] The November 16, 2012 Resolution was not incorporated and its legality was not challenged in that proceeding until March 20, 2013 (a month after the internal memorandum created by Ms. Rayo during her meeting with Ms. Salas), when the Second District Judge granted E-Mex's March 19, 2013 request to amend its request for *amparo* to include the Resolution;[1787] E-Games immediately appealed that order through *Recurso de Queja* 30/2013, arguing that the amendment was untimely.[1788] Accordingly,

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[1783] Email from C. Rayo Zapata re: Meeting and Notes with M. Salas re: E-Games (Feb. 22, 2013), **C-401**.

[1784] Email from C. Rayo Zapata re: Meeting and Notes with M. Salas re: E-Games (Feb. 22, 2013), **C-401** ("*Exciting* [E-Games] *Están en proceso ante juzgado, si declara que fueron dados de manera irregular van a ser revocados*.").

[1785] *Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón* (Jan. 27, 2013). Retrieved from http://www.jornada.unam.mx/2013/01/27/politica/013n1pol, **C-17**.

[1786] Counter-Memorial, ¶ 300; E-Mex Request for *Amparo* (Dec. 18, 2012), **C-273**.

[1787] Order of the Second District Judge accepting to process the filing of E-Mex's Amendment (Mar. 20, 2013), **C-293**; E-Mex Amendment (Mar. 19, 2013), **C-292**.

[1788] E-Games brief in *Recurso de Queja* 30/2013 (Mar. 5, 2013), **C-294**.

SEGOB's internal meeting notes of February 22, 2013 show that SEGOB intended that a court revoke the E-Games Independent Permit *before that permit was even under judicial review*. Thus, these notes contain an extraordinary admission of Mexico's intent (as conveyed by Ms. Salas) to destroy Claimants' investment.

695. SEGOB's next actions bore out this intent. Likely understanding that the First Collegiate Tribunal could agree with E-Games and find E-Mex's amendment inadmissible in the Second *Amparo* proceeding (which it did on October 17, 2013[1789]), SEGOB instead revoked the November 16, 2012 Resolution at the first opportunity on August 28, 2013 in response to Sixteenth District Judge Gallardo's August 26, 2013 Order in the First *Amparo* proceeding, *Amparo* 1668/2011—*where the November 16, 2012 Resolution had not been "before the court" at all*. As explained in the Memorial and herein, SEGOB completed this astonishing reversal of its own reasoning within 24 hours of being notified of Judge's Gallardo's Order, demonstrating its political and other nontransparent and illegitimate motivations to revoke the November 16, 2012 Resolution and E-Game's permit. That motivation was foreshadowed by Ms. Rayo's notes of her meeting with Ms. Salas from February 22, 2013, before the November 16, 2012 Resolution was "before the court" anywhere.

696. Subsequently, in September 2014, after Mexico had responded to Judge Gallardo's order in the amparo proceeding and issued its August 28, 2013 Resolution revoking the November 16, 2012 Resolution (thereby revoking E-Games' permit), and after it had illegally closed the Casinos and consummated the expropriation of Claimants' investments, SEGOB indicated again in an official internal memorandum that it had revoked the E-Games Independent Permit not due to "judicial orders," but rather: "The DGJS [Dirección General de Juegos y Sorteos, or the Games

[1789] Order of the *Primer Tribunal Colegiado en Materia Administrativa del Cuarto Circuito* (Oct. 17, 2013), **C-295**.

and Raffles Division] informed us that the Bis Permit [Claimants' independent permit] was canceled because it was a permit that had been irregularly granted at the end of the previous administration."[1790] *There is no mention at all of Judge Gallardo's order in that memorandum, nor that SEGOB revoked E-Game's permit because a court had required it to do so*. None. Thus, SEGOB's actions were not motivated by "judicial orders," but by SEGOB's consistent position from the beginning of the Peña Nieto administration that the E-Games Independent Permit was somehow "irregularly granted" and the Peña Nieto administration intended to and would put Claimants' out of business. In reality, as explained in the Memorial and herein, SEGOB's motivations for taking that unexplained position were political and corrupt.

697. SEGOB's incorrect assertion that the November 16, 2012 Resolution was issued a consequence of the May 27, 2009 Resolution was motivated by its predetermined decision to invalidate E-Games' permit for political and other nontransparent and improper reasons as admitted by SEGOB, noted in the immediately preceding paragraphs and elsewhere in this Reply. This is the only plausible explanation when one considers what SEGOB was saying in internal meetings, both before and after it issued the August 28, 2013 Resolution that invalidated E-Games' permit, as well as all of the over evidence that points to a decision by the Peña Nieto administration from its inception to declare Claimants' permit illegal and close their Casinos.

698. Mexico now contends that Claimants are incorrect to have included SEGOB's delay in granting a permit to E-Games pursuant to that policy in their explanation of Mexico's creeping expropriation of Claimants' investment.[1791] Mexico adds that Claimants have not shown why the PAN administration would have political motivations against Claimants (as the PRI administration

[1790] Memo E-Games, **C-261** ("*La DGJS nos comunicó que el Permiso Bis fue cancelado debido a que el mismo era un permiso que había sido otorgado al final de la administración anterior de manera irregular*.").

[1791] Counter-Memorial, ¶¶ 780-786.

did), and further argues that the delay in granting the permit until E-Mex's declaration of bankruptcy was consistent with Mexico's policy of limiting the number of Casinos.[1792]

699. Mexico's attempt to defend SEGOB's delay in granting the permit fails, because as Claimants explain herein, the executive/political policy in question was not a formally adopted public policy, but rather and arbitrary and nontransparent policy that lacked the necessary formalities of Mexican law and whose objective was illegitimate. Thus, Mexico's argument that the delay was consistent with that policy is tantamount to a concession that the delay was arbitrary and that this informal policy, nowhere written down or capable of being challenged judicially, without question negatively affected Claimants and their investment. Mexico has admitted the latter point. While that political, arbitrary, and nontransparent policy existed under the PAN administration, the PRI administration also seems to have relied on it, at least in part, to deny Claimant's request for a gaming permit in 2014. While that is not the stated reason for the denial of Claimants' request for a permit in 2014, it may have been part of the justification along with the obvious desire and decision by the Peña Nieto administration from its inception to declare Claimants' permit illegal, close their Casinos and prevent them from doing any further gaming business in the country. Thus, Mexico fails to rebut Claimants' showing that SEGOB's delay in issuing the permit, under this arbitrary policy, was part of Mexico's creeping expropriation of Claimants' investments that was consummated during the unlawful closure of the Casinos on April 24, 2014.

700. Moreover, in addition to the fact that the November 16, 2012 Resolution itself stated that it was independent and autonomous (and thus not one that resulted from the issuance of the earlier May 2009 Resolution, the November 16, 2012 Resolution could not be challenged in *any amparo*

[1792] Counter-Memorial, ¶¶ 780-786.

proceeding because it was an "implicitly consented act" under Mexican law, as later confirmed by the First Collegiate Tribunal in the *Amparo* 1151/2012 proceeding.[1793] Yet, SEGOB revoked the November 16, 2012 Resolution nonetheless—and again, astonishingly did so within just 24 hours of the August 26, 2013 Order, utilizing a reason that attributed to Judge Gallardo a ruling that he never made.[1794]

701. Contradicting its prior determination from November 2012, SEGOB claimed in its August 28, 2013 Resolution that (i) the November 16, 2012 Resolution was a consequence of the May 27, 2009 Resolution (which, in turn, recognized E-Games' "acquired rights," and thus granted E-Games the status of an independent operator under E-Mex's permit); (ii) Judge Gallardo had declared unconstitutional the doctrine of "acquired rights"; (iii) the November 16, 2012 Resolution was also based on the principle of "acquired rights"; and, (iv) the November resolution thus flowed from the May 2009 since both, according to SEGOB, were issued due to the doctrine of "acquired rights" and thus that the November resolution had to be nullified per Judge Gallardo's August 26, 2013 Order.[1795]

702. As explained above, following SEGOB's revocation of the November 16, 2012 Resolution, in an order dated October 17, 2013, the very judge (*i.e.*, Judge Gallardo) who ordered SEGOB to revoke all acts flowing from the May 27, 2009 Resolution explicitly stated that he never ruled the principle of "acquired rights" unconstitutional and that SEGOB had exceeded its authority and his order by nullifying the November 16, 2012 Resolution.[1796] Specifically, Judge Gallardo also ruled

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[1793] First Omar Guerrero Report, **CER-2**, ¶ 303; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 51; Order of the *Primer Tribunal Colegiado en Materia Administrativa del Cuarto Circuito* (Oct. 17, 2013), **C-295**.

[1794] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 59; First Omar Guerrero Report, **CER-2**, ¶¶ 162, 191, 312; SEGOB Resolution (Aug. 28, 2013), **C-289**.

[1795] SEGOB Resolution (Aug. 28, 2013), **C-289**.

[1796] Order of the *Primer Tribunal Colegiado en Materia Administrativa del Cuarto Circuito* (Oct. 17, 2013), **C-295**.

that the November 16, 2012 Resolution is "totally independent and autonomous and is not related in any way to the resolution declared unconstitutional [that is, the May 27, 2009 Resolution]."[1797]

703. Very oddly, in response to this reaction from Judge Gallardo, SEGOB did not budge and did not reinstate its November 16, 2012 Resolution, as one would expect any objective administrative agency to do when confronted with such a reaction and directive from a judge. Instead, it perplexingly insisted in the subsequent phase of the *Amparo* 1668/2011 proceeding that Judge Gallardo in fact struck down as unconstitutional the principle of "acquired rights" and that it thus was required to invalidate the November 2012 Resolution.[1798] This was directly contrary to what Judge Gallardo instructed SEGOB to do and to what he said was his ruling.

704. SEGOB also revoked the November 16, 2012 Resolution despite that it let Petolof—who secured the status of an independent operator on the basis of "acquired rights"—continue operating the casinos.[1799] It also did not revoke the permit of Producciones Móviles, who obtained its gaming permit under the same circumstances as E-Games.[1800] In this way, it acted inconsistently, and in a discriminatory fashion, allowing two Mexican-owned gaming companies to continue operating even though they were both in very like circumstances to E-Games.

705. In spite of the Judge Gallardo's October 13, 2013 order, stating that he did not rule the doctrine of "acquired rights" unconstitutional and did not intend for SEGOB to invalidate the November 16, 2012 Resolution, the Mexican appellate court rubber stamped SEGOB's recission of the November 16, 2012 Resolution. Unsatisfied with its results from Judge Gallardo, SEGOB sought and obtained an *ex-post* authorization for its act to improperly revoke the November 16,

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[1797] Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), **C-24** (emphasis added).

[1798] *See* supra ¶¶ 188-189; First Omar Guerrero Report, CER-2, ¶¶ 164, 191.

[1799] Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), **C-24**; Order of the *Suprema Corte de Justicia de la Nación* (May 6, 2014), **C-25**; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 96.

[1800] Memorial, ¶¶ 156-161.

2012 Resolution granting the E-Games Independent Permit from the Collegiate Tribunal.[1801] Specifically, the Collegiate Tribunal's February 19, 2014 Order retroactively and illegally legitimized SEGOB's revocation of the November 16, 2012, by finding that Judge Gallardo had ruled the doctrine of "acquired rights as unconstitutional" in the January 31, 2013 Order.[1802]

706. Again, this is striking and difficult to understand in the absence of the political and other improper motives that were fueling the actions of SEGOB and now the judiciary. The appellate court in essence told Judge Gallardo that he issued a ruling that he said he did not issue and on that basis, and that basis only, it ruled that SEGOB was right to nullify and revoke its November 16, 2012 resolution granting E-Games its independent gaming permit.

707. The Collegiate Tribunal's February 19, 2014 Order, however, is no excuse for SEGOB's conduct. Nor does that decision make SEGOB's revocation of the November 16, 2012 Resolution "a consequence of a judicial order." As explained, Judge Gallardo made clear that his January 31, 2013 and August 26, 2013 Orders neither required nor allowed SEGOB to rescind the November 16, 2012 Resolution. The Collegiate Tribunal's February 19, 2014 Order outright contradicts Judge Gallardo's interpretation of *his own decision* and amounts to an unlawful alteration of the terms and scope of the January 31, 2013 Order, which the Collegiate Tribunal could not do as a matter of law.[1803] Again, this gross miscarriage of justice and deviation from well-accepted norms of Mexican amparo law can only be explained by the illicit, political forces at play behind the scenes and being pursued by the Peña Nieto administration, including through Ms. Salas at SEGOB and the president's personal counsel.

[1801] Order of the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (Feb. 19, 2014), **C-290**.

[1802] First Omar Guerrero Report, **CER-2**, ¶ 200.

[1803] Memorial, ¶ 362.

708. Then, when the case reached the Supreme Court, the Supreme Court came under substantial political pressure from the highest levels of the Peña Nieto administration to stop hearing the case and to send it back to the very Collegiate Tribunal that had rendered the highly odd and illegal decision that rubber-stamped SEGOB's August 28, 2013 Resolution. This manifested itself in the *volte face* of the Supreme Court when it dismissed E-Games' appeal on procedural grounds, even though it agreed to hear the merits of the dispute and had been reviewing the merits of the dispute for months.[1804] As Mr. Gutierrez notes, this is highly irregular and does not happen normally.[1805]

709. If this was not enough, José Luis Caballero, the judge hearing that case on remand from the Supreme Court, had already expressed his unambiguous opposition to new gaming permits and professed to fear for his job if he did not rule in favor of the PRI administration's position.[1806] This meant that Claimants were deprived of their ability to further appeal these highly irregular and illegal rulings based on the illegal intervention into the Supreme Court case by the Peña Nieto administration. As noted *infra*, these and other facts also amounted to a denial of justice for Claimants.

710. As a result, the E-Games Independent Permit stands revoked to this date, their Casinos closed, and Claimants were unable to obtain any form of justice from the Mexican judiciary. Yet, the fact that various judicial decisions rendered in the *Amparo* 1668/2011 proceeding ultimately provided the *post-hoc* cover for SEGOB's illegal revocation of the November 16, 2012 Resolution hardly makes said act by SEGOB a mere "consequence of a judicial order."[1807] Instead, as shown above, the PRI-controlled SEGOB injected itself into the enforcement stage of the *Amparo*

[1804] See *supra*, ¶¶ 226-231, 239; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶¶ 153.

[1805] See *supra*, ¶ 239; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 153.

[1806] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 102.

[1807] Counter-Memorial, ¶ 745.

1668/2011 proceeding to achieve an unlawful invalidation of the E-Games Independent Permit, an outcome pre-determined by the PRI administration from its onset for reasons unrelated to the legal validity of the E-Games Independent Permit, and premised in part on political paybacks to PRI supporters, in part to a political vendetta against supporters of the PAN administration, and in part on Mexico's arbitrary and nontransparent executive policy of limiting and not increasing the number of gaming permits. Again, even before the issuance of the January 31, 2013 Order, which SEGOB incorrectly and falsely asserted that it was fulfilling when revoking November 16, 2012 Resolution on August 28, 2013, Mr. Salas declared publicly that the E-Games Independent Permit was "illegal."[1808] Clearly, SEGOB's revocation of the November 16, 2012 Resolution was an act of its own volition, inspired by dark motivations, that was neither required nor authorized by any of Mexican court's decisions in place at the time. Again, SEGOB has admitted this in internal memoranda as noted above.

711. Second, although E-Games was in the process of challenging SEGOB's August 28, 2013 revocation of the November 16, 2012 Resolution and had even obtained an injunction that expressly prohibited SEGOB from taking any further damaging actions against E-Games or the E-Games Independent Permit, SEGOB moved on April 24, 2014 to illegally close the Casinos, depriving all economic value of Claimants' investments in Mexico, including, among others, the Casinos, Expansion Projects, gaming machines and all other assets that Claimants owned for their Casino operations, and Claimants' shares in the Mexican Enterprises. While Mexico argues that the closure resulted from routine inspections,[1809] the inspections were far from regular and instead

[1808] *Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón* (Jan. 27, 2013). Retrieved from http://www.jornada.unam.mx/2013/01/27/politica/013n1pol, **C-17**.

[1809] Counter-Memorial, ¶ 308.

reflected SEGOB's pre-ordained intention to drive Claimants out of the Mexican gaming market, once and for all.

712. First, SEGOB sent a large police force in clear breach of the strict limitations on the use of police force under Mexican law.[1810] Claimants' witnesses also explain that this military-style operation was nothing like any normal inspection they had experienced and that SEGOB had arrived at the Casinos with orders to close them down.[1811] In fact, documentary evidence from SEGOB undoubtedly confirms that SEGOB visited the Casinos on April 24, 2014 to shut them down completely, and not to carry out a routine inspection as Mexico now tries to allege in its Counter-Memorial.[1812] More specifically, the verification orders issued by SEGOB on or about April 23, 2014 expressly instructed SEGOB officials "to proceed with the closures accordingly."[1813] Further, another internal document from SEGOB unequivocally reveals that SEGOB's plan for April 24, 2014 was to "suspend immediately all activities and close down the establishment."[1814] As explained in Section II.M.1.a above, this internal document also instructs SEGOB officials to refer to the E-Games Independent Permit as a Resolution (*oficio*) and not a permit, [1815] which coincidentally is what Mexico has been doing in the present proceeding.

[1810] Second Ezequiel González Matus Report, **CER-6**, ¶ 176.

[1811] Second Patricio Chávez Statement, **CWS-65**, ¶ 11; Second Héctor Ruiz Statement, **CWS-66**, ¶ 15; First Patricio Chávez Statement, **CWS-54**, ¶ 33.

[1812] Counter-Memorial, ¶¶ 315–316.

[1813] SEGOB Verification Orders instructing SEGOB Officials to Close Down Claimants' Casinos (April 23, 2014), **C-402** ("*proceder a la clausura correspondiente*"); Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 104.

[1814] SEGOB Internal Document: Steps to Follow by SEGOB Officials for Closing Down Claimants' Casinos, Case File AJP-0067-2014-VII, San Jerónimo, Mexico City Casino, **C-403**.

[1815] SEGOB Internal Document: Steps to Follow by SEGOB Officials for Closing Down Claimants' Casinos, Case File AJP-0067-2014-VII, San Jerónimo, Mexico City Casino, **C-403**; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 106.

713. Second, the Inspection Orders contained a number of flaws including the failure to identify the name of the company it planned to inspect/close down.[1816] In fact, Messrs. Chávez, Ruiz, and Galván all confirmed that the inspection or closure orders were directed at E-Mex, not E-Games.[1817] Mexico admits this flaw, by acknowledging that SEGOB's Inspection Orders for the five Casinos and the Temporary Location in Huixquilucan did not "reference the name of the company to which the establishments belong."[1818] This was in plain violation of the Gaming Regulation, which requires SEGOB to provide the name of the company on an inspection order.[1819]

714. Third, and as explained at Section II.M.2 above, the certificates of inspection addressed at E-Games contained no date, no indication of whether the Inspection Orders were produced at the time of the closures, and no witness signatures,[1820] even though SEGOB would have been required to provide such information on the certificates of inspection under the Federal Gaming Law and the Gaming Regulation.[1821]

715. Mexico also alleges that the closures of the Casino were a consequence of a judicial order, by referencing the Sixteenth District Judge's March 10, 2014 Order. This is flat wrong. As explained above at Section II.L.4.a, in this decision, the Sixteenth District Judge, Judge Gallardo, confirmed that SEGOB had fulfilled his January 31, 2013 Order following the Collegiate Tribunal's February 19, 2014 Order, which retroactively legitimized SEGOB's recission of the

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[1816] Memorial, ¶¶ 390–392.

[1817] Memorial, ¶¶ 390–392.

[1818] Counter-Memorial, ¶ 315 ("*Las órdenes no hacen referencia al nombre de la empresa a la que pertenecen los establecimientos, sólo indican la dirección en la que deben de presentarse los inspectores comisionados para realizar la inspección.*").

[1819] Second Ezequiel González Matus Report, **CER-6**, ¶ 185; 2004 Gaming Regulation, Article 145, **CL-72**.

[1820] *See* Second Ezequiel González Matus Report, **CER-6**, ¶¶ 192–196; Certificate of Inspection Mexico City Casino (Apr. 24, 2014), **C-300**; Certificate of Inspection Cuernavaca Casino (Apr. 24, 2014), **C-301**; Certificate of Inspection Puebla Casino (Apr. 24, 2014), **C-302**; Certificate of Inspection Naucalpan Casino (Apr. 24, 2014), **C-303**; Certificate of Inspection Villahermosa Casino (Apr. 24, 2014), **C-304**.

[1821] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 173–174.

November 16, 2012 Resolution. The order says nothing about closing the Casinos, much less that SEGOB should do so in violation of another judicial order that precluded SEGOB from taking any action, including closing the Casinos, that altered the Claimants' gaming operations.

716. The facts of this case prove otherwise. As explained at Section II.M.3 above, in closing down the Casinos, SEGOB entirely disregarded (1) that E-Games had obtained an injunction explicitly preventing SEGOB from acting against E-Games or the E-Games Independent Permit pending a final resolution of the *Amparo* 1668/2011 proceeding,[1822] and (2) Mexican law provides that pending a final resolution of the case, the relevant authorities—here SEGOB—cannot act to the detriment of any of the parties.[1823] Thus, SEGOB was acting in defiance of a court order and Mexican law, and not in observance of its legal "duty," as Mexico incorrectly asserts.[1824]

717. Mexico further claims that given Claimants had applied for new permits in early April of 2014 (thus prior to the closures of the Casinos), Claimants would have known that there were no "legal impediments (for example, a standing judicial order") for the closure of the Casinos."[1825] This is absurd. As Claimants previously explained, E-Games' applications for new permits were nothing less than its good faith attempt to fix the unravelling situation.[1826] As a matter of fact, SEGOB requested a revocation of the injunction from the Second Regional Chamber on May 14, 2014 (nearly a month after the closure of the Casinos).[1827] Why did SEGOB have to ask for the

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[1822] *See supra* Section II.M.3.a; *see also* Injunctive Relief (Sept. 2, 2013), **C-299**.

[1823] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 70.

[1824] Counter-Memorial, ¶ 788.

[1825] Counter-Memorial, ¶ 789.

[1826] Memorial, ¶ 437.

[1827] Second Ezequiel González Matus Report, **CER-6**, ¶ 204 Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 112; *Oficio* UGAJ/DGC/433/2014, *del 14 de mayo de 2014*, **R-063**; *Resolución del 22 de septiembre de 2014 de Segunda Sala Regional Hidalgo-México del Tribunal Federal de Justicia Fiscal y Administrativa en el expediente* 4635/13-11-02-3-OT, **R-061**; Counter-Memorial, ¶ 335.

revocation of the injunction expressly preventing it from taking any further action against E-Games or its permit, if there was no legal impediment in the first place for the closures of Casinos? The answer is evident.

718. In these circumstances, Mexico's justification for the unlawful closures of the Casinos is simply wrong.[1828] And through SEGOB's closures of the Casinos on April 24, 2014, Mexico rendered Claimants' operations and investments in Mexico entirely valueless, thereby consummating the complete expropriation of Claimants' investments.

719. As if the above expropriatory measures were not enough, SEGOB engaged in further unlawful acts to ensure that Claimants remained deprived of the use, enjoyment, and disposal of their investments in Mexico. In particular, SEGOB's refusal to issue a new permit for E-Games—based on irrational, non-transparent, arbitrary, and discriminatory grounds—confirmed that E-Games would never be able to operate another casino in Mexico again. Additionally, while the Casinos were under its custody, SEGOB prevented E-Games from accessing the Casinos and allowed third parties to loot the Casino's valuable hardware, like its gaming machines. There was no justification for this. While SEGOB claimed that it was returning the buildings to their owners, that action further destroyed Claimants' investments, because SEGOB failed to notify E-Games as required by law because E-Games was an interested party with a property interest in the facilities,[1829] and then improperly transferred the Casinos to third parties.[1830] This allowed others to steal many of Claimants' gaming machines and further resulted in a fire in one of the Casinos that further destroyed some of Claimants' property.

[1828] Counter-Memorial, ¶ 788.

[1829] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 236-239.

[1830] *Infra*, ¶¶ 236-239.

720. Against this background, Mexico's attempt to characterize Claimants' expropriation claim as an impermissible "judicial expropriation" claim[1831] does not hold water. Notably, while erroneously contending that the above-described acts of SEGOB were adopted "as a consequence of a judicial order," Mexico does not dispute the expropriatory nature of those measures—*i.e.*, that these measures led to the substantial deprivation of the value of Claimants' investments in Mexico. Mexico's concession to this effect is not surprising, because Mexico, through a series of acts implemented by SEGOB, completely shut down Claimants' Casino business in Mexico and further ensured that the Casinos remain closed to this date and that Claimants never retrieve valuable assets located in their Casino facilities.

721. Arbitral jurisprudence, as discussed below, also confirms that the executive measures adopted by SEGOB, both individually and as a whole, sufficiently amount to an expropriation, which under NAFTA's Article 1110 can become lawful only upon the satisfaction of the four cumulative requirements.

722. First, the taking of the E-Games Independent Permit was alone sufficient to make out an expropriation under international law. In the words of the *Stans Energy* tribunal, "the decisions of state bodies by which the licenses are directly or indirectly withdrawn and the permits are cancelled which are necessary for a foreign investor to do business in the territory of the state shall be considered as expropriation."[1832] Similarly, the tribunal in *Crystallex v. Venezuela* found that Venezuela's denial of an environmental permit for the claimant's mining activities—coupled with

[1831] Counter-Memorial, ¶¶ 745-748.

[1832] *Stans Energy Corp. and Kutisay Mining LLC v. Kyrgyz Republic (I)*, MCCI Case No. A-2013/29, Award (June 30, 2014), ¶ 442, **CL-291**.

the statements of government officials, who (like Ms. Salas) directly targeted the claimant—was an expropriation.[1833]

723. Recently, a tribunal in the case of *Casinos Austria* found that Argentina breached its obligations under the Argentina-Austria BIT when a state-level gaming regulator revoked the license of a local company owned by an Austrian investor.[1834] The tribunal found that the state-level regulator took advantage of "manifestly ill-conceived and arbitrary interpretations and applications of the regulatory framework in place" to create a pretext to revoke the local company's license.[1835] According to the *Casinos Austria* tribunal, Argentina's revocation of the permit was clearly disproportionate and thus constituted an expropriation under the treaty.[1836] The *Casinos Austria* case is a telling example of how the revocation of a gaming permit can breach a State's international obligations.

724. In this case, however, Mexico's actions went far beyond the actions of the Argentinian state regulator. Unlike in the *Casinos Austria* case, where the tribunal found there was no evidence of political influence, the political influence of the highest levels of the Mexican government is evident in this case. Likewise, while the Argentinian state regulator's actions were only "disproportionate," but nonetheless legal under Argentinian law, SEGOB's actions were clearly illegal under international law *and* Mexican law (as they were taken contrary to the decisions of Mexican courts, such as the injunction not to close the Casinos and the decisions finding the November 16, 2012 Resolution legal), and contrary to the requirements of the gaming law and the

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[1833] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (Apr. 4, 2016), ¶ 683, **CL-95**.

[1834] *Casinos Austria International GmbH and Casinos Austria Akitiengesellschaft v. Argentine Republic* ("*Casinos Austria*"), ICSID Case No. ARB/14/32, Award (Nov. 5, 2021), **CL-292**.

[1835] *Casinos Austria*, Award, ¶ 400, **CL-292**.

[1836] *Casinos Austria*, Award, ¶ 415, **CL-292**.

Mexican constitution with sundry instances of due process violations. As but one example, canceling the Claimants' permit based on unspecified grounds of a supposed "irregularities" leading to its issuance *without* disclosing these supposed grounds to Claimants and *without* providing them with an opportunity to be heard on such a transcendental issue is illegal under anyone's conception of proper process in any country of this globe.

725. Second, Mexico shut down the Casinos, prevented Claimants from accessing them, and permitted the looting of casino hardware. This too was a clear taking under international law. In the *Wena Hotels* case, for example, a tribunal had "no difficulty finding that" a State had "deprived [the investor, a hotel company] of its 'fundamental rights of ownership' by allowing [a third party] forcibly to seize the hotels, to possess them illegally for nearly a year, and to return the hotels stripped of much of their furniture and fixtures."[1837] Similarly, in the *Abou Lahoud* case, a tribunal found that looting allowed by the State deprived the claimants of any chance to conduct their business under regular conditions and therefore had to stop their activities.[1838]

726. Third, SEGOB's refusal to grant a new permit, again based on arbitrary, nontransparent, political, and discriminatory grounds, effectively prevented Claimants from continuing to operate in Mexico. In *Tecmed*, for example, Mexico's decision to deny an environmental permit to a landfill project was considered an expropriation because the opposition of local groups to the landfill was not a sufficient reason to destroy the economic value of the claimants' investment.[1839]

[1837] *Wena Hotels Ltd. v. Arab Republic of Egypt* ("*Wena Hotels*"), ICSID Case No. ARB/98/499, Award (Dec. 8, 2000), ¶ 99, **CL-293**.

[1838] *Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v. Democratic Republic of the Congo*, ICSID Case No. ARB/10/4, Award (Feb. 7, 2014), ¶¶ 502, 504, **CL-294**.

[1839] *Tecmed*, Award, **CL-84**, ¶ 113 ("Those events—not related to the transportation and discharge of Alco Pacífico's waste by Cytrar—which constitute material evidence of the opposition put up by community entities and associations to the Landfill or its operation by Cytrar, do not give rise, in the opinion of the Arbitral Tribunal, to a serious urgent situation, crisis, need or social emergency that, weighed against the deprivation or neutralization of the economic or commercial value of the Claimant's investment, permits reaching the conclusion that the Resolution did not amount to an expropriation under the Agreement and international law").

727. Finally, all of SEGOB's discriminatory and improper actions rendered Claimants' investments in the Casinos worthless. Numerous arbitral tribunals have held that a State may expropriate a company by depriving it of any commercial use or rendering shares in it worthless. In *Pope & Talbot*, for example, a NAFTA tribunal found that "[r]egulations can indeed be characterized in a way that would constitute creeping expropriation . . . . Indeed, much creeping expropriation could be conducted by regulation, and a blanket exception for regulatory measures would create a gaping loophole in international protection against expropriation."[1840] As the NAFTA tribunal in *SD Myers* established, it is not necessary that the investor be deprived of its proprietary rights for an expropriation to occur: "[a]n expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights although it may be that, in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if it were partial or temporary."[1841] Thus, for example, in the *CME* case, a tribunal concluded that the State had expropriated an investment where its actions left the investor's local company "as a company with assets, but without business."[1842]

728. In short, Mexico executed the expropriation of Claimants' investments, including the E-Games Independent Permit, the Claimants' Casinos, and their ability to operate them, through its administrative and regulatory functions. In each of these actions, SEGOB acted in its full discretion—without any court order with which it was "forced" to comply. Mexico does not substantively address Claimants' arguments to this effect. As demonstrated above, Mexico's suggestion that the various ways in which it substantially deprived Claimants of their investments were simply "a consequence of a judicial order" is absurd and contrary to the facts of the case.

[1840] *Pope & Talbot, Inc. v. Canada ("Pope & Talbot")*, UNCITRAL, Interim Award (June 26, 2000), ¶ 99, **CL-85**.

[1841] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (Nov. 13, 2000), ¶ 283, **CL-30**.

[1842] *CME*, Partial Award, ¶ 591, **CL-108**.

2. Mexico's Expropriation Was Illegal

729. Just as Mexico cannot rebut Claimants showing that it expropriated Claimants' investments, so too does it fail to rebut that the expropriation was illegal. In order to be considered legal under Article 1110, an expropriation must be (1) for a public purpose, (2) on a non-discriminatory basis, (3) in accordance with due process and Article 1105(1) of the NAFTA (*i.e.*, "in accordance with international law, including fair and equitable treatment and full protection and security"), and (4) on payment of compensation in accordance with NAFTA Article 1110. As Claimants explained in their Memorial on the Merits and explain further herein, Mexico did not fulfill *any* of these conditions.

(a) Mexico's Expropriation Was Not for a Public Purpose

730. Having staked its argument on the incorrect assertion that the Tribunal should not find a "judicial expropriation," Mexico hardly attempts to argue that Mexico's expropriation of Claimants' investments was for a public purpose. It was not for a public purpose.

731. Claimants have shown that the explanation for Mexico's expropriation of Claimants' investments was the PRI administration's political motivations and desires to favor its allies, including paying back the Hank family for its support to the president's political campaign. President Peña Nieto's appointee to lead SEGOB, Ms. Salas (who had no prior experience in the gaming industry), openly called the E-Games Independent Permit illegal within days of assuming her role—with little more by way of explanation than the suggestion that the permit was linked to the prior Government.[1843] Ms. Salas (along with two other SEGOB officials) has now submitted a witness statement in this arbitration in which she disavows any political impetus for her

[1843] S*ee supra* ¶ 114.

regulatory decisions.[1844] But that is not a credible submission, given the enmeshment of Ms. Salas, "a lifelong member of the PRI party" who had no prior experience in gaming before joining SEGOB's Games and Raffles Division.[1845] Moreover, Ms. Salas' own actions belie her credibility. After unlawfully revoking E-Games' Independent Permit, Ms. Salas even refused to allow Claimants to sell their assets and refused all potential buyers. She (as well as her successor, Mr. Cangas) also expressly told Messrs. Chow and Pelchat that the Casinos would not reopen while the Americans remained shareholders.[1846] It is also not credible in light of the Black Cube evidence, from Mr. Avila Mayo and Mr. Rosenberg of Televisa, one of Mexico's biggest gaming companies and a government-thwarted buyer of E-Games, that E-Games obtained its permit legally, that incoming PRI appointees at SEGOB (wrongly) associated E-Games with the prior PAN government, and that the permit was ultimately revoked for this reason as well as to benefit political appointees.[1847] Tellingly, Mexico has not sought to put forward evidence to rebut the testimony of those two individuals. The reality is that the only real purpose for Mexico's expropriation of Claimants' investments was a political one—as Claimants explained in their Memorial.[1848] This is confirmed by all the evidence before the Tribunal:

- Ms. Salas' open attacks on the legality of the E-Games Independent Permit just after her appointment confirm that SEGOB's *volte face* and refusal to defend its own Resolutions was based on nothing more than political favoritism.[1849]

[1844] *See supra*, ¶¶ 114-124.

[1845] *Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón* (Jan. 27, 2013). Retrieved from http://www.jornada.unam.mx/2013/01/27/politica/013n1pol, **C-17**.

[1846] Third Gordon Burr Statement, **CWS-50**, ¶ 114; Third Erin Burr Statement, **CWS-51**, ¶ 121; Luc Pelchat Statement (July 21, 2017), **CWS-4**, ¶¶ 7-8.

[1847] *See supra*, ¶ 408.

[1848] *See supra*, Section II.J.

[1849] Memorial, ¶¶ 200-202.

- The internal SEGOB memorandum confirms that the permit was revoked because it had been issued at the end of the Calderon's administration "in an irregular manner."[1850]
- Notes from a meeting between Ms. Salas and Mr. Rayo Zapata also suspiciously reveal that SEGOB predicted that the E-Games Independent Permit would be revoked in February 22, 2013, long before there was a final court ruling in the ongoing a*mparo* case or before the Casinos were shuttered.[1851]
- The fact that to date, neither SEGOB, nor anyone in the Mexican government, has ever revealed to Claimants (or this Tribunal), what the supposed "irregular manner" was that led to the issuance of Claimant's permit and the resulting non-transparent decision by SEGOB to revoke the permit, nor has Mexico ever given Claimants any due process prior to or following its illegal revocation of Claimants' permit and closure of their Casinos; instead, it choose to try and hide behind judicial rulings that themselves were not the cause of SEGOB's actions and that, in any event, are themselves breaches of Mexican and international law;
- Messrs. Ávila Mayo and Rosenberg confirmed that:
    - PRI officials (like Ms. Salas) viewed the Claimants as affiliated with the Calderón administration and that they concluded that Claimants could not be "controlled" (*i.e.*, would not agree to pay bribes to the Peña Nieto government officials[1852]);

[1850] E-Games Memo ("*La DGJS [Dirección General de Juegos y Sorteos de la SEGOB] nos comunicó que el Permiso Bis fue cancelado debido a que el mismo era un permiso que habia sido otorgado al final de la administración anterior de manera irregular."),* **C-261**.

[1851] Email from C. Rayo Zapata re: Meeting and Notes with M. Salas re: E-Games (Feb. 22, 2013), **C-401** *("Exciting [E-Games] Están en proceso ante juzgado, si declara que fueron dados de manera irregular van a ser revocados.").*

[1852] Memorial, ¶¶ 233-234.

- SEGOB revoked the E-Games Independent Permit to benefit Grupo Caliente and its owners, the Hank Rhon family, who were affiliated with the PRI;[1853] and

- SEGOB had interfered with the Supreme Court proceedings, leading the Supreme Court to decline jurisdiction and remand the case to the appellate court which had rendered the original decision that was being challenged.[1854]

732. This political context is integral when considering the legality of Mexico's expropriation. In the *CME* case, for example, the tribunal took into account, when assessing the legality of Mexico's expropriation, the fact that the governmental authority involved, the Media Council, had reversed its position in respect of the claimant's investment after Council members were replaced by the Czech Parliament.[1855] Similarly, the *Tecmed* tribunal found that even though the claimant had committed breaches of certain environmental regulations, they were not the true reason for Mexico's non-renewal of the license, but in reality the true reason was a political one.[1856] Likewise, in *Abengoa*, the tribunal noted that the federal and municipal authorities until the election of a hostile administration had confirmed on numerous prior occasions that all the necessary administrative and environmental authorizations required for operation of the facility had been properly obtained by the investor,[1857] and that the fact that such authorizations were

[1853] Memorial, ¶¶ 235-238.

[1854] Memorial, ¶¶ 239-241.

[1855] *CME*, Partial Award, ¶ 592, **CL-108**.

[1856] *Tecmed*, Award, ¶¶ 124, 127-132, **CL-84**.

[1857] *Abengoa, S.A. and COFIDES, S.A. v. United Mexican States* ("*Abengoa v. Mexico*"), ICSID Case No. ARB(AF)/09/2, Award (Apr. 18, 2013), ¶ 203, **CL-134**.

revoked *after the change in power* could mean only that the true reasons for the revocation were political—and thus the expropriation was illegal.[1858] The same is true in this case.

733. Tellingly, Mexico does not even seek to explain why SEGOB made an immediate *volte face* from defending its decision to issue the November 16, 2012 Resolution to affirmatively seeking to (1) revoke the November 16, 2012 Resolution, (2) revoke all resolutions granted in favor of E-Games, and (3) put an immediate end to Claimants' business activity in Mexico. Instead, it offers *ex post* litigation-driven excuses for its clear breaches.

734. *First*, Mexico suggests that SEGOB was simply enforcing judicial decisions and that "Claimants are simply trying to relitigate before this Tribunal, issues that have already been decided by domestic courts."[1859] This is incorrect for all of the reasons noted above. Claimants ask the Tribunal to look beyond the fact that Mexico has sought to shield its blatant expropriation of Claimants' investments with judicial decisions. Like numerous other tribunals have done, it must see Mexico's expropriation for what it really is: a blatant attack on a foreign investor for political reasons to favor local investors.

735. *Second*, Mexico argues that SEGOB's closure of the Casinos "was just a consequence of Claimants' violation of the law by continuing their operations without a permit."[1860] That, however, is also untrue. As explained above, in closing down the Casinos, SEGOB came in determined to shutter the Casinos and used excessive force beyond what is considered reasonable and proportional under Mexican law.[1861] Mexico provides no evidence showing why it was

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1858 *Abengoa v. Mexico*, Award, ¶¶ 623-624, **CL-134**.

1859 Counter-Memorial, ¶ 776.

1860 Counter-Memorial, ¶ 788.

1861 Second Ezequiel González Matus Report, **CER-6**, ¶ 177.

necessary to use force during the closures.[1862] Moreover, the closures were coordinated and according to Claimants' witnesses, were extremely different from a standard, routine inspection.[1863] Claimants were in the process of challenging SEGOB's revocation of the November 16, 2012 Resolution, which prevented all relevant authorities, including SEGOB, from taking further actions to the detriment of E-Games' interests. Furthermore, Claimants had obtained an injunction expressly barring the government from impeding the Casinos' operations pending the final resolution of the *Amparo* 1668/2011 proceeding, which was pending at the time before the Supreme Court.[1864] Moreover, and contrary to Mexico's arguments, E-Games' Motion for Reconsideration was admitted by the *Séptimo Tribunal Colegiado* on April 22, 2014, that is two days before the April 24, 2014 closures, and thus SEGOB was obliged to wait until that decision regarding the validity of the E-Games Independent Permit had become final before taking the irreversible action of shutting down the Casinos.[1865] Mexico misidentifies the Motion for Reconsideration in its Counter-Memorial, citing to an irrelevant Motion for Reconsideration that was later admitted before the Supreme Court.[1866]

(b) Mexico's Expropriation Was Discriminatory

736. Mexico's expropriation of Claimants' investments was discriminatory. Mexico granted more favorable treatment to other investors who were in the same situation as Claimants, including Producciones Móviles and Petolof.[1867] Producciones Móviles, a Mexican company who was an

[1862] Second Ezequiel González Matus Report, **CER-6**, ¶ 180.

[1863] *See supra*, Section II.M.1.a.

[1864] Memorial, ¶ 381; Injunctive Relief (Sept. 2, 2013), **C-299**. *Resolución del 22 de septiembre de 2014 de Segunda Sala Regional Hidalgo-México del Tribunal Federal de Justicia Fiscal y Administrativa en el expediente* 4635/13-11-02-3-OT, **R-61**.

[1865] Fifth Julio Gutierrez Statement, **CWS-62**, ¶¶ 105-108.

[1866] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 105.

[1867] Memorial, ¶¶ 525-527.

operator under E-Mex's permit and obtained its permit in precisely the same way that E-Games did, is still operating in Mexico today.[1868] Petolof obtained its independent operator status through acquired rights and SEGOB ultimately granted Petolof an independent permit.[1869] These similarly situated companies have been allowed to continue to operate in Mexico, unlike Claimants, whose Casinos were abruptly shut down and denied an ability to continue operating in Mexico.

737. Mexico's arguments that these two companies are not similarly situated fall flat and are easily rebutted by evidence and by Claimants' expert. SEGOB, in an exercise of discretion, granted a resolution in favor of Petolof on October 28, 2008. The fact that E-Games was subject to both the Federal Gaming Law and the Gaming Regulation does not change the fact that E-Games and Petolof were in like circumstances; the acquired rights on which Petolof obtained its permit was fully independent of those two pieces of legislation.[1870] Both E-Games' and Petolof's acquired rights arose from a contractual relationship and were recognized by SEGOB as a result of this contractual relationship.[1871]

738. Similarly, Producciones Móviles, who was operating under E-Mex's permit, sought and obtained an independent permit at essentially the same time as E-Games under the same circumstances. Considering the internal SEGOB memorandum discussed above that cites as the reason for SEGOB's cancelation of E-Game's permit the fact that it was issued at the end of the Calderon's administration "in an irregular manner,"[1872]one would think that SEGOB would have

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[1868] Memorial, ¶¶ 733-739.

[1869] Memorial, ¶¶ 750-757.

[1870] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 98–99.

[1871] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 106–107.

[1872] E-Games Memo ("*La DGJS [Dirección General de Juegos y Sorteos de la SEGOB] nos comunicó que el Permiso Bis fue cancelado debido a que el mismo era un permiso que había sido otorgado al final de la administración anterior de manera irregular.*"), **C-261**.

taken a similar action to cancel Producciones Móviles' permit considering it also was granted under the same circumstances as that of E-Games and also at the end of the Calderon administration. However, Producciones Móviles continues to have a valid permit and operate casinos today, while E-Games does not.[1873] SEGOB should have assumed similar positions with respect to both permits, as Mexican law requires legal security in its governmental actions. [1874] It failed to provide legal security to E-Games by revoking its permit and permitting Producciones Móviles to remain in business.

739. As a result, the expropriation of Claimants' entire investment, including the E-Games' Independent Permit, the Casinos, the value of the shares in the Mexican Enterprises, and the Casino assets was discriminatory, and thus illegal as a matter of international law. In *Quiborax v. Bolivia*, for example, a tribunal found that the revocation of eleven mining concessions was discriminatory because, even though other mining companies had been audited under the same law as the claimant, and fined for alleged errors in their export declarations, the claimant was the only one to have lost its concessions as a result of such audit findings.[1875]

740. The discriminatory nature of Mexico's actions are addressed in greater detail in Section IV.H as Mexico's actions also constitute a breach of NAFTA Article 1102.

(c) Mexico's Expropriation Was Not in Accordance with Due Process of Law or Article 1105(1)

741. Mexico's expropriation was not conducted in accordance with due process or NAFTA Article 1105(1), and thus is illegal as a matter of international law. Mexico's breach of Claimants'

[1873] Memorial, ¶ 160.

[1874] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 118-119; Mexican Constitution, Articles 8, 14, 16, 17, 18, 19, 20, 21, 22 and 23, **CL-77**.

[1875] *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award (Sept. 16, 2015), ¶ 247, **CL-290**.

due process rights and other protections under NAFTA Article 1105 are addressed in greater detail below as those acts are also a denial of justice and thus a breach of Article 1105 of the NAFTA. Claimants recall here the principal and incontrovertible facts.

742. First, when SEGOB rescinded the November 16, 2012 Resolution on August 28, 2013, SEGOB failed to follow established procedures for the revocation of an administrative act, effectively denying E-Games the ability to challenge its actions and presenting E-Games with a *fait accompli*, even though E-Games had rights to challenge SEGOB's actions as a matter of Mexican law.[1876] Further, in revoking the November 16, 2012 Resolution, SEGOB employed a reasoning that departs from the order it received from the Sixteenth District Judge in his August 26, 2016 Order, and, importantly, that squarely contradicts the language and reasoning employed by SEGOB when it issued the November 16, 2012 Resolution. As demonstrated by Mexico's own concession that SEGOB prepared no documents, analyses, or correspondences regarding its decision to rescind the November 16, 2012 Resolution,[1877] SEGOB thus breached the key principle of due process: the duty to provide adequate reasons and legal basis for its decision.

743. SEGOB and Mexico have never revealed to Claimants the true reason why it revoked Claimants' permit and closed its Casinos. Neither SEGOB nor anyone in the Mexican government has ever revealed to Claimants (or this Tribunal), what the supposed "irregular manner" was that led to the issuance of Claimant's permit and that led SEGOB to cancel E-Game's permit, nor has Mexico ever given Claimants any due process prior to or following its illegal revocation of Claimants' permit and closure of their Casinos.

[1876] *Supra* ¶¶ 224-225.

[1877] *Supra* ¶¶ 106-110, 264; *infra* ¶¶ 833-834.

744. Then, during the shutdown, SEGOB officials refused to provide E-Games with copies of the closure orders and prevented them from contacting their counsel. SEGOB's decision to close down the Casinos was rendered without any serious reasoning, as evidenced by Mexico's failure to produce any responsive documents in this regard in response to Claimants' document production requests.[1878] Moreover, SEGOB prevented E-Games from challenging the closures by declining to open the second phase of the Closure Administrative Review, the phase during which E-Games would have had the ability to challenge the closures. Instead, it provided an incorrect and belated *ex post* justification, alleging that it had actually initiated a second phase and notified it to E-Games, although that was clearly not true.

745. Thereafter, SEGOB lifted the closure seals that it had placed on the Casinos without notifying E-Games, although Claimants had valuable property inside the Casinos, and allowed third parties to loot the Casinos. SEGOB lifted the seals in the absence of a judicial order to do so in all but one cases. E-Games was never given the opportunity to challenge these actions, before they took place or after.

(d) Mexico's Expropriation Was Not on Payment of Compensation

746. Mexico did not compensate Claimants for the expropriation. Mexico does not even seek to engage with this reality in its Counter-Memorial. Its expropriation, therefore, is illegal and compensation should be paid to Claimants without any further delay.

3. The *Ex Post* Acts of Mexico's Judiciary Do Not Absolve Mexico from Responsibility for its Expropriation

747. SEGOB revoked the November 16, 2012 Resolution on its own initiative and shut down the Casinos while the judicial review of SEGOB's decision to rescind the November 16, 2012 was

[1878] *Supra* ¶¶ 224-225.

pending and in clear breach of a Mexican court decision enjoining any closure. As such, Mexico, acting through SEGOB, effectuated a complete and unlawful expropriation of Claimants' investments in Mexico. E-Games, of course, sought to challenge the illegal actions of SEGOB, but was defeated by judges who were compromised by conflicts and political pressure. Now, Mexico seeks to invoke those judicial decisions as a shield against any liability for the permanent deprivation of the use and enjoyment of Claimants' investments by claiming that "the NAFTA does not recognize the concept of 'judicial expropriation."[1879] As explained above, this contention fails, because it is clear on its face that a series of executive and administrative actions culminating in the unlawful closures of the Casinos on April 24, 2014 were what destroyed the entirety of Claimants' operations and investments in Mexico. Thus, Mexico's reliance on a purported bar against "judicial expropriation" is misplaced.

748. In any event, as Claimants set out in their Memorial, actions or omissions by a State's judiciary, like the acts of any other State organ, can give rise to an expropriation. In this regard, Claimants explained how, in addition to the actions and omissions of SEGOB, various decisions and orders rendered in the *Amparo* 1668/2011 proceeding by the Sixteenth District Court, Collegiate Tribunal, and Supreme Court also effectuated an unlawful expropriation of Claimants' investments, in particular, by rubber stamping SEGOB's recission of the November 16, 2012 and thereby providing the *post-hoc* cover for the PRI administration's unlawful expropriation of Claimants' investments. Through these measures, Mexico also made sure that the E-Games Independent Permit could never come back to life again. The E-Games Independent Permit was undoubtedly a key investment that Claimants held to operate the Casinos and Expansion Projects, and by retroactively sanctioning SEGOB's unlawful revocation of the November 16, 2012

[1879] Counter-Memorial, ¶ 748.

Resolution (and by extension, SEGOB's unlawful closures of the Casinos, which was based on SEGOB's unilateral and unauthorized revocation of the November 16, 2012 Resolution), the Mexican judiciary ensured that Claimants remained deprived of all use and enjoyment of their investments.

749. The following sections (i) refute Mexico's erroneous assertion that it cannot held liable under NAFTA Article 1110 for the actions and omissions of Mexican courts, and (ii) demonstrate once again how Mexico, through its judiciary, unlawfully expropriated Claimants' investments.

(a) NAFTA Recognizes Judicial Expropriation

750. Article 1110—on its face—does not distinguish (much less exclude) expropriations resulting from, or having any nexus with, judicial acts. It does not even mention them, but broadly provides that "[n]o 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."

751. Numerous tribunals have found that Article 1110 (and provisions like it) cover judicial expropriations. For example, in the *Eli Lilly* case, a NAFTA tribunal found that "[a]s a matter of broad proposition, therefore, it is possible to contemplate circumstances in which a judicial act (or omission) may engage questions of expropriation under NAFTA Article 1110, such as, perhaps, in circumstances in which a judicial decision crystallizes a taking alleged to be contrary to NAFTA Article 1110."[1880] Likewise, the arbitral tribunal in *Azinian v. Mexico* also acknowledged that some judicial decisions could engage the responsibility of the State under NAFTA.[1881] Similarly, the recent decision in *Lion v. Mexico* confirmed (1) that a denial of justice could lead to judicial

[1880] *Eli Lilly*, Final Award, ¶ 221, **CL-112**.

[1881] *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States* ("*Azinian*"), ICSID Case No. ARB(AF)/97/2, Award (Nov. 1, 1999), ¶ 98, **CL-192**.

expropriation and (2) that, even absent a denial of justice, there could be expropriation "*whenever it can be proved that the courts were not neutral and independent especially from the other branches of power of the host State*."[1882]

752. Moreover, there is no doubt that Mexico's judiciary is a State organ as a matter of international law—and therefore its acts can give rise to Mexico's liability. Article 4 of the ILC Draft Articles on State Responsibility provides that the acts of *any* State organ—including one that exercises judicial functions—will be considered the act of the State under international law:

> *The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.*

753. It is for this reason that investor-State tribunals have consistently found that the acts of a State's judiciary (like any other State organ) may give rise to State liability. As stated by the *Eli Lilly* tribunal (on whose decision Mexico itself relies): "the judiciary is an organ of the State" and thus "[j]udicial acts will therefore in principle be attributable to the State by reference to uncontroversial principles of attribution under the law of State responsibility."[1883]

754. Moreover, Mexico's argument that—despite the clear and broad language of Article 1110 and the case law—Article 1110 contains an implicit bar of "judicial expropriation" relies on three false premises.

[1882] *Lion*, Award, **CL-295**, ¶ 192 (emphasis added).

[1883] *Eli Lilly*, Final Award, ¶ 221, **CL-112**.

755. First, Mexico relies on a number of submissions and briefs by NAFTA parties in other arbitrations.[1884] Its presentation of those submissions, however, is not only misleading, but also ignores that they are of no assistance to this Tribunal's task: to interpret NAFTA Article 1110(1).

756. Most fatal to Mexico's claim is the reality that if the NAFTA parties really wanted to "interpret" the NAFTA (rather than simply lay down a marker to argue against liability in arbitrations brought against them), they would have done so through Article 2001 of the NAFTA, which establishes the Free Trade Commission, a high-level body "*comprising cabinet-level representatives of the Parties or their designees*," with the authority to "resolve disputes that may arise regarding [the NAFTA's] interpretation or application." Tellingly, however, they have not done so with respect to any of the issues on which they now opine.

757. Putting that to one side, however, the sources on which Mexico relies do not actually say what Mexico says they say. Mexico's argument that the submissions of NAFTA parties demonstrate that "the NAFTA parties have been unequivocal and clear" that the concept of "judicial expropriation" is not included under Article 1110(1)[1885] is a regrettable misrepresentation of those sources:

- The United States: Far from suggesting "unequivocally" and "clearly" that Article 1110(1) does not include "judicial expropriation" under any circumstances, the three non-disputing party submissions of the United States cited by Mexico[1886] affirm only that "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

[1884] *See* Counter-Memorial, ¶¶ 750-756.

[1885] Counter-Memorial, ¶ 750.

[1886] Counter-Memorial, ¶¶ 750-751.

1110(1)."[1887] It follows that, where a domestic court is not acting in a neutral or independent manner, a "judicial expropriation" would arise. Accordingly, Mexico is not assisted by its citation to the United States' position.

- Canada: Mexico points to submissions by Canada in one case in which Canada acted as a respondent, the *Eli Lilly* case.[1888] In that case, Canada—protecting its own self-interest—argued that "the customary international law of expropriation has, for centuries, concerned only executive, legislative, military and police actions."[1889] The *Eli Lilly* tribunal, however, found that Canada was wrong: "As a matter of broad proposition, therefore, it is possible to contemplate circumstances in which a judicial act (or omission) may engage questions of expropriation under NAFTA Article 1110, such as, perhaps, in circumstances in which a judicial decision crystallizes a taking alleged to be contrary to NAFTA Article 1110."[1890] Thus, Mexico's citation to Canada's position does not assist its case.

- Mexico: Mexico claims that it "has consistently taken the same position," but cites no authority for that naked assertion.[1891] Even if that were true, that position would have been consistently incorrect for the reasons explained herein.

758. Even if Mexico could somehow suggest that, through non-disputing and disputing party submissions in NAFTA cases, the NAFTA parties had implied that Article 1110(1) contains an

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[1887] *Eli Lilly*, Submission of the United States of America, ¶ 221, **RL-055**.

[1888] Counter-Memorial, ¶¶ 752-754.

[1889] *Eli Lilly*, Canada's Counter-Memorial, ¶ 214, **RL-066**.

[1890] *Eli Lilly*, Final Award, ¶ 221, **CL-112**.

[1891] Counter-Memorial, ¶ 755.

implicit exclusion of "judicial expropriations," that would still get Mexico nowhere. Under international law, a treaty must be interpreted textually "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[1892] The parties' *ex ante* views of any treaty provision are only relevant—but by no means in any way dispositive—where the textual approach "leaves the meaning ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable"—which Mexico does not—and cannot—suggest is the case of Article 1110. The parties' *ex post* interpretation may be relevant only where made by "agreement relating to the treaty"— and the diffuse pleadings in other cases by Canada and the United States (but not Mexico) clearly are not such an agreement.[1893] Even if they were, however, such subsequent agreement would only be one *additional* factor (constituting part of the "context [of the NAFTA] for the purpose of the interpretation" and could not strike out the "ordinary meaning" of Article 1110(1).[1894]

759. Second, Mexico seeks to distinguish four of the cases relied upon by Claimants, but, here too, its objection relies on misrepresentations of the case law.[1895]

760. ***Eli Lilly***: Mexico's claim that the *Eli Lilly* tribunal's explicit finding that "a judicial act (or omission) may engage questions of expropriation under NAFTA Article 1110" "was *obiter dictum* and does not belong to the binding decision of the tribunal"[1896] misses the point. As a general matter, the *Eli Lilly* decision does not bind this Tribunal and thus any distinction between *obiter dictum* and *ratio decidendi* is irrelevant. What does matter is that the *Eli Lilly* tribunal

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[1892] Vienna Convention on the Law of Treaties (1969), Article 31(1), **CL-296**.

[1893] Vienna Convention on the Law of Treaties (1969), Article 31(2), **CL-296**.

[1894] Vienna Convention on the Law of Treaties (1969), Article 31, **CL-296**.

[1895] Counter-Memorial, ¶¶ 758-764.

[1896] *Eli Lilly*, Final Award, ¶ 758, **RL-066**.

rejected Canada's position in that case (and Mexico's position in this case) that Article 1110 contains an explicit exclusion of expropriations in which a judicial act played a role.

761. ***Rumeli and Sistem***: Mexico's claim that the *Rumeli* and *Sistem* tribunals "misapplied" the customary international law rules of attribution[1897] is unhelpful to its argument. Mexico argues that these distinguished tribunals concluded that judicial expropriation does exist, in part, on the basis of Article 4 of the ILC Draft Articles on State Responsibility, which clearly establishes that a State may be responsible for the acts or omissions of its judiciary, but, according to Mexico, does not specify "under which primary rule of international law—*i.e.*, treaties and customary international law" and thus is not dispositive as to whether "judicial expropriation" exists under international law.[1898] Yet, the *Sistem* decision clearly establishes that it applies Article 4 of the ILC Draft Articles on State Responsibility for the finding that "[t]he Court decision deprived the Claimant of its property rights in the hotel just as surely as if the State had expropriated it by decree."[1899] For its part, the *Rumeli* decision does not even purport to apply any customary international law rules of attribution. Rather, the *Rumeli* tribunal found the State liable for a judicial decision in a proceeding instigated by a private actor because a State organ colluded with the private actor: "The Tribunal is left in no doubt, however, that the court process which resulted in the expropriation of Claimants' shares was brought about through improper collusion between the State, acting through the Investment Committee, and Telcom Invest."[1900]

762. ***Saipem***: Mexico argues that, "[i]n Saipem, the applicable treaty only allowed an investor to file an expropriation claim before an international tribunal" (*i.e.*, the treaty did not allow an

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[1897] Counter-Memorial, ¶ 761.

[1898] Counter-Memorial, ¶ 762.

[1899] *Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic* ("*Sistem Mühendislik*"), ICSID Case No. ARB(AF)/06/1, Award (Sept. 9, 2009), ¶ 118, n. 103, **CL-114**.

[1900] *Sistem Mühendislik*, Award, ¶ 707, **CL-114**.

investor to bring a "denial of justice" or "fair and equitable treatment" claim) and thus the investor brought a "judicial expropriation" claim "although the claim is fundamentally one of denial of justice."[1901] That, however, does not change the reality that a denial of justice may also amount to a judicial expropriation. Moreover, the tribunal did not disguise a "denial of justice" finding through a "judicial expropriation" finding. The tribunal applied the provisions of the treaty to find that an expropriation had occurred, noting that contractual rights were also capable of being expropriated and that the judiciary was an organ of the State capable of carrying out an expropriation.[1902]

763. In *Saipem*, a State entity that had contracted with the claimant obtained an illegal injunction from State courts ordering the claimant not to participate in a commercial arbitration that it had brought against that State entity under their contract. The claimant nonetheless participated and won the arbitration. After the award in that commercial arbitration was rendered in the claimant's favor, the State entity attempted to set it aside in a State court. The State court ruled in the State entity's favor declaring the commercial award "non-existent" due to the earlier injunction. As a result, in the investor-State arbitration that followed, the tribunal determined that the State courts had deprived the claimant of its contractual rights under its contract with the State entity, constituting an expropriation by the State courts (but not by the contracting State entity, because it had not acted in a governmental capacity in obtaining the injunction).[1903]

[1901] Counter-Memorial, ¶ 763 ("*En Saipem, el tratado aplicable sólo permitía a un inversionista presentar una reclamación en un arbitraje internacional por expropiación. . . . cuando la reclamación es esencialmente de denegación de justicia.*").

[1902] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award (June 30, 2009), **CL-115**, ¶¶ 202-204.

[1903] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award (June 30, 2009), **CL-115**, ¶ 130.

764. Finally, Mexico's suggestion that Claimants "seek to reargue their denial of justice claim as 'judicial expropriation' without distinguishing between the two concepts"[1904] misconstrues Claimants' arguments.

765. Mexico incorrectly suggests that "Article 1105(1) would lose its meaning if Claimants could present their claims in any other way" than judicial expropriation.[1905] However, that is wrong. Denial of justice, as Claimants have explained, is a protection that falls under the international law standard, including fair and equitable treatment. It does not require a substantial deprivation of the use or economic benefit of property. An expropriation, by contrast, does. Just as conduct may breach Article 1105 as well as Article 1110, a treaty violation may also be characterized as a "denial of justice and a "judicial expropriation."

766. Mexico relies on a single authority for its misguided assertion that acts of the judiciary do not constitute an expropriation: an article by Christopher Greenwood QC. However, that authority nowhere suggests that a claim of denial of justice may not rise to the level of expropriation and, in fact, notes that other international law bodies like the Iran-United States Claim Tribunal have found that "a judicial decision was capable of amounting to a measure of expropriation."[1906] Rather, Mexico claims that, "when the original cause of the damage is the act of a private party [that] is not itself contrary to international law, no State responsibility will arise."[1907] That is incorrect. Even Mexico admits that "the primary obligation of [full protection and security,

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[1904] Counter-Memorial, ¶ 764 ("*Las Demandantes buscan volver a presentar su reclamación por denegación de justicia como una de 'expropiación judicial' sin distinguir los dos conceptos*").

[1905] Counter-Memorial, ¶ 574 ("*perdería su significado si se permitiera a las Demandantes presentar sus reclamaciones en otra forma*").

[1906] 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), ¶ 65, **RL-062**.

[1907] Counter-Memorial, ¶ 766 ("*cuando la causa original del daño es un acto de un particular que no es sí mismo contrario al derecho internacional, no habría lugar a la responsabilidad del Estado*").

another NAFTA protection,] by a host State is to prevent an investor from being harmed by physical violence"—*i.e.*, by a third party.[1908] Even setting that aside, however, at best, Mexico's argument in this arbitration—if accepted, which it should not be—would apply only to the cancellation of the May 27, 2009 Resolution (which originally was the only resolution challenged by E-Mex in the *Amparo* 1688/2011 proceeding), not the expropriation of the E-Games Independent Permit (because it was SEGOB, not E-Mex, who unlawfully sought to revoke the permit by unlawfully introducing the November 16, 2012 Resolution into the *Amparo* 1668/2011 proceeding via its August 28, 2013 Resolution), the illegal closure of the casinos Casinos, the actions taken by SEGOB that allowed third parties to steal the gaming machines and other equipment, and the resulting diminution in value of Claimants' shareholding in the Juegos Companies and E-Games as a result of these governmental measures.

(b) Through the Acts and Omissions of its Judiciary, Mexico Unlawfully Expropriated Claimants' Investments

767. As explained in detail in Claimants' Memorial,[1909] Mexico, through the Sixteenth District Judge, Collegiate Tribunal and Supreme Court, adopted a series of improper resolutions and decisions which ultimately "opened the door" to allow SEGOB to illegally revoke the November 16, 2012 Resolution (granting the E-Games Independent Permit). Among other actions and omissions of the Mexican judiciary, Claimants recite here the principal judicial measures that led to the permanent taking of the E-Games Independent Permit:

- In contravention of fundamental principles of Mexican law, the Sixteenth District Judge and the Collegiate Tribunal failed to take into consideration in the *Amparo* 1668/2011 proceeding that the November 16, 2012 Resolution constituted an implicated consented

[1908] *Alicia Grace and others v. Mexico*, UNCT/18/4, Mexico's Statement of Defense (June 1, 2020), **CL-297**, ¶ 776.

[1909] Memorial, ¶ 506.

act by E-Mex (by virtue of the failed attempt by E-Mex to challenge that resolution in *Amparo* 1551/2012, which meant that under Mexican *Amparo* law, the constitutionality of the November 16, 2012 could not be questioned in the *Amparo* 1668/2011 proceeding, much less revoked.[1910]

- The Collegiate Tribunal, on February 19, 2014, unlawfully and arbitrarily altered the terms and scope of the Sixteenth District Judge's January 31, 2013 Order, thus giving the retroactive authorization for SEGOB's improper and unlawful introduction of the November 16, 2012 Resolution into the enforcement stage of the *Amparo* 1668/2011 proceeding. Even before rendering the decision, the judge responsible for delivering the combined opinion of the Collegiate Tribunal (*i.e.*, Ms. Adela Domínguez) admitted to the Mexican Enterprises' Legal Director that Mexican courts would under no circumstances would allow operators to become permit holders because that would cause instability in the gaming industry in Mexico.[1911] This again shows that politics—and not legal principles—were influencing and dictating the outcome of the judicial proceeding. Further, in rubber stamping SEGOB's revocation of the November 16, 2012 Resolution, the Collegiate Tribunal egregiously violated Claimants' due process right by denying Claimants' opportunity to present evidence or argument in support of the validity of the November 16, 2012 Resolution.[1912]
- The Supreme Court, under pressure by the PRI administration, refused to decide E-Games' appeal on the merits and remitted the case to the same appellate court that had issued the decision that was the subject of E-Games' appeal to the Supreme Court, depriving E-

[1910] First Omar Guerrero Report, **CER-2**, ¶¶ 313, 315, 332.

[1911] Fourth Julio Gutiérrez Morales Statement, **CWS-52**, ¶ 65.

[1912] First Omar Guerrero Report, **CER-2**, ¶¶ 244-251.

Games and Claimants of its right to appeal the highly irregular and illegal ruling of the Collegiate Tribunal.[1913]

- On January 29, 2015, the Collegiate Tribunal, on remand from the Supreme Court, unsurprisingly upheld its prior decision, thereby leaving no judicial recourse for Claimants to restore the E-Games Independent Permit.[1914] As explained, one of the judges hearing the case on remand (*i.e.*, José Luis Caballero) revealed to Claimants' Mexican counsel that he feared for the safety of his job given the politically charged nature of the case involving the E-Games Independent Permit.[1915]

768. Same with respect to the expropriatory measures adopted by SEGOB, Mexico does not and cannot deny that these judicial measures had an expropriatory effect. It is undisputed in this arbitration that SEGOB's revocation of the E-Games Independent Permit caused Claimants' inability to operate their Casinos. That expropriation by SEGOB was then made irreversible due to a series of highly irregular resolutions and decisions adopted by Mexican courts in the *Amparo* 1668/2011 proceeding. Nor does Mexico deny that Claimants received no compensation for the permanent revocation of the E-Games Independent Permit, which is one of the four cumulative requirements for *lawful* expropriation as specified in NAFTA's Article 1110.

769. Mexico also fails to engage, in any meaningful way, with Claimants' arguments that the judicial measures at issue here, either individually or in combination, amount to an *unlawful* expropriation, because they were adopted and carried out for non-public purposes, in a discriminatory manner, and in breach of fundamental principles of due process. Instead, Mexico merely rehashes its argument that "none of the decisions described by the Claimants as 'illegal,'

[1913] First Omar Guerrero Report, **CER-2**, ¶ 288; Fourth Julio Gutiérrez Morales Statement, **CWS-52**, ¶ 101.

[1914] Order of the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (Jan. 29, 2015), **C-297**.

[1915] Fourth Julio Gutiérrez Morales Statement, **CWS-52**, ¶ 102.

'improper' or 'irregular' are, in fact, illegal, improper, or irregular."[1916] As demonstrated above at Section II.L and again below at Section IV.G (denial of justice, Mexico is wrong. In short, Mexico denied E-Games' due process rights through the *Amparo* 1668/2011 proceeding and the Collegiate Tribunal's subsequent proceeding with, *inter alia,* by (1) the admission by the Sixteenth District Judge of the E-Mex amendment that introduced the May 27, 2009 Resolution as part of that court proceeding when that amendment was clearly untimely; (2) the Collegiate Tribunal's failure to also consider and find untimely E-Mex's amendment seeking to introduce the May 27, 2009 Resolution into the *Amparo* 1668/2011 proceeding; (3) illegally and retroactively altering the terms and scope of the Sixteenth District Judge's August 26, 2013 Order; (4) ignoring the established findings of Mexican courts that the November 16, 2012 Resolution was an "implicitly consented act"; (5) the Collegiate Court's improper endorsement and rubber-stamping of SEGOB's August 28, 2013 Resolution, relying on and attributing to the Sixteenth District Judge a ruling that the "acquired rights" doctrine was unconstitutional when Judge Gallardo found in his October 14, 2013 order that he made no such ruling; (6) allowing the Supreme Court proceedings to be tainted by political influence as a Justice Pérez Dayán, who was recently appointed by President Peña Nieto immediately reversed course, (7) dismissing E-Games challenge on a procedural point after accepting to hear the case on the merits, following the visit of President Peña Nieto's lead counsel, who exerted pressure on the Supreme Court to drop the case and send it back to the same Collegiate Court that had issued the ruling that was on appeal; and (8) allowing the case on remand to be heard by the same Collegiate Court that had issued the highly irregular ruling, including a panel that included José Luis Caballero of the Collegiate Tribunal who had prejudged the case, telling

[1916] Counter-Memorial, ¶¶ 775-772.

Claimants' Mexican counsel that the courts would under no circumstances allow operators to become permit holders.

770. Neither did the various acts and decisions of the Mexican judiciary in the *Amparo* 1168/2011 proceeding or the subsequent appeals that followed serve a legitimate public purpose, nor were they in accordance with the requirement of non-discrimination. The ample evidence before the Tribunal shows that the judiciary was acting for improper purposes and motivated by political and discriminatory purposes and under undue executive influence.

771. Mexico simply "denies that the Peña Nieto administration illegally lobbied the Supreme Court."[1917] In support of this, Mexico relies on two witness statements: the witness statement of Ms. Salas, a political appointee with no gaming experience appointed to head SEGOB under the Peña Nieto administration, and Mr. Landgrave, who was at the time, a lawyer at SEGOB. These individuals lack credibility and have no basis on which to testify as to whether the Peña Nieto administration exerted undue political influence on Mexican courts. Indeed, all that Ms. Salas can say is that *she personally* did not receive "instructions," but, even if that were true (which Claimants dispute and find unconvincing and self-serving), it is irrelevant as to the question of whether the *courts* received instructions.[1918] All that Mr. Landgrave can purport to say is that he would have been aware of any such influence because the President's counsel would have asked "for information or documents."[1919] However, the President's counsel has other means to obtain such documents would not have needed any information from SEGOB. Claimants' own local counsel *saw* Mr. Castillejos, President Peña Nieto's legal counsel, in Justice Pérez Dayán's

[1917] Counter-Memorial, ¶ 795 ("*La Demandada niega que la administración de Peña Nieto haya ilegalmente cabildeado en la Suprema Corte*").

[1918] Witness Statement of Mrs. Marcela Gonzalez Salas ("Salas Statement"), **RWS-1**, ¶ 13.

[1919] Witness Statement of Mr. José Raúl Landgrave Fuentes ("Fuentes Statement"), **RWS-2**, ¶ 32.

chambers and heard him request the case file for E-Games' *recurso de inconformidad* immediately before meeting with the Justice.[1920] Although the court had been analyzing the merits of the case for months, following the meeting with Mr. Castillejos, the Supreme Court abruptly dismissed E-Games' appeal on procedural grounds. Tellingly, Mexico puts forward no one from the former President's office (let alone the President's lead counsel) and no one from the judiciary (let alone a judge in the *Amparo* 1668/2011 proceeding) to rebut these allegations. Instead, it offers testimony from two individuals with no firsthand evidence of these specific matters when Claimants' own witnesses do have firsthand knowledge of the matter.

772. In sum, Claimants have sufficiently proven that Mexico, not only acting through SEGOB, but also through the office of President Peña Nieto, and its judiciary, unlawfully expropriated Claimants' investments in Mexico. Mexico thus must pay Claimants full compensation for their losses, which is long overdue.

B. Minimum Standard of Treatment (Article 1105(1)): Mexico Breached Its Fair and Equitable Treatment Full Protection and Security Obligations and the Obligation to Not Deny Claimants Justice

773. Mexico has breached its obligation under NAFTA Article 1105(1) to accord Claimants' investments "treatment in accordance with international law, including fair and equitable treatment and full protection and security" by (**A**) denying E-Games justice in judicial and administrative proceedings before its judicial and administrative bodies resulting in the improper revocation of the E-Games Independent Permit; (**B**) failing to provide fair and equitable treatment to Claimants' investments, which instead were the target of a campaign of persecution as soon as the Peña Nieto administration came to power for political and corrupt reasons; and (**C**) failing to provide full

[1920] Fifth Julio Gutierrez Statement, **CWS-62**, ¶¶ 148-149.

physical and legal protection to Claimants' authorization to operate the Casinos as well as their physical assets in Mexico (the Casinos and the costly material inside the Casinos).

C. Claimants Have Proven that Respondent Violated the Obligation to Accord Fair and Equitable Treatment and Full Protection and Security under Article 1105 of the NAFTA

774. In the Memorial on the Merits, Claimants demonstrated that the minimum standard of treatment (**"MST"**) under customary international law (**"CIL"**) has evolved such that in the context of foreign investment, it has converged in substance with the autonomous standard of fair and equitable treatment (**"FET"**) as interpreted by investment treaty tribunals. Claimants further showed that Mexico's acts that have destroyed Claimants' investments, separately and together, breached its obligation under Article 1105 of the NAFTA to provide fair and equitable treatment to Claimants' investments by (1) arbitrarily and discriminatorily interfering with the operation of Claimants' investments; (2) frustrating Claimants' legitimate expectations that their investments, and the rights associated with those investments, would not be arbitrarily interfered with in breach of Mexican law fueled by improper political motives; and (3) subjecting Claimants to harassment and retaliatory measures for political motives. In addition, Mexico breached its obligation to provide full protection and security (**"FPS"**) by failing to prevent the looting of Casino hardware by third parties and by failing to provide legal security to Claimants and their investments.

775. In its Counter-Memorial, Mexico seeks to evade liability with the stale argument that Article 1105 of the NAFTA only offers the minimum standard of treatment, which, it says is lower than the standard of treatment in the "autonomous" FET/FPS provisions of other treaties.[1921] On this basis, Mexico attempts to impose an artificially narrow legal standard that does not protect Claimants' legitimate expectations while, at the same time, incorrectly characterizing Claimants'

[1921] Counter-Memorial, ¶ 546.

claims of breach as mere "disagreements with the Respondent's judicial system and the administrative actions arising from its decisions."[1922] On the facts, it seeks to hide behind the deeply flawed and notably inconsistent decisions of its administrative agencies, judiciary, and other State organs. As Claimants have proven, this argument fails, and the Tribunal should find that Mexico's conduct has clearly breached the NAFTA.

D. The Minimum Standard of Treatment Has Evolved To Reflect the Autonomous Principle of FET and FPS Interpreted by Non-NAFTA Tribunals

776. In its Counter-Memorial, Mexico makes two principle attempts to impose an artificial minimum standard of treatment gutted of key protections, like the protection of fair and equitable treatment and full protection and security.

777. First, Mexico claims that the minimum standard of treatment under NAFTA Article 1105 is distinct from any "autonomous" standard. It argues that the protections under NAFTA Article 1105 are "subject to . . . an element of the MST standard under the NAFTA" and "the FET standard under the NAFTA cannot be interpreted as an independent MST standard."[1923]

778. Even if that that argument were true, which it is not, it ignores the reality that the minimum standard of treatment is an evolving one, as Mexico itself has conceded. In the *ADF v. United States of America* case, Mexico accepted that "the customary international law referred to in Article 1105(1) is not 'frozen in time' and that the minimum standard of treatment does evolve."[1924] The other NAFTA Parties have equally conceded that the MST standard has

[1922] Counter-Memorial, ¶ 565.

[1923] Counter-Memorial, ¶ 553.

[1924] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Award (Jan. 9, 2003), ¶ 179, **CL-18**.

evolved.[1925] It follows, therefore, that any antiquated awards that Mexico cites in its bid to narrow its scope of liability under Article 1105, such as the *Neer* case, is hopeless.

779. Mexico's only response to this is a misplaced criticism of two decisions relied upon by Claimants for the assertion that the minimum standard of treatment is (as Mexico itself acknowledges) an evolving one: the *Mondev* and *Waste Management II* decisions.[1926]

780. Regarding the former, Mexico accuses Claimants of "misrepresent[ing] the *Mondev* tribunal's summary of the United States' position on the MST standard."[1927] Mexico then attempts to distract the Tribunal with a *non-sequitur* argument focusing on the transcript of one day of the evidentiary hearing in *Mondev*. Using this transcript, Mexico argues that the United States "did not indicate that the threshold of the MST standard had been lowered" and argues that, "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"[1928]

781. First, Mexico's assertion that "Claimants' only cause of action is . . . denial of justice . . . and not the FET sub-element" is baseless and preposterous, as Claimants amply demonstrated facts in the Memorial to establish expropriation; various violations of Article 1105, including independently each of the following breaches: FET, FPS, and denial of justice; as well

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[1925] *ADF Group Inc. v. United States of America,* ICSID Case No. ARB (AF)/00/1, Award (Jan. 9, 2003), ¶ 179 (noting that México, the United States, and Canada have all accepted "that the customary international law referred to in Article 1105(1) is not 'frozen in time' and that the minimum standard of treatment does evolve"), **CL-18**; *Mondev*, Award, ¶¶ 119 ("The United States itself accepted that Article 1105(1) is intended to provide a real measure of protection of investments, and that having regard to its general language and to the evolutionary character of international law, it has evolutionary potential."), 124 ("The [United States] noted that there was some common ground between the parties to the present arbitration in respect of the FCT's interpretations, namely, '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 . . . like all customary international law, the international minimum standard has evolved and can evolve . . . the sets of standards which make up the international law minimum standard, including principles of full protection and security, apply to investments.' . . . . [B]oth Canada and Mexico expressly accepted this point."), **CL-17**.

[1926] *See* Counter-Memorial, ¶¶ 562-572.

[1927] Counter-Memorial, ¶ 563.

[1928] Counter-Memorial, ¶ 564-565.

as violations of Article 1102 and 1103, the national treatment obligation and most favored nation treatment obligation respectively.[1929] Mexico's argument here is an obvious effort to pigeonhole Claimants' case into the more narrow and harder to establish claim for denial of justice. One can understand why Mexico would do that given that its conduct unquestionably breaches the other Article 1105 standards of liability. But Mexico cannot recast Claimants' case. Claimants have alleged and proven the other breaches under Article 1105. And while Claimants also have proven that Mexico's conduct also is tantamount to a denial of justice, Mexico cannot escape liability for its other breaches of Article 1105.

782. Second, in its analysis of *Mondev*, Mexico offers no response to the conclusion by the tribunal in *Mondev* that, in modern times, "what is unfair or inequitable need not equate with the outrageous or the egregious," and "a State may treat [a] foreign investment unfairly and inequitably without necessarily acting in bad faith."[1930]

783. Third, even if Mexico's restrictive reading of the fair and equitable treatment standard could somehow withstand scrutiny, it cannot hide behind the actions of its judiciary in this case in a vain attempt to justify the prejudicial actions of its administrative bodies, namely SEGOB, or the illegal intrusions and undue influence into the actions of the judiciary and SEGOB by the office of President Peña Nieto, as explained elsewhere in this Reply and below.

[1929] Memorial, *passim*.

[1930] *Mondev*, Award, ¶ 116 (finding it "unconvincing to confine the meaning of 'fair and equitable treatment' . . . to what [that term]—had [it] been current at the time—might have meant in the 1920s when applied to the physical security of an alien"), **CL-17**; *Chemtura Corporation v. Government of Canada* ("*Chemtura*"), UNCITRAL, Award (Aug. 2, 2010), ¶ 121 (observing that it could not "overlook the evolution of customary international law, nor the impact of BITs on this evolution"), **CL-21**; *Merrill & Ring Forestry L.P. v. The Government of Canada* ("*Merrill*"), ICSID Case NO. UNCT/07/1, Award (Mar. 31, 2010), ¶ 193 (noting "a shared view that customary international law has not been frozen in time and that it continues to evolve in accordance with the realities of the international community"), **CL-124**.

784. As for the *Waste Management II* decision, Mexico argues that "[n]othing 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."[1931] Yet, the *Waste Management II* tribunal recognized key protections that Mexico now denies are a part of the protections under NAFTA Article 1105. For example, the *Waste Management II* tribunal found that "representations made by the host State which were reasonably relied on by the claimant" are protected by the fair and equitable treatment obligation under the minimum standard of treatment,[1932] even though Mexico has denied that legitimate expectations are covered by NAFTA Article 1105.[1933] Once again, Mexico mischaracterizes Claimants' FET claim as one "based on conduct attributable to the respondent party's court system" in an attempt to argue that Claimants must show a "manifest injustice,"[1934] but, again, that is clearly not true. Mexico's administrative bodies acted independently of its courts on numerous occasions in clear breach of Mexico's NAFTA obligations, as amply explained in the Memorial and below. The office of President Peña Nieto also acted in breach of the Article 1105 standards independent of the actions of the judiciary. Mexico cannot now seek to use the decisions of its courts as a shield to liability in this case.

785. Second, Mexico argues that the protections under Article 1105 are "subject to [a] high threshold."[1935] And further that non-NAFTA decisions are irrelevant to the Tribunal's interpretation of the content of the NAFTA fair and equitable treatment obligation.[1936] Mexico's

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[1931] Counter-Memorial, ¶ 650.

[1932] *Waste Management II*, Award, ¶ 98, **CL-36**.

[1933] Memorial, Section V.C.3.a.

[1934] Counter-Memorial, ¶¶ 569, 571.

[1935] Counter-Memorial, ¶ 562 ("*el estándar de TJE está sujeto al alto umbral*.").

[1936] Counter-Memorial, ¶ 546.

argument is clearly aimed at imposing its artificially elevated standard, one that excludes important protections that numerous NAFTA and non-NAFTA tribunals have accepted, such as the protection of legitimate expectations, denial of justice, and full *legal* protection and security.

786. Its argument fails to engage with the numerous NAFTA and other decisions that have found that "there is no substantive difference in the level of protection afforded by both standards" (*i.e.*, the minimum standard of treatment and any autonomous standard of treatment for protections like fair and equitable treatment or full protection and security, for example).[1937] For example, the NAFTA tribunal in *Waste Management v. México II*, found that "despite certain differences of emphasis a general standard for Article 1105 is emerging."[1938] While the majority of cases address

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[1937] *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (Aug. 22, 2016) ¶ 520, **CL-125**. *See also Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan ("Rumeli")*, ICSID Case No. ARB/05/16, Award (July 29, 2008), ¶ 611, ("[The tribunal] shares the view of several ICSID tribunals that the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law."), **CL-113**; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* ("*Biwater Gauff v. Tanzania*"), ICSID Case No. ARB/05/22, Award (July 24, 2008), ¶ 592 ("[T]he Arbitral Tribunal also accepts, as found by a number of previous arbitral tribunals and commentators, that the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law."), **CL-22**; *Azurix*, Award, ¶ 361 ("[T]he minimum requirement to satisfy this standard [fair and equitable treatment] has evolved and the Tribunal considers that its content is substantially similar whether the terms are interpreted in their ordinary meaning, as required by the Vienna Convention, or in accordance with customary international law."), **CL-126**; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* ("*Duke Energy*"), ICSID Case No. ARB/04/19, Award (Aug. 18, 2008), ¶¶ 335-337, **CL-127**; *Saluka Investments BV (The Netherlands) v. Czech Republic* ("*Saluka*"), UNCITRAL, Partial Award (Mar. 17, 2006), ¶ 291 ("[I]t appears that the difference between the Treaty standard laid down in Article 3.1 and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real. To the extent that the case law reveals different formulations of the relevant thresholds, an in-depth analysis may well demonstrate that they could be explained by the contextual and factual differences of the cases to which the standards have been applied."), **CL-128**; *Waste Management II*, Award, ¶ 98, **CL-36**; *Merrill*, Award, ¶ 211, **CL-124**; *Cargill*, Award, ¶ 283 ("The central inquiry therefore is: what does customary international law *currently* require in terms of the minimum standard of treatment to be accorded to foreigners? The *Waste Management II* tribunal concluded that a general interpretation was emerging from NAFTA awards."), **CL-136**; *Methanex Corp. v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits (Aug. 3, 2005), Part IV, Chapter C, ¶ 12, Chapter D, ¶ 8 (referring to the fair and equitable treatment standard articulated in *Waste Management II* with approval), **CL-27**; *GAMI*, Final Award, ¶ 95 ("The ICSID tribunal in *Waste Management II* made what it called a 'survey' of standards of review applied by international tribunals dealing with complaints under Article 1105. It observed the emergence of a 'general standard for Article 1105.'"), **CL-39**; *Mobil Investments Canada Inc. and Murphy Oil Corp. v. Government of Canada*, Decision on Liability and on Principles of Quantum, ¶ 141 ("The [*Waste Management*] tribunal identified the customary international law standard."), **CL-132**; see *also Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (Jan. 17, 2007), ¶ 291, **CL-91**; *CMS Gas v. Argentina*, Award, ¶ 284, **CL-129**; *Occidental v. Ecuador*, Final Award, ¶¶ 188-90, **CL-130**.

[1938] *Waste Management II*, Award, ¶ 98, **CL-36**.

the fair and equitable treatment standard, the same is true of full protection and security. Several tribunals have found that the words "full protection and security" must mean both physical and legal protection and security.[1939] As explained below, the full protection and security standard clearly covers both physical and legal security.

787. To impose a higher threshold, Mexico claims that the minimum standard of treatment under the NAFTA "must be analyzed under very specific parameters."[1940] Yet, it never explains what those parameters are. In reality, even the decisions on which Mexico relies confirm that the minimum standard of treatment is "indistinguishable" from or materially identical to that of the fair and equitable treatment standard found in other treaties. For example, while the NAFTA tribunal in *S.D. Myers v, Canada* found (as Mexico correctly notes) that "the phrase . . . fair and equitable treatment . . . must be read in conjunction with . . . treatment in accordance with international law,"[1941] it also established that "[t]he minimum standard of treatment provision of the NAFTA is similar to clauses contained in BITs."[1942] Likewise, the NAFTA tribunal in *Cargill v. Mexico* endorsed the *Waste Management II* tribunal's conclusion "that a general interpretation [of the MST under Article 1105] was emerging from NAFTA awards."[1943] This "general interpretation," according to the NAFTA tribunal in *Merrill & Ring v. Canada*, leaves no doubt that the minimum standard of treatment has evolved so as to include the autonomous fair and equitable treatment standard.[1944]

[1939] *See Azurix*, Award, ¶ 408, **CL-126**; *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability (Dec. 27, 2010), ¶ 343, **CL-315**.

[1940] Counter-Memorial, ¶ 558.

[1941] *SD Myers*, Partial Award, ¶ 262, **CL-30**.

[1942] *SD Myers*, Partial Award, ¶ 259, **CL-30**.

[1943] *Cargill*, Award, ¶ 283, **CL-136**.

[1944] *Merrill*, Award, ¶ 211 ("But against the backdrop of the evolution of the minimum standard of treatment discussed above, the Tribunal is satisfied that fair and equitable treatment has become a part of customary law."), **CL-124**.

788. In sum, Mexico's attempt to narrow its obligations under Article 1105 of the NAFTA and exclude decisions of tribunals ruling under "autonomous" treaties fails.

E. Fair and Equitable Treatment: Mexico Cannot Deny That It Has Breached Article 1105's FET Standard

789. In the Memorial on the Merits, Claimants provided a detailed explanation of fair and equitable treatment under the minimum standard of treatment in international law. Mexico seeks to artificially narrow that legal standard. However, that bid to escape liability on legal grounds also fails.

1. The FET Legal Standard: Mexico's Hopeless Bid to Narrow the FET Standard

(a) Denial of Justice: Conduct May Breach Both Mexico's Fair and Equitable Treatment and Denial of Justice Obligations under NAFTA Article 1105

790. Mexico seeks to defeat Claimants' fair and equitable treatment claim by mischaracterizing that claim. It argues wrongly that "Claimants' only cause of action" is denial of justice given that (it says) "Claimants cannot deny in this case that their claim is also based on disagreements with the Respondent's judicial system and the administrative actions arising from its decisions."[1945]

791. That is factually inaccurate. As Claimants explain below, their fair and equitable treatment claim is independent of their denial of justice claim and relies substantially on the reality that the actions of Mexico's non-judicial authorities engaged in conduct that breached Mexico's obligations under Article 1105's fair and equitable treatment obligation, including by allowing its decisions to be influenced by political pressures exerted on it by office of President Peña Nieto

[1945] Counter-Memorial, ¶ 565 ("*Lo que las Demandantes no pueden negar en este caso es que su reclamación también está basada en sus inconformidades con el sistema judicial de la Demandada y las acciones administrativas derivadas de sus decisiones. . . . la única causa de acción de las Demandantes es el elemento de denegación de justicia . . . .*").

and by the political, informal policy objectives of the PRI and PAN parties that did not approve of increasing the number of available casino permits.

792. Mexico's argument is also wrong as a matter of law. Under international law, the same fact may give rise to breaches of different standards. Mexico does not deny, for example, that a breach of Article 1105's fair and equitable treatment obligation may also constitute a breach of its expropriation protection under Article 1110 of the NAFTA—or of its full protection and security obligation under Article 1105. In fact, numerous tribunals—including NAFTA tribunals—have made such findings.[1946] For example, the *Merrill* tribunal "identified unfair and inequitable treatment with conduct that is arbitrary, grossly unfair, unjust or idiosyncratic which, in so far as it also encompasses questions of due process, leads to an outcome which 'offends judicial propriety.'"[1947] And the recent NAFTA tribunal in *Eli Lilly* confirmed that "a claimed breach of the customary international law minimum standard of treatment requirement of NAFTA Article 1105(1) may be properly a basis for a claim under NAFTA Article 1105 notwithstanding that it is not cast in denial of justice terms."[1948]

793. This is only logical. Under the international law rules of state responsibility, and as NAFTA tribunals acknowledge, a State is responsible for the acts of its organs including its

[1946] *See, e.g.*, *Merrill*, Award, ¶ 217 ("While not qualifying as an act of expropriation, it is still necessary to examine whether this particular situation could result in the breach of fair and equitable treatment, as the ability of the Investor to conduct its business without undue interference might be unreasonably hindered."), **CL-124**; *Wena Hotels*, Award, ¶¶ 84, 95, 110, **CL-293**; *Azurix*, Award, ¶ 406, **CL-126**; *Occidental v. Ecuador*, Final Award, ¶ 187 ("Treatment that is not fair and equitable automatically entails an absence of full protection and security of the investment."), **CL-130**; *Reinhard Hans Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award (May 16, 2012), ¶ 257 ("That violation of the Treaty might, alternatively, have been explained in terms of violations of the fair and equitable treatment standard, since, as is well known, expropriation may result from a variety of potential causes."), **RL-035**.

[1947] *Merrill*, Award, ¶ 199, **CL-124**.

[1948] *Eli Lilly and Company v. Canada* ("*Eli Lilly*"), ICSID Case No. UNCT/14/2, Final Award (Mar. 16, 2017), ¶ 223, **CL-112**.

judiciary, as developed more fully below in the denial of justice section.[1949] Thus, to the extent that a host State's judiciary engages in unlawful conduct, the State will be responsible—regardless of whether that conduct arises from a denial of justice or some other act.

794. The cases on which Mexico relies to argue the opposite offer Mexico no support.

795. *Mondev*: Mexico relies on the 20-year old decision in the *Mondev* case, which, it suggests, stands for the principle that "disagreements" with a host State's "judicial system and the administrative actions arising from its decisions"[1950] can only amount to a denial of justice at best, but that decision nowhere states that a denial of justice cannot be a breach of the fair and equitable treatment standard. The only claim before the *Mondev* tribunal was a denial of justice claim.[1951] Notably, while the *Mondev* decision arose out of a single decision of the Massachusetts Supreme Judicial Court, which the claimant argued, misapplied the law on the merits, Claimants' claims of breach arise out of the conduct of its non-judicial authorities (including, SEGOB, as well as Mexico's tax and criminal authorities). *Mondev*, therefore, is of no assistance to Mexico's argument.

796. *Waste Management II*: Similarly, the *Waste Management II* award nowhere suggests that Claimants may bring only a denial of justice claim. To the contrary, it notes that the FET standard is breached by conduct that "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

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[1949] *See Eli Lilly*, Final Award, ¶ 221 ("First, the judiciary is an organ of the State. Judicial acts will therefore in principle be attributable to the State by reference to uncontroversial principles of attribution under the law of State responsibility."), **CL-112**; *Azinian v. Mexico*, Award, ¶ 98 ("Although independent of the Government, the judiciary is not independent of the State: *the judgment given by a judicial authority emanates from an organ of the State in just the same way as a law promulgated by the legislature or a decision taken by the executive*."), **CL-192**; *Rumeli*, Award, ¶ 702 ("[A] taking by the judicial arm of the State may also amount to an expropriation[.]"), **CL-113**; *Siag v. Egypt*, ICSID Case No. ARB/05/15, Award (June 1, 2009), ¶ 196, **CL-68**.

[1950] Counter-Memorial, ¶ 565.

[1951] *Mondev*, Award, ¶ 126 et seq., **CL-17**.

proceedings."[1952] Likewise, the tribunal in *Loewen*, on which the *Waste Management II* tribunal relies heavily, acknowledged that "[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough" to establish "unfair and inequitable treatment *or* denial of justice."[1953]

797. Therefore, the mere fact that Claimants bring a denial of justice claim does not preclude their bringing a fair and equitable treatment claim on the basis of the same facts. For the avoidance of doubt, however, Claimants also bring their fair and equitable treatment claim on facts independent of the conduct of Mexico's judicial authorities.

(b) Legitimate Expectations: The Fair and Equitable Treatment Obligation Under NAFTA Article 1105 Protects an Investor's Legitimate Expectations

798. In the Memorial, Claimants explained that a cornerstone of the fair and equitable treatment obligation is the requirement that a State safeguard investors' legitimate expectations and thus accord investors a stable and predictable investment framework.[1954]

799. Mexico seeks to avoid liability for its frustration of Claimants' legitimate expectations that its administrative gaming agency (SEGOB) would act consistently and apply the gaming laws consistently rather than change its criteria depending on which political party was in power, as happened here, that is judiciary would function independently rather than under the influence and in furtherance of the political desires of the Mexican Executive branch, and that E-Games would continue as a gaming permit holder for 25 years and beyond by arguing that fair and equitable treatment under the NAFTA does not include this cornerstone protection. This, it says, is because

[1952] *Waste Management II*, Award, ¶ 98, **CL-36**.

[1953] *Waste Management II*, Award, ¶ 97, **CL-36** (emphasis added).

[1954] Memorial, Section V.C.3.a.

there is no State practice or *opinio juris* pursuant to customary international law supporting the existence of such a protection at international law.[1955]

800. Mexico, however, ignores one basic rule of international law: "[w]hen parties to a treaty agree that a tribunal may render binding decisions on the interpretation or application of that treaty, the decisions of that tribunal constitute, for the States concerned, both State practice and—thanks to the requirement of explicit ratiocination in terms of international law—*opinio juris*."[1956] Mexico's argument that fair and equitable treatment does not include protection of Claimants' legitimate expectations relies on nothing more than the self-serving, *ad hoc* submissions of NAFTA contracting parties (including its own) under NAFTA Article 1128.[1957] Those submissions cannot and do not offer a valid interpretation of the NAFTA under the applicable rules of international law, which provides that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"[1958]—and much less any rules of customary international law.

801. Numerous NAFTA tribunals have established that "the concept of 'legitimate expectations'" exists under NAFTA Article 1105 and "relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or

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[1955] Counter-Memorial, ¶¶ 577-580.

[1956] Michael Reisman, "Canute Confronts the Tide: States versus Tribunals and the Evolution of the Minimum Standard in Customary International Law," ICSID Review - Foreign Investment Law Journal (2015), **CL-300**; *see also Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award (Mar. 24, 2016), ¶¶ 496-502, 504-505, 512, 553, **RL-013**; *Windstream Energy LLC v. The Government of Canada*, PCA Case No. 2013-22, Award (Sept. 27, 2016), ¶¶ 350-352, 355-361, **CL-301**.

[1957] Counter-Memorial, ¶¶ 578-579.

[1958] Vienna Convention, Article 31(1), **CL-41**.

investment) to suffer damages" (in the words of the *International Thunderbird* tribunal).[1959] Thus, the NAFTA's FET standard undeniably protects an investor's legitimate expectations that a host State will respect the contractual obligations that it has entered into with the investor in a sovereign capacity, as the *Mondev* tribunal found.[1960]

802. This protection does not cover only specific commitments made by the State to an investor, as Mexico wrongly argues,[1961] but, even more broadly, "an expectation that its business may be conducted in a normal framework free of interference from government regulations which are not underpinned by appropriate public policy objectives."[1962] Mexico's opposition to such legitimate expectations is all the more inexplicable given that the NAFTA Preamble itself states that a purpose of the Treaty was to establish "clear . . . rules" and "ensure a predictable commercial framework for business planning and investment,"[1963] thus confirming that an investor may legitimately expect a stable and predictable commercial framework based on the rule of law and not subject to political whim (as Claimants' investments were). As the *Tecmed v. México* tribunal

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[1959] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award (Jan. 26, 2006), ¶ 147, **CL-07**; *Waste Management II*, Award, ¶ 98, **CL-36**; *Merrill*, Award, ¶ 233, **CL-124**; *Bilcon*, Award on Jurisdiction and Liability, ¶ 572, **RL-010**.

[1960] *Mondev*, Award, ¶ 134, **CL-17** ("a governmental prerogative to violate investment contracts would appear to be inconsistent with the principles embodied in Article 1105 and with contemporary standards of national and international law concerning governmental liability for contractual performance"); *see also Waste Management II*, Award, ¶ 115 ("an outright and unjustified repudiation of the transaction" may constitute a breach of the FET obligation where there is no "remedy [] open to the [investor] to address the problem."), **CL-36**; *Impregilo S.p.A. v. The Argentine Republic*, ICSID Case No ARB/07/17, Award (June 21, 2011), ¶ 299, **CL-302**; *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (Jan. 29, 2004), ¶ 162 ("[A]n unjustified refusal to pay sums admittedly payable under an award or a contract at least raises arguable issues under [the FET obligation]."), **CL-303**; *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction (Feb. 12, 2010), ¶ 146 ("[A] State's non-payment of a contract is, in the view of the Tribunal, capable of giving rise to a breach of fair and equitable treatment requirement, such as, perhaps, where the non-payment amounts to a repudiation of the contract, frustration of its economic purpose, or substantial deprivation of its value."), **CL-304**.

[1961] Counter-Memorial, ¶ 581.

[1962] *Merrill*, Award, ¶ 233, **CL-124**.

[1963] NAFTA Preamble, **CL-154**.

explained: "The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations."[1964]

803. Mexico relies on only two non-NAFTA awards for its attempt to strike any protection of legitimate expectations from the NAFTA's fair and equitable treatment standard, although it does not address them in the text of its Counter-Memorial and instead consigns them to a mere footnote.[1965] Those awards, however, do Mexico's credibility no favors. For example, the *Duke Energy* award—on which Mexico relies—says the exact opposite of what Mexico seeks to argue, *i.e.*, "[t]he stability of the legal and business environment is directly linked to the investor's justified expectations," which must be "legitimate and reasonable at the time when the investor makes the investment," taking into account "all circumstances."[1966] Moreover, Mexico's reliance on non-NAFTA awards is all but an admission that its attempts to prevent the Tribunal from relying on any non-NAFTA cases in relation to Article 1105 (like the rest of its arguments on the law) cannot be taken seriously.

(c) Harassment and Retaliatory Measures: Mexico Does Not Deny That NAFTA Article 1105's FET Standard Protects Against

[1964] *Tecmed*, Award, ¶ 154, **CL-84**.

[1965] Counter-Memorial, fn. 662.

[1966] *Duke Energy*, Award, ¶ 340, **CL-127**. The *Duke Energy* tribunal also found that "the difference between the Treaty standard laid down in [the BIT] and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real," and that "[t]o the extent that the case law reveals different formulations of the relevant thresholds, an in-depth analysis may well demonstrate that they could be explained by the contextual and factual differences of the cases to which the standards have been applied."

Harassment and Retaliatory Measures and Cannot Shield Mexico from Liability for its Bad Faith Tax Measures

804. In the Memorial, Claimants explained that Mexico had breached its fair and equitable treatment obligation under NAFTA Article 1105 by engaging in a campaign of harassment and retaliatory measures.[1967]

805. Mexico does not deny that harassment and retaliatory measures will give rise to breach of NAFTA Article 1105.

806. Mexico's only response on the law is that (it says) any measure labeled a tax measure is excluded from any liability under Article 2103 of the NAFTA--and thus this Tribunal lacks jurisdiction over such claims.[1968] That, of course, is incorrect. Article 2103(1) provides that "nothing in this Agreement shall apply to taxation measures." That provision, however, only applies to genuine, good faith tax measures.

807. This has been the finding of numerous tribunals that have ruled on similar provisions of other treaties. For example, the *Yukos*, *Europa Nova*, *Novenergia*, and other tribunals have found, addressing a similar provision of the Energy Charter Treaty, that "for the taxation carve-out to apply, the taxation measure in question needs to have been adopted in good faith."[1969] A tax carve out will not apply, according to the *Eurus* tribunal, where it is "taken for ulterior, improper motives under the guise of taxation and therefore in bad faith"[1970]—as is clearly true in this case.

[1967] Memorial, ¶¶ 593-597.

[1968] Counter-Memorial, ¶¶ 606-607.

[1969] *See e.g.*, *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, Final Award (Feb. 15, 2018), ¶ 520, **CL-305**; *see also Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227, Final Award (July 18, 2014), ¶ 1443, **CL-248**; *WA Investments-Europa Nova Limited v. The Czech Republic*, PCA Case No. 2014-19, Award (May 15, 2019), ¶ 334, **CL-306**.

[1970] *Eurus Energy Holdings Corporation and Eurus Energy Europe B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability (Mar. 17, 2021), ¶ 173, **CL-307**.

808. This is also true under the NAFTA. The *Waste Management II* tribunal found that where tax measures are part of "a deliberate conspiracy—that is to say, a conscious combination of various agencies of government without justification to defeat the purposes of an investment agreement," they "would constitute a breach of" the FET standard.[1971] As explained below, the same is true of the tax measure taken by Mexico.

809. Tellingly, the two NAFTA cases on which Mexico relies[1972] actually demonstrate that only good faith tax measures are covered by Article 2103. In *Cargill*, for example, the tribunal confirmed that even lawful tax measures "may nevertheless aid the Tribunal's understanding of the context of the acts legitimately within the Tribunal's purview."[1973] This is consistent with the reality that the fair and equitable treatment standard is broadly designed to "fill gaps which may be left by the more specific standards" of international investment treaties.[1974] Moreover, the NAFTA tribunal in *Feldman* confirmed that Article 2103 only applies to "non-discriminatory, bona fide taxation."[1975]

810. This is only logical. If Mexico were correct, a State could simply apply a "tax" label to its prejudicial conduct in order to escape its treaty breaches. That, of course, is impermissible under international law, and is not consistent with the object and purpose of the NAFTA.

[1971] *Waste Management II*, Award, ¶ 138, **CL-36**; Memorial, ¶ 594.

[1972] Counter-Memorial, fn. 684.

[1973] *See Cargill*, Award, ¶ 297, **CL-136**.

[1974] Memorial, ¶ 459 (quoting Dolzer & Schreuer at 132 (The clause is broadly designed "to fill gaps which may be left by the more specific standards, in order to obtain the level of investor protection intended by the treaties." The principle of good faith is the "common guiding beacon" that will orient the understanding and interpretation of the obligations), **CL-122**); *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007), ¶ 297, **CL-148**.

[1975] *Marvin Roy Feldman Karpa v. United Mexican States* ("*Feldman*"), ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002), ¶ 106, **CL-96**.

811. In any event, Mexico's argument that this Tribunal lacks "jurisdiction" over a claim involving Mexico's retaliatory tax actions is not only wrong, but untimely, as explained at Section II.A.1. The Tribunal has already heard Mexico's jurisdictional arguments and concluded that it has jurisdiction over these claims. Mexico's tax measures were detailed at Section III(J)(I) of the Request for Arbitration. If Mexico had wished to raise an objection to jurisdiction, it should have done so earlier.

(d) Arbitrary and Discriminatory Measures: Mexico Does Not Deny that NAFTA Article 1105's FET Standard Protects Against Arbitrary and Discriminatory Measures

812. Mexico also does not deny that Article 1105 protects against arbitrary and discriminatory interference with Claimants' investments.[1976] It cannot, as this is one of the core elements of the fair and equitable treatment standard.[1977] The tribunal in *Merrill v. Canada* explained that "[c]onduct which is unjust, arbitrary, unfair, discriminatory or in violation of due process has also been noted by NAFTA tribunals as constituting a breach of fair and equitable treatment, even in the absence of bad faith or malicious intention on the part of the state."[1978]

813. This protection has two prongs: a protection against (1) arbitrary conduct as well as (2) discriminatory conduct.

814. Mexico does not challenge the first prong. It relies on the *Waste Management II* award and quotes the passage from that award, which states that "the minimum standard of treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary."[1979]

[1976] Counter-Memorial, ¶¶ 595-603.

[1977] *See* Memorial, ¶¶ 460, 471-474.

[1978] *Merrill*, Award, ¶ 208, **CL-124**.

[1979] Counter-Memorial, ¶¶ 555, 566, and 568.

815. Mexico also does not address the second prong, as discrimination is clearly an element of the fair and equitable treatment protection under NAFTA Article 1105. While Articles 1102 and 1103 of the NAFTA protect against discrimination on the basis of nationality, Article 1105 protects against protects against discrimination on the basis of other factors, such as, for example, political influence. As the *Glamis Gold* tribunal found, "under the NAFTA, there are two types of discrimination: nationality-based discrimination and discrimination that is founded on the targeting of a particular investor or investment."[1980] In this case, as discussed below in this section and in the national treatment section, we have both types of discrimination.

2. Mexico's FET Breaches: Mexico's Mischaracterization of Claimants' FET Claim as "Disagreements with the Respondent's Judicial System" Cannot Allow It to Escape Liability

816. Mexico's mischaracterization of Claimants' FET claim as "disagreements with the Respondent's judicial system"[1981] cannot allow it to escape liability. Each of the abovementioned FET protections guaranteed by the NAFTA has been breached by Mexico.

(a) Arbitrary and Discriminatory Conduct: Mexico Arbitrarily and Discriminatorily Interfered with Claimants' Investments and Denied Them Due Process

817. In the Memorial, Claimants showed that Mexico interfered with Claimants' casino operations by closing their Mexico City Casino for 34 days in June 2013 on baseless safety regulations, arbitrarily and unreasonably cancelling the E-Games independent permit, improperly and illegally closing all the Casinos in April 2014, and then again by arbitrarily and in a nontransparent manner denying E-Games' requests for new, independent gaming permits.[1982]

[1980] *Glamis Gold, Ltd. v. The United States of America* ("*Glamis Gold v. USA*"), UNCITRAL, Award (June 8, 2009), ¶ 542 n. 1087, **RL-051**.

[1981] Counter-Memorial, ¶ 564.

[1982] Memorial, ¶¶ 587-589.

After that, Mexico repeatedly thwarted Claimants' persistent efforts to reopen the Casinos and/or sell their investments to third parties, including by hindering and refusing to approve various proposed transactions.[1983] All of their potential partners even told the Claimants that the Mexican government would not let Claimants' business survive in Mexico.[1984] Moreover, two Directors of the Games and Raffles Division (both Ms. Salas as well as her successor Mr. Cangas) made clear that they would *not* allow the Casinos to reopen as long as the U.S. shareholders were involved.[1985] This was not the result of a legitimate policy, but instead a politically motivated campaign to remove Claimants, U.S. investors, from the Mexican casino industry in order to benefit political allies of the PRI.

818. Mexico cannot deny that these established breaches are squarely breaches by the executive branch and are not judicial decisions, and thus—even on Mexico's case—cannot be barred by a claim of denial of justice or the due process aspect of FET.

819. First, in respect to the decision to close the Mexico City Casino in June 2013 for 34 days, Mexico offers the stale argument that Claimants "did not provide evidence to support their claim" that the purported "violations" of public safety regulations for which the Casino was closed were fabricated.[1986] That is simply false. As Claimants have explained, and Mexico *does not deny*, the closure of Claimants' Mexico City Casino for over a month was based on the "almost unbelievable" allegation that one particular wire within one particular slot machine cabinet in the Mexico City Casino needed to be enclosed in a conduit.[1987] Even if the allegation were true,

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[1983] Memorial, ¶¶ 590-592.

[1984] Memorial, ¶ 591.

[1985] Memorial, ¶¶ 590-592.

[1986] Counter-Memorial, ¶ 596 ("*las Demandantes no presentan evidencia en apoyo a esta parte de su reclamación*.").

[1987] *See* Email from E. Burr Re: B-Mex/B-Mex II/ Palmas South: Update (Aug. 7, 2013), p. 1, **C-422**; Third Gordon Burr Statement, **CWS-50**, ¶ 97; Third Erin Burr Statement, **CWS-51**, ¶ 107.

however, it would be no ground to shut down the whole Casino for over a month. That is without question a disproportionate reaction by Mexico and surely motivated by something other than concern for safety or any other legitimate reason for the closure.

820. First, an exposed wire of this kind is not considered a hazard by the manufacturers of the wire and by all certifying agencies (including in Mexico[1988]) as the voltage that runs through this wire generates approximately 75 milliwatts (a harmless amount).[1989] Second, and *tellingly, none of the competitors of the Mexico City Casino, which had identical wires in their machine cabinets, was closed for the alleged infraction*.[1990]

821. This closure was not a reasonable exercise of a legitimate policy, but an arbitrary, discriminatory, and disproportionate attempt to disadvantage Claimants in order to benefit their competitors. Claimants also were told informally that a competitor bribed someone within the local government to close this Casino and to keep it closed.[1991] These political motivations explain why, when Claimants attempted to provide paperwork to demonstrate compliance with the alleged encasing requirement, the local government arbitrarily did not accept it.[1992] Indeed, even though Claimants had obtained a court order allowing this Casino to reopen within three days of the harassing closure, the city prevented the reopening for over one month, until July 24, 2013.[1993] It

[1988] *See* Email from E. Burr Re: B-Mex/B-Mex II/ Palmas South: Update (Aug. 7, 2013), p. 1, **C-422**; Third Gordon Burr Statement, **CWS-50**, ¶ 97; Third Erin Burr Statement, **CWS-51**, ¶ 107.

[1989] *See* Email from E. Burr Re: B-Mex/B-Mex II/ Palmas South: Update (Aug. 7, 2013), p. 1, **C-422**; Third Gordon Burr Statement, **CWS-50**, ¶ 97; Third Erin Burr Statement, **CWS-51**, ¶ 107.

[1990] Third Gordon Burr Statement, **CWS-50**, ¶ 97; Third Erin Burr Statement, **CWS-51**, ¶ 107.

[1991] *See* Email from E. Burr Re: B-Mex/B-Mex II/ Palmas South: Update (Aug. 7, 2013), p. 1, **C-422**.

[1992] Memorial, ¶ 195; Third Gordon Burr Statement, **CWS-50**, ¶ 98; Third Erin Burr Statement, **CWS-51**, ¶ 108.

[1993] Third Gordon Burr Statement, **CWS-50**, ¶ 97.

is thus no surprise that Claimants learned from an informal source that a competitor had bribed someone within the local government to keep the Casino closed.[1994]

822. The futility of Mexico's argument is exposed by its attempt to brush this reality aside with the claims that (1) "Claimants had domestic remedies at their disposal" and (2) Claimants "are not claiming damages for the temporary closure of the Mexico City Casino in June 2013."[1995] Those arguments cannot succeed because they are wrong. With regards to the former, Mexico puts forward no proof that exhaustion of local remedies is required for an FET claim. It is not. As to the latter, Claimants specifically stated that they seek damages for the fact that Mexico "deliberately obstructed the reopening of the facility, *aggravating the damages caused by the pretextual, arbitrary, and discriminatory closure*."[1996] Moreover, Claimants' damages expert does adjust the net gaming revenue for the Mexico City Casino to account for this unjustified and pretextual closure targeting the Claimants.[1997] As Claimants explained in their Memorial, the Mexico City Casino produced high revenues, having had 267 machines, six electronic tables, four hybrid tables and 10 Texas Hold'em tables for poker, food services, a bar, and a stage for live entertainment.[1998]

823. Mexico's attempt to escape liability on grounds that Claimants somehow failed to exhaust local remedies gets it no further.[1999] No such obligation exists under Article 1105's fair and

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[1994] Memorial, ¶ 195; Third Gordon Burr Statement, **CWS-50**, ¶ 98; Third Erin Burr Statement**, CWS-51**, ¶ 108.

[1995] Counter-Memorial, ¶ 596 ("*las Demandante no reclaman daños por la clausura temporal del casino de la Ciudad de México en junio de 2013*.").

[1996] Memorial, ¶ 588. (emphasis added).

[1997] *See* Second Berkeley Research Group Report, **CER-7**, ¶¶ 23, 82.

[1998] Memorial, ¶ 45; Third Erin Burr Statement, **CWS-51**, ¶ 16.

[1999] Counter-Memorial, ¶ 598.

equitable treatment standard and, in any event, any such attempts would clearly be futile (see *supra* ¶ 929).

824. Second, Mexico does not rebut Claimants' showing—and, through its clearly deficient document production, effectively concedes—that SEGOB's cancellation of the E-Games Independent Permit reflected an unreasonable and arbitrary decision-making process in violation of the FET standard.[2000] As explained above, SEGOB's own internal and contemporaneous memoranda[2001] show that SEGOB's purported revocation of the November 16, 2012 Resolution was not the result of judicial decisions. Rather, it was the result of SEGOB's politically motivated strategy to use the courts to destroy Claimants' investments, before the legality of the E-Games Independent Permit was under review by the courts, and premised on SEGOB's incorrect and unexplained belief that the E-Games Independent Permit was granted in an "irregular" manner at the end of the preceding PAN administration. SEGOB's position and actions in this regard were arbitrary, discriminatory, and lacking any reasoning in violation of Mexico's fair and equitable treatment obligation. Importantly, SEGOB's position was entirely nontransparent—as to date it has never explained what the supposed irregularities were that led to the issuance of the permit, nor has it ever provided Claimants with any process, let alone due process, to defend against such allegations—and could not be challenged by E-Games, in violation of Claimants' due process rights as well as the fair and equitable treatment standard.

825. As explained above, during document production, Mexico produced notes taken by Ms. Rayo from a meeting that she had with Ms. Salas on or around February 22, 2013.[2002] These notes describe the history of E-Mex's permit and the granting of the E-Games Independent Permit

[2000] Memorial, ¶¶ 572-574, 587; *see* Counter-Memorial, ¶¶ 595-599.

[2001] *See* Email from C. Rayo Zapata re: Meeting and Notes with M. Salas re: E-Games (Feb. 22, 2013), **C-401**;

[2002] Email from C. Rayo Zapata re: Meeting and Notes with M. Salas re: E-Games (Feb. 22, 2013), **C-401**.

and relate SEGOB's arbitrary position that "Exciting [E-Games] is in a proceeding before the court, if it declares that they were given irregularly, then they will be revoked."[2003] That language mirrors Ms. Salas' then-recent statement to the press that E-Games Independent Permit was granted "irregularly."[2004]

826. However, at the time of that meeting February 2013, the legality of the E-Games Independent Permit was *not* a live legal question "before [any] court." While the November 16, 2012 Resolution was mentioned in the Second *Amparo* proceeding (*Amparo* 1151/2012, filed by E-Mex on December 18, 2012), that *amparo* initially challenged the lack of notice regarding the permits granted to E-Games and Producciones Moviles, and not the legality of the E-Games Independent Permit, as Mexico concedes in its Counter-Memorial.[2005] The November 16, 2012 Resolution was not incorporated and its legality was not challenged in that proceeding until a month after the February 13, 2013 meeting between Ms. Salas and Ms. Rayo, on March 20, 2013, when the Second District Judge granted E-Mex's March 19, 2013 request to amend its request for *amparo* to include the Resolution;[2006] E-Games immediately appealed that order through *Recurso de Queja* 30/2013, arguing that the amendment was untimely.[2007]

827. Likely understanding that the First Collegiate Tribunal could agree with E-Games and find E-Mex's amendment inadmissible in the Second *Amparo* proceeding (which it did on October 17,

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[2003] Email from C. Rayo Zapata re: Meeting and Notes with M. Salas re: E-Games (Feb. 22, 2013), **C-401** ("*Exciting* [E-Games] *Están en proceso ante juzgado, si declara que fueron dados de manera irregular van a ser revocados*.").

[2004] *Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón* (Jan. 27, 2013). Retrieved from http://www.jornada.unam.mx/2013/01/27/politica/013n1pol, **C-17**.

[2005] Counter-Memorial, ¶ 300; E-Mex Request for *Amparo* (Dec. 18, 2012), **C-273**.

[2006] Order of the Second District Judge accepting to process the filing of E-Mex's Amendment (Mar. 20, 2013), **C-293**; E-Mex Amendment (Mar. 19, 2013), **C-292**.

[2007] E-Games brief in *Recurso de Queja* 30/2013 (Mar. 5, 2013), **C-294**.

2013[2008]), SEGOB instead revoked the November 16, 2012 Resolution at the first opportunity on August 28, 2013 in response to Sixteenth District Judge Gallardo's August 26, 2013 Order in the First *Amparo* proceeding, *Amparo* 1668/2011—*where the November 16, 2012 Resolution had not been "before the court" at all*. As explained in the Memorial and herein, SEGOB completed this astonishing reversal of its own reasoning within 24 hours of being notified of Judge's Gallardo's Order, demonstrating its political motivation to revoke the November 16, 2012 Resolution. The reasoning it employed, which wrongly attributed a ruling to Judge Gallardo regarding the unconstitutionality of the doctrine of "acquired rights", which he clearly did not make—he had in fact made the direct opposite ruling—proves that this administrative action was not only arbitrary, but motivated by a preordained decision to put the Claimants out of business.

828. Subsequently, in September 2014, after Mexico illegally closed the Casinos and consummated the expropriation of Claimants' investments, SEGOB indicated again in an official memorandum that it had revoked the E-Games Independent Permit not due to judicial orders, but rather: "The DGJS [Dirección General de Juegos y Sorteos, or the Games and Raffles Division] informed us that the Bis Permit [Claimants' independent permit] was canceled because it was a permit that had been irregularly granted at the end of the previous administration."[2009] It said nothing about Judge Gallardo's orders in the *Amparo* 1168/2011 case.

829. Thus, SEGOB's actions were not motivated by "judicial orders," but by SEGOB's consistent position from the beginning of the PRI administration through Mexico's expropriation of Claimants' investments that the E-Games Independent Permit was somehow "irregularly granted" during the prior PAN administration. SEGOB's own meeting notes show that this was

[2008] Order of the *Primer Tribunal Colegiado en Materia Administrativa del Cuarto Circuito* (Oct. 17, 2013), **C-295**.

[2009] Memo E-Games, **C-261** ("*La DGJS nos comunicó que el Permiso Bis fue cancelado debido a que el mismo era un permiso que había sido otorgado al final de la administración anterior de manera irregular*.").

SEGOB's position before the November 16, 2012 Resolution was even under judicial review before any court.

830. As explained in Claimants' Memorial and herein, SEGOB's motivations for taking that unexplained position were political and corrupt. Accordingly, SEGOB's August 28, 2013 revocation of the November 16, 2012 Resolution and purported cancellation of the E-Games Independent Permit were arbitrary and discriminatory in violation of Mexico's fair and equitable treatment obligation.

831. Further, when Mexico revoked the November 16, 2012 Resolution on August 28, 2013, it did not express that it did so on the (incorrect) basis that the E-Games Independent Permit was granted in an "irregular manner" during the prior PAN administration.[2010] Accordingly, that decision and SEGOB's true motivation—revealed more fully in document production through SEGOB's meeting notes—were nontransparent. Thus, they could not be challenged by E-Games, in violation of E-Games' due process rights and Mexico's obligation to accord Claimants fair and equitable treatment.

832. Setting this damning admission by Mexico aside for one moment, Claimants note that Mexico's representations during document production in this NAFTA are likewise—and independently—fatal to its case. During document production, Mexico asserted that it had no documents (including, *e.g.*, correspondence, reports, notes, memoranda, analyses, and official resolutions) related to, prepared in connection with, or reflecting an analysis of, *inter alia*: SEGOB's May 27, 2009 Resolution (E-Games Independent Operator);[2011] the status of "independent operator" under Mexican law;[2012] any opinion that that E-Games was not an

[2010] *See* SEGOB Resolution (Aug. 28, 2013), **C-289**.

[2011] Procedural Order No. 10 (Mar. 26, 2021), Annex I, Request 1.

[2012] Procedural Order No. 10 (Mar. 26, 2021), Annex I, Request 2.

independent operator under E-Mex's permit;[2013] SEGOB's August 15, 2012 Resolution (E-Games Exploitation and Operation Rights);[2014] SEGOB's November 16, 2012 Resolution (the E-Games Independent Permit);[2015] any instructions that Ms. Salas received from superiors or gave to others within the Mexican government during her time as Director of the Games and Raffles Division at SEGOB with respect to E-Games, E-Mex, or Producciones Móviles;[2016] the Mexican government's view on the independent nature of the E- Games Independent Permit and/or any links between the E-Games Independent Permit and E-Mex's permit;[2017] and, crucially, directions that Ms. Salas received from superiors and/or gave to staff who reported to her reflecting the basis for her or the government's opinion related to her interview with *La Jornada* in January 2013 where she stated that the E-Games Independent Permit was "illegal."[2018] In essence, Mexico asserted that it has no documents or analyses regarding the most important aspects of its cancellation of the E-Games Independent Permit.

833. As explained throughout this Reply, Mexico's assertions that it has no relevant documents are not credible and merit numerous adverse inferences. *However*, accepting Mexico's assertions at face value, Mexico effectively concedes that it performed no analysis in cancelling the E-Games Independent Permit. Thus, for instance, Mexico conceded that it performed *no analysis* regarding Ms. Salas declaration, immediately upon taking office in January 2013, that the E-Games Independent Permit was illegal. Mexico also concedes that it performed no analysis when SEGOB did an about face on August 28, 2013 and revoked all resolutions issued to E-Games, including

[2013] Procedural Order No. 10 (Mar. 26, 2021), Annex I, Request 3.

[2014] Procedural Order No. 10 (Mar. 26, 2021), Annex I, Request 10.

[2015] Procedural Order No. 10 (Mar. 26, 2021), Annex I, Request 11.

[2016] Procedural Order No. 10 (Mar. 26, 2021), Annex I, Request 17.

[2017] Procedural Order No. 10 (Mar. 26, 2021), Annex I, Request 18.

[2018] Procedural Order No. 10 (Mar. 26, 2021), Annex I, Request 22.

the November 16, 2012 Resolution, including as to how these resolutions flow from May 27, 2009 Resolution. Accordingly, Mexico concedes that its decision to cancel the E-Games Independent Permit was based on no reasoning or analysis, except, that is, for a desire to achieve a pre-ordained outcome. Such a decision-making process was patently unreasonable and arbitrary, in violation of the FET standard. Having claimed that it has no documents concerning any such analysis, Mexico cannot seriously argue otherwise.

834. Third, Mexico argues that Claimants did not qualify for new permits not because they did not have operating casinos—the inexistent requirement that was the arbitrary basis for the denials, as Claimants have explained[2019]—but because "the casinos that the Claimants intended to open with these new permits had been shut down" and "an administrative proceeding was initiated to make a final determination" and thus "SEGOB simply could not issue a new permit until the administrative proceeding had concluded."[2020]

835. Mexico's argument is nonsensical. As an initial matter, Mexico's assertion is unsupported by the record, as the denials contain only "is CLOSED DOWN," showing that Mexico arbitrarily denied Claimants' permit applications because the casinos were not open and operating (due to Mexico's illegal closures).[2021] In any event, the *ex post* "requirement" that an administrative proceeding (that begins after SEGOB closes a casino) be concluded exists nowhere in any relevant laws, notably the Gaming Regulation, and Mexico does not point to any such authority.[2022]

[2019] Memorial, ¶ 589.

[2020] Counter-Memorial, ¶ 597 ("*La SEGOB negó la solicitud porque los casinos que las Demandantes pretendían abrir en virtud de los permisos solicitados habían sido clausurados por operar sin permiso y, como resultado del cierre, se abrió un procedimiento administrativo para tomar una determinación final. La SEGOB simplemente no podía emitir un nuevo permiso hasta que se cerrara el procedimiento administrativo*.").

[2021] *See* SEGOB's denial of E-Games' requests (Aug. 15, 2015), **C-27 – C-33**; First Ezequiel González Matus Report, **CER-3**, ¶¶ 190, 192-193; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶¶ 75, 80.

[2022] *See* First Ezequiel González Matus Report, **CER-3**, ¶¶ 190, 192-193; Counter-Memorial, ¶ 597.

836. As explained in Section II.P *supra*, Mexico's argument that it was unable to grant E-Games new permits because SEGOB had shut the Casinos down for operating without a permit has no basis in Mexican law and is circular: SEGOB had the authority to grant Claimants a new permit to reopen the Casinos (as it took the decision to illegally close them), and thus an "administrative proceeding" *before SEGOB* would not have been any impediment to granting that permit.[2023] Indeed, as Mr. González explains, "the new permit would have functioned as the administrative act of approval to carry out precisely the same activity that was closed down previously by the same authority."[2024] Thus, under Mexican law, a resolution from SEGOB granting the new permits would have been the proper administrative act, as granting the new permits would have allowed for E-Games' continued lawful operation of the casinos that SEGOB improperly closed down.[2025] Claimants also explained in Section II.P *supra* that Mexico's other justifications for its denials are bogus, and that Mexico fails to justify its refusal to offer Claimants an opportunity to cure the alleged (inexistent) defects in their applications as required under Mexican law.[2026] Thus, by any measure, Mexico's denials were unlawful and cannot be rescued by *ex post* inexistent "requirements" that have no basis in Mexican law.

837. Yet, even if Mexico were correct that SEGOB's denials were justified under Mexican law due to SEGOB's own ongoing administrative proceeding (which Claimants, as noted, deny), that would *still* constitute a breach Mexico's fair and equitable treatment obligation because the denials do not state this *ex post* justification for the denial nor any clear way to redress the situation and

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[2023] *See* Second Ezequiel González Matus Report, **CER-6**, ¶ 203; First Ezequiel González Matus Report, **CER-3**, ¶¶ 192-198.

[2024] Second Ezequiel González Matus Report, **CER-6**, ¶ 204 ("*Esto es importante si se considera que el permiso hubiera sido el acto administrativo de aprobación para realizar justamente la misma actividad que en su momento fue materia de la clausura por la misma autoridad*".).

[2025] Second Ezequiel González Matus Report, **CER-6**, ¶ 203.

[2026] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 210-211.

allow Claimants to obtain a permit. This is a clear violation of Mexican law, Claimants' due process rights, and the obligation to treat Claimants in a non-arbitrary manner.[2027]

838. Moreover, SEGOB's administrative proceeding, like the April 24, 2014 closures themselves, was unlawful and irregular. SEGOB illegally prolonged the Closure Administrative Review Proceedings, improperly seeking to delay the proceedings until the conclusion of Claimants' *recurso de revisión* before the Supreme Court[2028] and ensure Claimants' Casinos would not reopen, even if the Supreme Court ruled in the Claimants' favor. Mexico cannot now argue, as it does, that it could not grant Claimants' permit applications due to the administrative proceeding *that Mexico itself unlawfully delayed*.

839. In any event, the proceedings and the closures were not based on a rational or legitimate policy goal, but an illegitimate attempt to remove Claimants from the industry to benefit political allies of the PRI. This is now clear. The PRI/Peña Nieto administration sought to destroy Claimants' investments because they would not pay bribes and hence could not be "controlled," and because the PRI believed that Claimants and E-Games were affiliated with the prior Calderón administration and the PAN given that their prior business partner, E-Mex, was a known supporter of the PAN.[2029] Further, as Mr. Ávila Mayo explained, the Mexican government revoked E-Games' permit as a political favor to the Hank Rhon family, a longstanding political dynasty affiliated with the PRI, and a strong supporter of President Peña Nieto's presidential campaign.[2030]

[2027] *See supra*, ¶¶ 991-996.

[2028] Memorial, ¶ 683; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 87.

[2029] *See supra*, ¶¶ 732; Memorial, ¶ 360; *Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón* (Jan. 27, 2013). Retrieved from http://www.jornada.unam.mx/2013/01/27/politica/013n1pol, **C-17**; E-Games Memo, **C-261**; First Black Cube Statement, **CWS-57**, ¶ 47; Third Gordon Burr Statement, **CWS-50**, ¶ 110.

[2030] *See* First Black Cube Statement, **CWS-57**, ¶¶ 42-45, 48.

840. Mexico's attempts to avoid liability on grounds that (1) Claimants allegedly do not seek damages in relation to this breach, and (2) Claimants allegedly have not exhausted local remedies fails for the same reasons articulated above. Both arguments are meritless. Claimants absolutely are seeking damages in relation to this breach. The damages are the same amounts that Claimants are seeking. It matters not whether the Tribunal finds that Claimants are owed its damages for the wrongful cancelation of its November 16, 2012 permit or the new permit it was seeking in 2014 that SEGOB wrongfully denied. As to the exhaustion point, Claimants already have established that NAFTA has no such requirement, so that argument also fails.

841. Mexico also cannot credibly dispute that its discriminatory treatment of Claimants and their investments is a breach of its FET obligations. SEGOB granted permits to Mexican-owned companies Megasport (owned, along with Producciones Moviles, by Mr. Guillermo Santillán-Ortega, a high-ranking former SEGOB official and former E-Mex lawyer) and Pur Umazal Tov, even though it revoked their prior permits and their casinos were not open and operating. As explained in Section II.P *supra*, it is immaterial whether these Mexican companies closed their casinos down before SEGOB could close them, as it is SEGOB's administrative act of issuing a permit that allows a casino to open and operate.[2031] Thus, Mexico's discriminatory treatment of E-Games had no legal or legitimate basis, but was motivated by a political agenda to undermine and destroy Claimants' business and to benefit local competitors in the gaming sector.

842. Fourth, Mexico claims that it did not interfere with Claimants' efforts to salvage their investments.[2032]

[2031] *See* Second Ezequiel González Matus Report, **CER-6**, ¶¶ 207-208.

[2032] *See* Counter-Memorial, ¶¶ 600-601.

843. The evidence, however, is overwhelming: (1) Mexico improperly closed down the Casinos and not only prevented the Claimants from reopening them, but also prevented Claimants and E-Games from *accessing them* (including, the highly valuable materials inside of the Casinos); (2) Mexico thwarted any efforts by Claimants to sell the Mexican Enterprises and/or their assets to third parties; and (3) Mexico allowed third parties to occupy the Casino facilities, effectively allowing the wholesale theft of Claimants' valuable investment in Mexico.[2033]

844. In response, Mexico relies on the self-serving witness statement of Ms. González Salas, who had served as Director of SEGOB's Games and Raffles Division from 2013 to 2015 and who was central to Mexico's interference in Claimants' ability to mitigate their losses.[2034] That evidence, however, is of no assistance. Ms. González Salas's witness statement is not credible given the numerous falsehoods contained in it:

- While Ms. Salas claims that she merely told Messrs. Jose Antonio Garcia and Juan Cortina Gallardo (potential buyers of Claimants' assets) that the Casinos "were not in any legal condition to be reopened,"[2035] Messrs. Garcia and Cortina actually informed Mr. Burr that Ms. Salas would not permit the Casinos to reopen.[2036] An executive from Cirsa Gaming also conveyed the same message to Ms. Burr.[2037] Messrs. Chow and Pelchat also told Mr. Burr that Ms. Salas unequivocally stated that she would not permit the Casinos to reopen because they were owned by U.S. investors.[2038] Ms. Salas' successor, Mr. Cangas, conveyed the same message to Messrs. Chow and Pelchat.[2039]

- Ms. Salas also claims that she met with Mr. Burr as well as David Garay and Hugo Vera, Head of the Government Unit and General Legal Deputy Director of the Games and Raffles Division respectively, to discuss the alleged insufficiency of E-

[2033] Memorial, ¶¶ 590-592, 685.

[2034] *See* Salas Statement, **RWS-1**, ¶¶ 22-24.

[2035] *See* Counter-Memorial, ¶ 600; Salas Statement, **RWS-1**, ¶¶ 22-24.

[2036] Fourth Gordon Burr Statement, **CWS-59,** ¶ 59.

[2037] Fourth Gordon Burr Statement, **CWS-59,** ¶ 59.

[2038] Fourth Gordon Burr Statement, **CWS-59** ¶ 59.

[2039] Memorial, ¶¶ 590-592.

Games' permit and the reopening of the Casinos.[2040] That is false: Mr. Burr never met with Ms. González Salas, despite that he had attempted to meet with her almost every day after SEGOB illegally closed the Casinos on April 24, 2014.[2041] She repeatedly rebuffed his numerous attempts to meet with her. Mr. Burr had perfunctory and unproductive meetings with Mr. Garay and Mr. Vera, but he never met with Ms. Salas.[2042]

- Ms. Salas further contends that she did not have a political agenda in steering SEGOB's treatment of Claimants, revoking their permit, and closing their Casinos.[2043] That claim lacks credibility on its face: SEGOB's treatment of Claimants shifted without factual or legal basis immediately after Ms. Salas joined SEGOB as a member of the new PRI Peña Nieto administration in January 2013. That month, after only days at SEGOB, Ms. González Salas gave an interview in which she characterized E-Games' permit as "illegal," demonstrating her and SEGOB's new political agenda.[2044] Soon after, in February 2013, Ms. González Salas fleshed out her strategy in a SEGOB meeting, predicting in early 2013 (over a year before the Casinos were closed) that E-Games' permit would be revoked.[2045] SEGOB's memorandum to the Ministry of Economy from 2014 admits SEGOB's political agenda by again asserting that she and SEGOB revoked the permit, because it was granted "in an irregular manner at the end of the [Calderon PAN] administration."[2046] Ms. Salas, however, has claimed otherwise in her witness statement, and her August 28, 2013 Resolution revoking the November 2012 Resolution, and hence E-Games' permit, says nothing about the manner in which the permit was granted, or anything about the permit supposedly having been granted in an "irregular" manner at the end of the PAN administration.

845. Moreover, Mexico does not even bother to address Claimants' evidence showing that Mr. Rosenberg, Director of Business Development at Televisa's PlayCity since 2012, confirmed that SEGOB steadfastly blocked the sale of Claimants' Casinos to Televisa's PlayCity.[2047]

[2040] *See* Salas Statement, **RWS-1**, ¶ 14.

[2041] Fourth Gordon Burr Statement, **CWS-59,** ¶ 56.

[2042] Fourth Gordon Burr Statement, **CWS-59,** ¶ 56.

[2043] *See* Salas Statement, **RWS-1** ¶ 17.

[2044] *Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón* (Jan. 27, 2013). Retrieved from http://www.jornada.unam.mx/2013/01/27/politica/013n1pol, **C-17**.

[2045] Email from C. Rayo Zapata re: Meeting and Notes with M. Salas re: E-Games (Feb. 22, 2013), **C-401** ("*Exciting Están en proceso ante juzgado, si declara que fueron dados de manera irregular van a ser revocados*.").

[2046] E-Games Memo, **C-261** ("*La DGJS [Dirección General de Juegos y Sorteos de la SEGOB] nos comunicó que el Permiso Bis fue cancelado debido a que el mismo era un permiso que habia sido otorgado al final de la administración anterior de manera irregular*.").

[2047] First Black Cube Statement, **CWS-57**, ¶ 50; Memorial, ¶ 591.

846. Even if her statements were true (they are not), Ms. Salas only confirms that she dissuaded Messrs. Garcia and Cortina from purchasing the Casinos on the basis of SEGOB's unlawful closure of the Casinos and the erroneous position that the Casinos "were not in any legal condition to be reopened."[2048] Moreover, that conspiracy—that is, Ms. Salas' secret conversations with suitors who were willing to acquire Claimants' gaming business and/or assets—sharply evidences Mexico's bad faith in its treatment of Claimants' investment. Thus, even accepting Ms. Salas' (false) statement, her communication with Messrs. Garcia and Cortina violated Mexico's obligation to afford fair and equitable treatment.

847. Mexico further seeks to argue—based on an excerpt from an email written by Claimant Gordon Burr, referencing another email written by Claimant John Conley, which is found in Exhibit R-75—that the possible sale of the Casinos to Play City (a company owned by competitor Televisa) was not real and therefore did not fail due to interference by Mexico.[2049] Aside from the fact that the attempted Televisa sale was but one of many attempts by Claimants to mitigate their losses that SEGOB intentionally foiled, as explained in Section II.Q above, Mexico's assertion regarding this attempt is simply not true. Mr. Conley was not involved in Claimants' initial negotiations in 2013 and 2014 with Televisa that occurred just before and immediately after Mexico illegally closed the Casinos.[2050] As Mr. Burr explains in his fourth witness statement, after the closures of the Casinos, the management and the shareholders were under stress attempting to develop a reasonable way forward and to try to recover value for the investors.[2051] At the time, a

[2048] Salas Statement, **RWS-1**, ¶¶ 22-24 ("*no se encontraban en condiciones legales para ser reabiertos*").

[2049] Counter-Memorial, ¶ 602.

[2050] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 60, 95.

[2051] Fourth Gordon Burr Statement, **CWS-59**, ¶ 60.

sale of assets to Televisa was one of the options the Claimants explored.[2052] Mr. Burr met with Messrs. Garcia and Rosenberg to pursue this potential deal.[2053] He also met with Televisa both before and after the Casinos were shut down.[2054] Even before the Casinos were shut down, Mr. Garcia somehow already knew that the government was going to shut the Casinos down.[2055] After the Casinos were closed, Mr. Garcia offered to purchase the Casinos for a fraction of what they were worth, and Mr. Burr declined the deal.[2056] Later in 2016, Mr. Conley was also involved with a separate potential transaction with Televisa that ultimately did not come to fruition.[2057] This attempted sale was real, as proven by letters of intent between Telestar (Televisa's subsidiary) and each of the Juegos Companies.[2058] Indeed, Ms. Salas' testimony itself confirms that Televisa was interested in acquiring Claimants' Casinos.[2059]

848. Therefore, Mexico's suggestion that "Claimants have purposely tried to deceive this Tribunal into thinking"[2060] there was a Televisa deal is simply nonsense. Claimants have explained in Section II.U that the allegations in Exhibit R-75 are simply false and do not even merit the Tribunal's attention. It is regrettable that Mexico must resort to tactics like mischaracterizing Claimants' case as a "disagreement" with judicial decisions and casting

[2052] Fourth Gordon Burr Statement, **CWS-59**, ¶ 60.

[2053] Fourth Gordon Burr Statement, **CWS-59**, ¶ 60.

[2054] Fourth Gordon Burr Statement, **CWS-59**, ¶ 60.

[2055] Fourth Gordon Burr Statement, **CWS-59**, ¶ 60.

[2056] Fourth Gordon Burr Statement, **CWS-59**, ¶ 60.

[2057] Fourth Gordon Burr Statement, **CWS-59**, ¶ 60.

[2058] *See* Telestar Naucalpan Casino Letter of Intent (Sept. 1, 2015), **C-423**; Telestar Cuernavaca Casino Letter of Intent (Sept. 1, 2015), **C-424**; Telestar Puebla Casino Letter of Intent (Sept. 1, 2015), **C-425**; Telestar Mexico City Casino Letter of Intent (Sept. 1, 2015), **C-426**; Telestar Villahermosa Casino Letter Intent (Sept. 1, 2015), **C-427**.

[2059] Salas Statement, **RWS-1**, ¶¶ 22-23.

[2060] Counter-Memorial, ¶ 603.

aspersions falsely on the sincerity of its submissions in order to escape liability for what are clear NAFTA breaches.

849. Fifth, Mexico does not even attempt to respond to the evidence that, after shutting down the Casinos, it allowed those premises to be occupied by third parties (including potentially Claimants' competitors in the gaming industry), without providing notice to Claimants, and also that it allowed the wholesale theft of the assets in the Casinos, in violation of Claimants' due process rights and Mexican law.[2061] Specifically, Mexico, through SEGOB, illegally lifted the closure seals that it had placed on the Casinos years earlier—*without notifying Claimants whose property was inside the Casinos given that SEGOB prevented them from taking anything when it illegally closed the Casinos*—and returned possession of the premises and the assets therein to third parties other than Claimants.[2062] As NAFTA tribunals recognize, fair notice and the opportunity to be heard are essential due process rights recognized under customary international law.[2063] Accordingly, by failing to notify Claimants, Mexico denied Claimants any opportunity to be heard, in violation of Claimants' due process rights and applicable law.[2064] As a result, third parties pilfered the Claimants' assets within the Casinos.[2065] No justification was given, and none can exist other than an intention to arbitrarily and discriminatorily destroy any ability for Claimants to mitigate their losses.[2066]

[2061] *See* Memorial, ¶ 685; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶¶ 108-112; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 138; First Alejandro Vargas Statement, **CWS-58** ¶ 4; Second Ezequiel González Matus Report, **CER-6**, ¶¶ 233-239.

[2062] *See* Memorial, ¶¶ 416, 506, 685; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶¶ 108-112.

[2063] *Metalclad*, Award, ¶ 91, **CL-79**.

[2064] *See* Memorial, ¶¶ 685; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶¶ 109-112.

[2065] *See* Memorial, ¶¶ 416, 506, 685; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 108.

[2066] *See* Memorial, ¶¶ 416; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 108.

3. Harassment and Retaliatory Measures: Mexico Pursued Arbitrary and Illegal Tax Audits and Criminal Investigations against E-Games and Its Representatives

850. In the Memorial on the Merits, Claimants showed that Mexico had also breached the FET treatment standard by engaging in harassment and retaliatory measures, not only by revoking E-Games' permit to operate, taking over the Casinos, and transferring the Casinos and valuable Casino materials to third parties, but also through illegal tax audits and criminal investigations against E-Games and its representatives.[2067] These efforts were part of the attack by the new Mexican administration's on Claimants' investments for political motives. More specifically, under the PRI administration, Mexico's tax authorities, the SAT, used an audit into E-Games' tax reporting to issue a resolution on February 28, 2014 ordering E-Games to pay over USD 12.7 million in back taxes, alleging that E-Games had not complied with its reporting obligations in its 2009 tax returns.[2068] As E-Games' tax lawyers confirmed, this matter was politically charged.[2069] Because of this political motivation, E-Games' efforts to fight the SAT's groundless February 28, 2014 resolution through a *juicio de nulidad*, an *amparo*, and a *recurso de revision* were to no avail.[2070]

851. Shortly after Mexico received the Notice of Intent in this arbitration, it also embarked on a campaign of vindictive criminal investigations through the PGR (Mexico's Attorney General) based on criminal charges filed by SEGOB against E-Games representatives.[2071] These, of course, are only two independent actions taken by Mexico to advance its unlawful, politically-motivated

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[2067] Memorial, ¶¶ 459-467, 593-597.

[2068] Memorial, ¶ 595.

[2069] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 107; Fifth Julio Gutiérrez Statement, **CWS-62**, § X, ¶¶ 146-147.

[2070] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶¶ 106-107; Fifth Julio Gutiérrez Statement, **CWS-62**, § X.

[2071] Memorial, ¶ 596.

campaign against Claimants. The Claimants maintain that all of Mexico's actions, taken together, constitute a campaign of harassment and retaliatory measures.

852. Mexico cannot disprove that these acts constitute harassment and retaliation and thus a breach of its FET obligation.

853. First, Mexico says precious little about the measures carried out by its tax authorities. It only argues that "the evidence shows that the SAT resolution was issued according to its verification powers and is duly justified."[2072] It does not explain what evidence it relies upon or why it would apparently show that any SAT resolution was "duly justified." In reality, the evidence establishes that Mexico's tax measures were not.

854. Mexico has no response to Claimants' showing that the tax reporting measures that were allegedly in breach of Mexican law reporting obligations were actually confirmed as valid and accurate by its taxing authority, SAT, who confirmed during the prior PAN administration that Claimants' methodology for calculating it taxable income complied with Mexican law reporting obligations:

- The tax returns—which SAT found in its February 28, 2014 resolution to be in breach of E-Games' reporting obligations—used *the exact same method and steps* authorized by the SAT under the PAN administration[2073] (*i.e.*, the same tax reporting method that had been verified by independent auditors approved by the Mexican government).
- In 2012, the PAN-controlled SAT audited E-Games' tax returns for 2011—which used identical reporting methods as those 2009 returns that were later found by the PRI-controlled SAT to be in breach of E-Games' reporting obligations—but determined that E-Games was in compliance with all applicable tax legislation.[2074]

[2072] Counter-Memorial, ¶ 610 ("*las pruebas muestran que la resolución del SAT fue emitida de conformidad con sus facultades de verificación y están debidamente justificadas.*").

[2073] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 106; Third Gordon Burr Statement, **CWS-50**, ¶¶ 132-133; Third Erin Burr Statement, **CWS-51**, ¶ 139; Fifth Julio Gutiérrez Statement, **CWS-62**, § X(B).

[2074] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 106; Third Gordon Burr Statement, **CWS-50**, ¶ 133; Third Erin Burr Statement, **CWS-51**, ¶ 139; Fifth Julio Gutiérrez Statement, **CWS-62**, § X(B).

855. These measures will have a significant impact on Claimants' resources. The PRI-controlled SAT's February 28, 2014 resolution saddled E-Games with a tax debt exceeding USD 12.7 million. Mexico will no doubt seek to improperly set off any damages ordered in this arbitration against that unlawful tax burden. The Tribunal should reject such an attempt.

856. Moreover, Mexico has no explanation for the glaring inconsistencies between these determinations and the SAT's February 28, 2014 resolution. Mexico does not even attempt to explain the legal or factual basis for the SAT's unexplained shift from approving Claimants' tax reporting methodology under the PAN administration, to rejecting it under the PRI administration.[2075] Mexico also refused to produce any documentation relevant to its retaliatory tax measure. The Tribunal must draw adverse inferences from Mexico's failure to produce such documents.

857. There is only one logical conclusion: the SAT's imposition of such liability on bogus grounds was due to political reasons and as a reprisal for Claimants having filed this arbitration. While Mexico correctly notes that Mexico's Supreme Court "confirmed the decision made by the tax authority,"[2076] it ignores Claimants' evidence that that result and the proceedings were clearly "politically charged."[2077] That is no surprise, as Mexico's executive branch improperly lobbied the Supreme Court to rule against E-Games during the E-Mex *amparo* proceedings in 2015.[2078]

858. Second, Mexico defends the actions of its criminal authorities by claiming that "SEGOB always files a criminal complaint when a casino is shut down for operating without a permit"[2079]

[2075] *See* Counter-Memorial, ¶¶ 428-430, 609-610.

[2076] Counter-Memorial, ¶ 6109 ("*la cual confirmó la decisión de la autoridad fiscal*.").

[2077] Memorial, ¶ 463, 595; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 107.

[2078] *See* Section II.L.5.

[2079] Counter-Memorial, ¶ 612 ("*la SEGOB siempre presenta una denuncia penal cuando se cierra un casino por operar sin permiso*.").

and that "Claimants could not have reasonably expected Mexican authorities to turn a blind eye to presumably criminal acts."[2080] Mexico alleges that Claimants operated their Casinos without a permit from August 13, 2013, when the Sixteenth District Judge ordered SEGOB to rescind all resolutions derived from the May 27, 2009 Resolution, until SEGOB illegally closed Claimants' Casinos on April 24, 2014.[2081] But this is not the case. The attack on E-Games' permit was *sub judice* at that time, still subject to Claimants' appeals, and there was an injunction allowing Claimants to continue operating their Casinos without SEGOB's interference while the case continued to work its way through the courts.[2082]

859. SEGOB's criminal complaint was thus arbitrary and contrary to valid judicial orders. It had no legal or factual basis. On September 2, 2013, E-Games obtained an injunction barring the Mexican Government from shutting down the Casinos *pending the final resolution* of the *Amparo 1668/2011* proceeding.[2083] Mexico's only counter to this—that the injunction expired upon the annulment of Claimants' permit—is wrong on the law because the injunction remained in effect after the Sixteenth District Judge issued the March 10, 2014 Order in the ongoing *Amparo 1668/2011* proceeding, and, notably, when Claimants filed their Motion for Reconsideration on March 13, 2014, and when the Motion for Reconsideration was admitted by the *Séptimo Tribunal Colegiado* on April 22, 2014 (two days before the illegal closures).[2084] Indeed, the justification SEGOB advanced in support of closing down the Casinos—that E-Games did not have a valid

[2080] Counter-Memorial, ¶ 614 ("*Las Demandantes no podían razonablemente esperar que las autoridades mexicanas cerrarían los ojos ante actos presuntamente criminales*.").

[2081] Counter-Memorial, ¶ 611.

[2082] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 194-202; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 119.

[2083] *See* Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 70; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 122; Injunctive Relief (Sept. 2, 2013), **C-299**.

[2084] *See* Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 105.

permit because its permit had been revoked—was precisely the matter under review in the pending appeal proceedings and Mexico was prohibited from acting until the appeal was resolved.[2085]

860. Mexico also has not proven that SEGOB "always" files criminal complaints in such circumstances. Moreover, it does not explain why SEGOB waited *over one month* after it illegally closed the Casinos to file the criminal complaint. Nor does it explain why it only did so just after it received Claimants' notice of intent to initiate this Arbitration under the NAFTA on May 24, 2014.[2086] The reason for this delay is evident: Mexico's baseless criminal complaint was an extension of its campaign of harassment and retaliation for Claimants' exercise of their rights under the NAFTA.[2087]

861. Mexico's suggestion that Claimants had remedies available to them in Mexican courts[2088]—which had denied them justice and treated them unfairly and inequitably under international law—is again misplaced: *the NAFTA does not impose an exhaustion of local remedies requirement for FET claims*. Mexico simply cannot escape its liability under the NAFTA on this argument.

862. Mexico next asserts that Claimants do not claim damages for its harassing behavior through the SAT or the PGR.[2089] Again, that is false. As noted above, Claimants' statement of damages accounts for *all* of Mexico's violations of the NAFTA.[2090] In this context, Claimants seek damages to compensate them for the harassing, retaliatory, and discriminatory treatment to which Mexico subjected them, and for Mexico's interference in their ability to continue operating and benefiting

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[2085] *See* Second Ezequiel González Matus Report, **CER-6**, ¶¶ 189-191.

[2086] *See* Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 126-127.

[2087] *See* Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 127.

[2088] Counter-Memorial, ¶ 615.

[2089] Counter-Memorial, ¶ 616.

[2090] Memorial, ¶ 865.

from their investments in Mexico. Damages thus would return Claimants to the position they would have been in but for Mexico's harassing and retaliatory conduct.

863. Finally, Mexico cannot deny that these actions by tax and criminal authorities, taken together along with other actions, such as the closure of the Casinos and the revocation of E-Games' authorization to operate casinos, form a campaign of harassment against Claimants and their investments. The starting point of this campaign was when the PRI administration came into power and installed Ms. Salas at SEGOB. Without explanation or legal basis, SEGOB, as well as other instrumentalities of the Mexican government, engaged in a series of arbitrary attacks on Claimants that Mexico to this day cannot justify.

4. Legitimate Expectations: Mexico Cannot Deny that Mexico Frustrated Claimants' Legitimate Expectations

864. In the Memorial, Claimants explained that Mexico frustrated Claimants' legitimate expectations by initiating a series of irregular administrative and judicial measures with political and discriminatory motives: (1) revoking E-Games' permit; (2) interfering in the judicial proceedings to ensure that SEGOB's cancellation of Claimants' permit would withstand any judicial scrutiny; and (3) illegally closing the casinos only later to illegally let third parties take control of the premises and Claimants' assets therein without notice to Claimants.[2091] Mexico cannot deny that Claimants had legitimate expectations and that it breached those expectations.

865. **Legitimate Expectations**: Mexico argues that Claimants have not identified any legitimate expectations because such expectations may only be created "through declarations or commitments of the host State" to the investor.[2092] As explained above, however, that is wrong on the law. Here, Claimants had a legitimate expectation that Mexico would respect Claimants'

[2091] *See* Memorial, ¶ 564.

[2092] Counter-Memorial, ¶ 581 ("*a través de declaraciones o compromisos del Estado anfitrión*.").

investments, would follow its laws in how it treated them and their investments, would have an independent judiciary free from political pressure and undue influence, and would not subject Claimants' investments to arbitrary and discriminatory treatment for political motives.

866. In addition, however, Claimants also derived legitimate expectations from specific assurances from SEGOB—prior to the change in political administration that led to a campaign of political harassment against Claimants and their investors:

a. SEGOB recognized, in its resolution of August 15, 2012, that (1) E-Games was entitled to the independent use and operation of the Casinos, because it verified that at all times E-Games had complied with every requirement under the Gaming Regulation; (2) E-Games' rights could not be modified, absent the presence of a cause for revoking a permit holder's rights under the Gaming Regulations; and (3) E-Games' rights were independent of any previous contractual relationship E-Games may have had with E-Mex or any other entity.[2093]

867.

b. In its November 16, 2012 Resolution granting E-Games its independent permit, SEGOB analyzed *de novo* E-Games' request for an independent permit and issued a standalone resolution recognizing that (1) E-Games had complied with all material requirements under the Gaming Regulation to have an independent permit issued to it; and that (2) E-Games' permit was not dependent on the August 15, 2012 Resolution, or any other prior SEGOB resolution relating to the company, and was subject to the same conditions and obligations as E-Mex's permit DGJAS/SCEVF/P-06/2005.[2094]

868. Mexico also argues that Claimants have not identified commitments or obligations made by Mexico *at the time Claimants made their investment*.[2095] That too is false. As explained at length in Claimants' Memorial, following SEGOB's issuing the August 15, 2012 Resolution and the November 16, 2012 Resolution granting E-Games an independent permit, Claimants continued to expand and renovate their operating Casinos, invest in and develop new projects in Cancun and

[2093] SEGOB Resolution No. DGJS/SCEV/0827/2012 (Aug. 15, 2012), **C-254**.

[2094] *See* SEGOB Resolution No. DGJS/SCEV/1426/2012 p. 5-7 (Nov. 16, 2012), **C-16**.

[2095] Counter-Memorial, ¶ 583.

Cabo, and expand into online gaming, all under the aegis of the independent permit.[2096] Their Casinos were extremely successful and they sought to further expand their business. And in any event, Claimants legitimate expectations were not confined to these discrete representations by Mexico, as explained above.

869. **Mexico's Frustration of Claimants' Legitimate Expectations**: Mexico frustrated these legitimate expectations when officials implemented a series of highly irregular administrative and judicial measures for political purposes, including SEGOB's reversing its criteria and decisions in relation to E-Games' permit and Claimants' Casinos, contradicting and going against pronouncements and administrative actions taken by the same agency only because there was a change in political parties in power, the unlawful taking of E-Games' permits, SEGOB's illegal closure of the Casinos on April 24, 2014, and SEGOB's transfer of the Casinos to third-parties, leading to the theft and pillage of Claimants' Casino assets.

870. Mexico offers three defenses to these breaches. None withstands scrutiny.

871. First, Mexico claims – relying on its Mexican law expert – that its "courts' rulings were consistent with the Constitution and applicable laws."[2097] These proceedings were rife with irregularities, violations of Claimants' due process rights, and unlawful determinations, as established and detailed above and below.

872. Mexico's defense of the non-judicial decision of SEGOB to revoke the November 16, 2012 Resolution—*i.e.*, that such revocation was confirmed by Mexico's courts—gets Mexico no further. As explained above, SEGOB purported to revoke the November 16, 2012 Resolution not due to judicial orders, but because of its politically motivated, arbitrary, discriminatory, and unexplained

[2096] Memorial, ¶¶ 55-56, 61-76.

[2097] Counter-Memorial, ¶ 586 ("*las sentencias de los tribunales fueron coherentes con la Constitución y las leyes aplicables.*").

and secret internal determinations that the E-Games Independent Permit had been granted in an "irregular manner" at the end of the prior PAN administration. SEGOB's internal memoranda show this to have been its position from essentially the beginning of the PRI administration and reaffirmed after Mexico destroyed Claimants' investments, as has been established. SEGOB's position is revealed in Ms. Rayo's notes from February 22, 2013[2098]—before the legality of the November 16, 2012 Permit was under judicial review—and consistent with Ms. Salas statement to the press in January 2013 that the E-Games Independent Permit was irregularly granted and illegal.[2099] SEGOB's position was reaffirmed in its internal memorandum from early September, 2014, after Mexico illegally closed the Casinos and destroyed Claimants' investments: "The DGJS [Dirección General de Juegos y Sorteos, or the Games and Raffles Division] informed us that the Bis Permit [Claimants' independent permit] was canceled because it was a permit that had been irregularly granted at the end of the previous administration."[2100] Mexico's attempt to blame its executive conduct on its judiciary fails.

873. In addition, Mexico fails even to address the countless irregularities and violations of due process and domestic law that permeated those judicial proceedings. Among them were the Collegiate Tribunal's February 19, 2014 refusal to affirm Judge Gallardo's October 14, 2013 Order finding that SEGOB had exceeded its authority in revoking E-Games' permit, and its contrary, irregular, and unlawful determination that SEGOB had not exceeded its authority in doing so.[2101]

[2098] Email from C. Rayo Zapata re: Meeting and Notes with M. Salas re: E-Games (Feb. 22, 2013), **C-401** ("*Exciting* [E-Games] *Están en proceso ante juzgado, si declara que fueron dados de manera irregular van a ser revocados*.").

[2099] *Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón* (Jan. 27, 2013). Retrieved from http://www.jornada.unam.mx/2013/01/27/politica/013n1pol, **C-17**.

[2100] Memo E-Games, **C-261** ("*La DGJS nos comunicó que el Permiso Bis fue cancelado debido a que el mismo era un permiso que había sido otorgado al final de la administración anterior de manera irregular*.").

[2101] *See* Order of the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (Feb. 19, 2014), **C-290**.

The Collegiate Tribunal made that determination by inexplicably attributing to Judge Gallardo a ruling—which he did not make—that the doctrine of "acquired rights" was unconstitutional.[2102] The Collegiate Tribunal's alteration of the scope of the Judge Gallardo's January 31, 2013 Order in this fashion resulted in the March 10, 2014 Order, which rubber stamped SEGOB's unlawful revocation of E-Games' permit. Subsequently, the Supreme Court of Mexico dismissed E-Games' *recurso de inconformidad* on procedural grounds one week after President Peña Nieto's head lawyer, Mr. Castillejos, met with Justice Alberto Pérez Dayán, despite that the Court had been analyzing the merits of the matter for four months.[2103] The Supreme Court thus remanded the case to the Collegiate Tribunal to review *its own* February 19, 2014 Order, thereby denying E-Games of effective appellate review in violation international and Mexican law.[2104] Mexico cannot explain these glaring irregularities and miscarriages of justice.

874. Second, Mexico argues that SEGOB's closure of the Casinos "was a direct consequence of the court's determination to annul" the May 27, 2009 Resolution and Claimants' "imprudent decision" to continue their operations under an "interim measure."[2105] However, that is incorrect because SEGOB's closure of the Casinos was illegal and in violation of a then valid and pending injunction preventing SEGOB from closing the Casinos.[2106] Mexico does not bother to (and cannot) explain SEGOB's illegal maneuvers, but instead *blames Claimants* for their "imprudent decision" to operate the Casinos "pursuant to a precautionary measure order (i.e., "*medida*

[2102] First Omar Guerrero Report, **CER-2**, ¶ 180; Order of the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (Feb. 19, 2014), **C-290**.

[2103] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 101; First Omar Guerrero Report, **CER-2**, ¶ 288; Mexican Supreme Court Order (Sept. 3, 2014), **C-26**.

[2104] *See* Fourth Mexican Supreme Court Order (Sep. 3, 2014), **C-26**; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 101.

[2105] Counter-Memorial, ¶ 587 ("*fue una consecuencia directa de la determinación del tribunal de anular . . . . la imprudente decisión de las Demandantes de seguir operando sus Casinos con arreglo a una 'medida cautelar*.").

[2106] Injunctive Relief (Sept. 2, 2013), **C-299**; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 70.

cautelar") that they knew or should have known was not applicable."[2107] Mexico's argument that the injunction was "not applicable" makes no sense because it clearly was, as already established.

875. Mexico doubles down on this point, insisting that the applicability of the injunction "was fully litigated in domestic courts."[2108] But that argument also gets Mexico nowhere. Those judicial proceedings culminated in the revocation of the injunction on September 22, 2014, five months *after* the illegal closure of the Casinos. Thus Mexico essentially argues—contrary to Mexican law—that it was justified in violating the injunction because it knew the injunction eventually would be revoked in the courts.[2109] That revocation too was irregular: as Mr. Gutiérrez explains, SEGOB exerted undue influence on the Mexican court hearing the injunction.[2110] Tellingly, Mexico has nothing to say about its illegally allowing the transfer to third parties of the Casinos and Claimants' assets therein, without notice to Claimants, in clear breach of Mexican law and Claimants' legitimate expectations.

876. Finally, Mexico "categorially rejects" the reality that its actions were taken for political reasons.[2111] Motives, of course, are not necessary to make out an FET breach under the NAFTA. But here the facts speak for themselves. Political motives are evident in virtually every consequential act taken by Mexico and its instrumentalities: the politically-charged pronouncements of Ms. Gonzales Salas, the improper lobbying of the Supreme Court by the executive, the conflicts of the Collegiate Tribunal, etc. The fact that Mexico's actions were carried

[2107] Counter-Memorial, ¶ 587 ("*la imprudente decisión de las Demandantes de seguir operando sus Casinos con arreglo a una "medida cautelar" que sabían o deberían haber sabido que era inapplicable*.").

[2108] Counter-Memorial, ¶ 588 ("*a fue litigada exhaustivamente ante los tribunales nacionales*.").

[2109] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 102.

[2110] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 110.

[2111] Counter-Memorial, ¶ 590 ("*rechaza categóricamente*.").

out for political motives lay bare the reality that these actions were not taken for any legitimate purpose – and thus breached Claimants' legitimate expectations.

877. In response, Mexico offers no credible evidence, only three self-serving witness statements from individuals who purport to confirm *ex post* that Mexico's actions were not motivated by political reasons or otherwise discriminatory.[2112] Yet Ms. Gonzalez Salas is not credible, as explained above, and certainly cannot claim that she acted without political motives when her actions can only be explained by such motives.[2113] Further, the excerpts of the witness statements of Messrs. Landgrave and Garcia on which Mexico relies show only that these individuals were simply following SEGOB's orders. They do not explain why SEGOB decided to reverse its treatment of Claimants and their investments immediately upon the change from the Calderon PAN administration to the Nieto PRI administration. The reason is obvious and is laid bare by Mexico's preferential treatment of Petolof and Producciones Móviles as compared to E-Games in violation of its fair and equitable treatment obligation.

F. Full Protection & Security

878. Mexico has also breached Article 1105 of the NAFTA because it failed to provide full protection and security to Claimants' investments.

1. The Legal Standard: Article 1105 Covers Full (Physical and Legal) Protection and Security

879. Article 1105 of the NAFTA requires Mexico to "accord to investments of investors of another Party treatment in accordance with international law, including . . . full protection and

[2112] Counter-Memorial, ¶¶ 590-94.

[2113] *Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón* (Jan. 27, 2013). Retrieved from http://www.jornada.unam.mx/2013/01/27/politica/013n1pol, **C-17**; Draft email from G. Hemández Salvador to C. Vejar transmitting draft email re: meeting with representatives of E-Games (Feb. 6, 2013), **C-393**; E-Games Memo, **C-261;** Email from C. Vejar to M. Salas re: meeting with representatives of E-Games (Mar. 15, 2013), **C-394**.

security."[2114] While no NAFTA tribunal has engaged in an extensive explanation of the content of the full protection and security obligation, it is clear that the full protection and security obligation includes two key aspects.

880. First, full protection and security covers both physical and legal security.

881. Thus, the full protection and security standard under Article 1105 undeniably protects an investment's physical security. Mexico itself accepts this,[2115] as do the other NAFTA parties,[2116] and numerous tribunals have found breaches of investment treaties where a State fails to prevent physical destruction of investments. For example, in *Wena Hotels v. Egypt,* Egypt failed to provide a hotelier investor full protection and security when it failed to prevent a public sector company from physically seizing the investor's hotels;[2117] "took no immediate action to restore the hotels promptly to [the investor's] control;"[2118] and failed to impose sanctions on the company or its senior officials, suggesting that the State approved of the company's actions.[2119] Virtually all tribunals recognize that a State's failure to prevent or redress physical incursions of this nature violate the full protection and security obligation.[2120] Thus, the protection of an investor's assets

[2114] NAFTA Article 1105, **CL-78**.

[2115] *Alicia Grace and others v. Mexico*, UNCT/18/4, Mexico's Statement of Defense (Jun. 1, 2020), ¶ 776, **CL-297**.

[2116] *Alicia Grace and others v. Mexico*, UNCT/18/4, Non-Disputing Party Submission of Canada (Aug. 24, 2021), ¶ 38, **CL-298**; *Alicia Grace and others v. Mexico*, UNCT/18/4, Submission of the United States of America (Aug. 24, 2021), ¶ 86, **CL-299**.

[2117] *Wena Hotels*, Award, ¶ 84, **CL-293**.

[2118] *Wena Hotels*, Award, ¶ 84, **CL-293**.

[2119] *Wena Hotels*, Award, ¶ 84, **CL-293**.

[2120] *See, e.g., Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (June 27, 1990), ¶¶ 85-86 (holding that under Sri Lanka-U.K. BIT, the physical destruction of AAPL property and the killing of a farm manager and permanent staff members violated the full protection and security obligation), **CL-251;** *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award (Feb. 21, 1997), ¶¶ 6.02-6.19 (holding that under the U.S.-Zaire BIT, Zaire had violated the obligation in relation to lootings carried out against AMT's investment), **CL-311**.

from physical destruction by third parties is undoubtedly part of the minimum standard of treatment and part of Article 1105.

882. The FPS obligation in Article 1105 also protects an investment's *legal* security. This conclusion is consistent with the findings of at least seventeen other tribunals, which have found that a full protection and security obligation under other treaties requires both physical and legal protection and security, particularly where the obligation is qualified by the word "full,"[2121] as is the case in the NAFTA.

[2121] *See Global Telecom Holding S.A.E. v. Canada*, Award, ¶ 664 ("The Tribunal has reviewed the terms of the BIT in accordance with Article 31 of the VCLT and in light of the authorities adduced by the Parties, and has noted that the terms "protection" and "security" in [the BIT] are qualified by "full" without any exclusion or limitation. The Tribunal therefore agrees with [claimant] that the standard of "full protection and security" as set in the BIT is not limited to safeguards against physical interference by State organs and private persons, but extends to accord legal safeguard for the investment and the returns of the investor."), **CL-310**; *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award (Jan. 18, 2019), ¶ 482 ("The Tribunal shares the Claimant's position that, if there are no express limits in the Treaty, this obligation is not limited to physical security, but also comprises a duty to afford legal security to investments. This interpretation has been confirmed by various tribunals."), **CL-313**; *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award (July 2, 2018), ¶ 652, **RL-061**; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Award (July 21, 2017), ¶ 905, **CL-314**; *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case Nos ARB/08/1 and ARB/09/20, Award (May 23, 2012), ¶ 281, **RL-035**; *Frontier Petroleum Services Ltd v Czech Republic*, UNCITRAL, Final Award (Nov. 12, 2010), ¶ 263 ("[I]t is apparent that the duty of protection and security extends to providing a legal framework that offers legal protection to investors - including both substantive provisions to protect investments and appropriate procedures that enable investors to vindicate their rights."), **CL-157**; *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability (Dec. 27, 2010), ¶ 343 ("A plain reading of [full protection and security], in accordance with Article 31 VCLT, shows that the protection provided for by [the treaty] to covered investors and their assets is not limited to physical protection but includes also legal security. The explicit linkage of this standard to the fair and equitable treatment standard supports this interpretation."), **CL-315**; *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability (Sept. 2, 2009), ¶ 246 (noting that other "tribunals have applied [protection and security] more broadly to encompass legal security as well. Therefore, it could arguably cover a situation in which there has been a demonstrated miscarriage of justice."), **CL-176**; *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award (Nov. 3, 2008), ¶¶ 144-45 (finding that Full Protection and Security is not inherently limited to protection and security of physical assets and that it would be "unduly artificial to confine the notion of '*full security*' only to one aspect of security, particularly in light of the use of this term in a [treaty] directed at the protection of commercial and financial investments."), **CL-100**; *Biwater v. Tanzania*, Award, ¶ 729 (holding that Full Protection and Security "implies a State's guarantee of stability in a secure environment, both physical, commercial and legal."), **CL-22**; *Ares International S.r.l. and MetalGeo S.r.l. v. Georgia*, ICSID Case No. ARB/05/23, Award (Feb. 26, 2008), ¶ 10.3.4, **CL-316**; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007), ¶¶ 7.4.15-7.4.16, **CL-92**; *Azurix*, Award, ¶ 408 ("[F]ull protection and security was understood to go beyond protection and security ensured by the police. It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view. . . [W]hen the terms "protection and security" are qualified by "full" and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security."), **CL-126**; *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Award (Dec. 29, 2004), ¶ 170, **CL-317**; *Occidental v Ecuador*, Final Award, ¶ 187, **CL-130**; *Tecmed*, Award, ¶ 177 (indicating that dysfunction of the host

883. As explained by the *Azurix* tribunal, "when the terms 'protection and security' are qualified by 'full' and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security."[2122] Likewise, the *Total v. Argentina* tribunal found that a "plain reading of the terms . . . [FPS] shows that the protection provided . . . to covered investors and their assets is not limited to physical protection but includes also legal security."[2123] Similarly, the *Biwater Gauff* tribunal found that FPS security inherently "implies a State's guarantee of stability in a secure environment, both physical, commercial and legal."[2124]

884. Thus, FPS protects an investor's right to a stable legal environment as well as to physical security. For example, in *CME v. Czech Republic*, the State had violated the FPS obligation through the actions of its regulatory media authority, which substantially altered the regulatory environment to enable an investor's local partner to terminate the contract underlying the investment and thereby damaging the investment.[2125] Similarly, in *Azurix v. Argentina*, Argentina was found to have violated the obligation to afford FPS when provincial authorities intervened "for political gain" during a tariff dispute with an investor, which provided potable water and sewerage services.[2126]

State authorities and their active encouragement of adverse actions can violate the minimum requirements of the full protection and security standard), **CL-84**; *CME*, Partial Award, ¶ 613 ("The Media Council's actions in 1996 and its actions and inactions in 1999 were targeted to remove the security and legal protection of the Claimant's investment in the Czech Republic. . . . The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued. This is not the case. The Respondent therefore is in breach of this obligation."), **CL-108**.

[2122] *Azurix*, Award, ¶ 408, **CL-126**.

[2123] *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability (Dec. 27, 2010), ¶ 343, **CL-315**.

[2124] *Biwater v. Tanzania*, Award, ¶ 729, **CL-22**.

[2125] *CME*, Partial Award, ¶ 613 (emphasis added), **CL-108**.

[2126] *Azurix*, Award, ¶ 408, **CL-126**.

885. While Mexico has argued that any non-NAFTA case law is irrelevant when addressing NAFTA Article 1105, that argument is all the more uncompelling when it comes to FPS. As the *Azurix*, *Total*, and *Biwater Gauff* decisions show, the conclusion that full protection and security extends to legal security is not the result of any "autonomous" legal standard, but of the actual words in the protection: "full" protection and security. There is nothing to suggest that the NAFTA would bar legal protection and security even though the majority of investor-State decisions have acknowledged that, by definition, "full protection and security" extends to legal protection and security.

886. Similarly, any suggestion that legal protection and security would overlap with fair and equitable treatment, and thus cannot be a separate protection, is also wrong. While the *Suez* tribunal found that the existence of separate full protection and security and fair and equitable treatment provisions "in two distinct articles" "leads to the conclusion that the Contracting Parties must have intended them to mean two different things,"[2127] that is not the case of the NAFTA, where both protections are included in NAFTA Article 1105's minimum standard of treatment. In any event, it is not contrary to international law for one action to breach multiple provisions of a treaty, including fair and equitable treatment and full protection and security, as the *Azurix* tribunal found.[2128]

887. Second, the obligation to accord full protection and security covers acts of third party actors as well as the State itself.

[2127] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, Decision on Liability (Jul. 30, 2010), ¶ 172, **CL-332**.
[2128] *Azurix*, Award, ¶ 408, **CL-126**.

888. In the words of the *Ulysses v. Ecuador* tribunal, it imposes a "duty of due diligence for the prevention of wrongful injuries inflicted by third parties to persons or property."[2129] Thus, while "[f]ull protection and security is a standard of treatment other than fair and equitable treatment" (even if both obligations protect against some overlapping conduct),[2130] the full protection and security obligation "complements the fair and equitable standard by providing protection towards acts of third parties, *i.e.*, non-State parties, which are not covered by the FET standard."[2131] Again, Mexico does not deny this.[2132]

889. However, the FPS obligation also protects against the acts of the host State itself.[2133] As the tribunal in *Biwater Gauff v. Tanzania* explained, the "'full security' standard is limited to a State's failure to prevent actions by third parties, but also extends to actions by organs and representatives of the State itself."[2134] In *CME v. Czech Republic*, for example, a tribunal found that a host State breached its FPS obligation after its media regulator created a substantially altered

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[2129] *Ulysseas, Inc. v. The Republic of Ecuador* ("*Ulysseas*"), PCA No. 2009-19, Final Award (Jun. 12, 2012), ¶¶ 271–274, (citing *El Paso v. Argentina*, ¶¶ 522 –523) (full protection and security entails "vigilance and care by the State under international law comprising of a duty of due diligence for the prevention of wrongful injuries inflicted by third parties to persons or property of aliens in its territory or, if not successful, for the repression and punishment of such injuries."), **CL-308**. Also in *Ulysseas*, Final Award, ¶ 272, the Tribunal went on to say that "[w]hat matters in our case is that the treatment of foreign investors do not fall below this minimum international standard, regardless of the protection afforded by the Ecuadorian legal order."), **CL-308**. The BIT under which this case was decided states that "fair and equitable treatment" and "full protection and security" are accompanied by treatment no "less than that required by international law." *See* Ecuador-United States Bilateral Investment Treaty, Article 3(a), **CL-309**.

[2130] *Ulysseas*, Final Award, ¶ 272, **CL-308**; *see Wena Hotels*, Award, ¶¶ 84, 95, 110, **CL-293**; *Azurix*, Award, ¶ 406, **CL-126**; *Occidental v. Ecuador*, Final Award, ¶ 187 ("Treatment that is not fair and equitable automatically entails an absence of full protection and security of the investment."), **CL-130**.

[2131] *Oxus Gold v. Republic of Uzbekistan*, UNCITRAL, Award (Dec. 17, 2015), ¶ 353, **RL-005**.

[2132] *Alicia Grace and others v. Mexico*, UNCT/18/4, Mexico's Statement of Defence (June 1, 2020) **CL-297**, ¶ 776.

[2133] *See, e.g., Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Award (Mar. 27, 2020), ¶ 664 ("The Tribunal therefore agrees with [claimant] that the standard of 'full protection and security' as set in the BIT is not limited to safeguards against physical interference by State organs and private persons, but extends to accord legal safeguard for the investment and the returns of the investor."), **CL-310**; *Tecmed*, Award, ¶ 177 (indicating that dysfunction of the host State authorities and their active encouragement of adverse actions can violate the minimum requirements of the full protection and security standard), **CL-84**; *CME v. Czech Republic*, Partial Award, ¶ 613, **CL-108**.

[2134] *Biwater Gauff v. Tanzania*, Award, ¶ 730, **CL-22**.

regulatory environment that enabled an investor's local partner to suddenly terminate the contract on which the investment depended. According to the *CME* tribunal, "[t]he host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued."[2135]

2. Mexico Failed To Provide Physical Protection and Security to Claimants' Investments

890. There can be no dispute that Mexico breached its obligation to provide physical protection and security to Claimants' investments.

891. *First*, on April 24, 2014, Mexico deployed SEGOB and its federal police force in coordinated commando-style raids at each of Claimants' Casinos to conduct a pretextual inspection, but in reality to unlawfully close the Casinos for arbitrary and political reasons.[2136] At each of these Casinos, the Mexican federal police presence was excessive, consisting of at least 15 to 20 police cars, with an average of two to four Mexican federal policemen in each police car dressed in special operations SWAT gear and toting long guns.[2137] The SEGOB personnel leading these pretextual inspections were at all times flanked by at least two Mexican federal police officers.[2138] The overwhelming police force then invaded and occupied each Casino to affect SEGOB's illegal closure orders, which violated the injunction preventing the Mexican

[2135] *CME*, Partial Award, ¶ 613 (emphasis added), **CL-108**.

[2136] *See* First Alfredo Galván Meneses Statement, **CWS-56**, ¶ 15; First Héctor Ruiz Statement, **CWS-55**, ¶ 12; First Patricio Gerardo Chávez Nuño Statement, **CWS-54**, ¶ 13.

[2137] First Patricio Gerardo Chávez Nuño Statement, **CWS-54**, ¶ 13.

[2138] First Alfredo Galván Meneses Statement, **CWS-56**, ¶ 15; First Héctor Ruiz Statement, **CWS-55**, ¶ 11; First Patricio Gerardo Chávez Nuño Statement, **CWS-54**, ¶ 14.

Government from impeding or hindering the Casinos' operations while the *Amparo* 1668/2011 proceeding (then before the Supreme Court) was ongoing.[2139]

892. Moreover, the closure of the Casinos on the basis of the closure orders was clearly illegal, as the closure orders were directed at E-Mex and not at E-Games. Despite this, SEGOB used the illegal closure orders to consummate the arbitrary and politically motivated closure of the Casinos.[2140] Mexican federal police at the Naucalpan Casino additionally barred Claimants' counsel from entering the Casino to speak to SEGOB officials,[2141] while Mexican federal police at the Puebla Casino ordered Mr. Galván to deactivate the Casinos' security cameras and refused to allow anyone, including Casino employees, to access the security monitoring area.[2142] Mexican federal police at these and the Villahermosa Casinos subsequently blocked all entrances and exits and evacuated the clientele, while also barring employees from reentering the Villahermosa and Puebla Casinos.[2143] Mexico's only justification for this conduct was that it was "common practice,"[2144] but, even if true, that is irrelevant. Under any standard, it exceeded the necessary use of force under Mexican law and, in particular, Article 10 of the Federal Gaming Law. Claimants' expert, Mr. González, explains that SEGOB does not have unfettered use of police power in its enforcement of the Gaming Law.[2145]

[2139] *See* Injunctive Relief (Sept. 2, 2013), **C-299**; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 70.

[2140] First Alfredo Galván Meneses Statement, **CWS-56**, ¶ 20; First Héctor Ruiz Statement, **CWS-55**, ¶ 18; First Patricio Gerardo Chávez Nuño Statement, **CWS-54**, ¶ 17; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 71.

[2141] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 69.

[2142] First Alfredo Galván Meneses Statement, **CWS-56**, ¶ 22.

[2143] First Alfredo Galván Meneses Statement, **CWS-56**, ¶ 22; First Héctor Ruiz Statement, **CWS-55**, ¶ 22; First Patricio Gerardo Chávez Nuño Statement, **CWS-54**, ¶ 24.

[2144] Counter-Memorial, ¶ 319 ("*una práctica común*.").

[2145] Second Ezequiel González Matus Report, **CER-6**, ¶ 176.

893. *Second*, while Mexican authorities held custody of the Casinos, they allowed mass looting to take place, doing nothing to prevent the destruction of the Casinos and the taking of Casino machines and other hardware. Mexican authorities obtained custody of Claimants' Casinos after SEGOB closed them, and were responsible for the physical security of the Casinos both under Article 1105 and Mexican law.[2146] During this time, E-Games retained property rights to those locations and to the costly material inside of them (which were investments of Claimants). Mexico, however, failed to prevent the damage and theft of Claimants' costly investments.

894. In May 2017, after the start of this arbitration, Mexico failed to prevent or combat a devastating fire from destroying much of the Naucalpan Casino.[2147] The Naucalpan Casino housed all hardcopy records and the email servers of the Mexican Enterprises.[2148] As a result, Claimants lost much of their physical and digital corporate records, which were relevant to Claimants' claims in this NAFTA Arbitration.

895. Then, Mexico, through SEGOB, failed to protect Claimants' investments by lifting the closure seals it had placed on the Casinos—without legal authority or a court order authorizing it to do so—and allowed third parties to take possession of the Casino premises *and the assets therein*.[2149] It did so without notifying E-Games as required by law.[2150] Similarly, E-Games was prevented from accessing the Casino locations (and thus from protecting its assets) prior to the

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[2146] *See* Second Ezequiel González Report, **CER-6**, ¶¶ 233-239; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 124.

[2147] *See* Third José Ramón Moreno Statement, **CWS-63**, ¶ 32; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 46, 88; Fourth Erin Burr Statement, **CWS-60**, ¶ 83; Second Neil Ayervais Statement, **CWS-61**, ¶ 61; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 137; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 108.

[2148] Fourth Gordon Burr Statement, **CWS-59**, ¶ 88; Fourth Erin Burr Statement, **CWS-60**, ¶ 83.

[2149] *See* Section II.O, *supra*; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶¶ 108-111; *Fe de Hechos* Villahermosa casino (Jan. 22, 2020), **C-309**; *Fe de Hechos* Puebla casino (Jan. 24, 2020), **C-310**; First Alejandro Vargas Statement, **CWS-58**, ¶¶ 9-15; Second Ezequiel González Matus Report, **CER-6**, ¶¶ 233-239.

[2150] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 108; First Alejandro Vargas Statement, **CWS-58** ¶ 4; Second Ezequiel González Matus Report, **CER-6**, ¶¶ 235-238.

seizure of these locations by third parties.[2151] These actions permitted third parties to physically invade the Casinos and pilfer certain of Claimants' remaining assets within:

1. The Naucalpan Casino: Shortly after the fire consumed the facility that housed Claimants' Naucalpan Casino in May 2017, without a court order or any legal (or other) justification, SEGOB lifted the closure seals and illegally returned legal possession of the premises to the owners of the premises without notifying Claimants.[2152] It also allowed unidentified individuals (likely Mr. Moreno Quijano) to physically invade the Casino and remove assets from within, including Claimants' valuable gaming machines.[2153] Mexico has prevented Claimants from gaining access to the Naucalpan Casino or retrieving any of its own remaining property or assets.[2154]
2. Mexico City Casino: SEGOB authorized the owners of the building where Claimants' Mexico City Casino was located to regain possession of the premises.[2155] In doing so, it improperly lifted the closure seals, without a court order instructing it to do so, and returned legal possession of the premises to the premises' owners instead of to E-Games.[2156] Mexico has prevented Claimants from gaining access to the Mexico City Casino or retrieving any of its own remaining property or assets, other than the gaming machines given to Claimants by the premises' owners.[2157]

[2151] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 108; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 135.

[2152] Decision issued by the Fifth Civil Court of First Instance of Tlalnepantla for Naucalpan 457/2015 (Sept. 22, 2015), p. 356, **C-415**; Decision issued by the Fifth Civil Court of First Instance of Tlalnepantla for Naucalpan 457/2015 (Nov. 18, 2015), p. 1, **C-408**; Second Ezequiel González Matus Report, **CER-6**, ¶¶ 234-235; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 108.

[2153] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 108.

[2154] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 108.

[2155] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 109.

[2156] Decision 439/2015 issued by 41st Court for Civil Matters for the Superior Court for Mexico City (May 2, 2017), pp. 11-13, **C-410**; Second Ezequiel González Matus Report, **CER-6**, ¶¶ 236-237; SEGOB Resolution No. AJD/0206/15-VIII (July 3, 2017), p. 2, **R-076** ("From the above transcription, it is clear that [Del Bosque] essentially requests the following from this authority: Order the lifting of the closure, on the grounds that it has the legitimate interest to request the cessation of the state of closure and **the consequent lifting of seals**, being the legitimate owners of the establishment…") (emphasis added). **Spanish Original** "*De la anterior transcripción, se desprende que [Del Bosque] solicita a esta autoridad esencialmente lo siguiente: Ordene el levantamiento de clausura, con motivo de que cuenta con el interés legítimo para solicitar el cese del estado de clausura **y el consecuente levantamiento de sellos**, al ser las legítimas propietarias del establecimiento…*") (emphasis added); Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 109.

[2157] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 108.

3. The Cuernavaca Casino: Without a court order or any legal (or other) justification, SEGOB lifted the closure seals and improperly transferred possession of the premises to a company other than E-Games without notifying Claimants.[2158] It then allowed Operadora de Coincidencias Numéricas to illegally use gaming machines from Claimants' Cuernavaca Casino.[2159] Mexico has prevented Claimants from gaining access to the Cuernavaca Casino or retrieving any of its own remaining property or assets.[2160]

4. The Villahermosa Casino: Without a court order or any legal (or other) justification, SEGOB lifted the closure seals and improperly transferred possession of the premises of the Villahermosa Casino to a company other than E-Games without notifying Claimants.[2161] It then allowed another company to open and operate the premises as the "Vegas Casino" for a period of time including late 2017.[2162] Mexico has prevented Claimants from gaining access to the Villahermosa Casino or retrieving any of its own remaining property or assets.[2163]

5. The Puebla Casino: SEGOB lifted the closure seals and improperly transferred possession of the premises to a company other than E-Games without notifying Claimants.[2164] It then allowed another company to open and operate the premises as a

[2158] Decision 56/2016 issued by the Second Court Civil and Commercial Matters for the State of Morelos (Feb. 17, 2017), pp. 64-68, **C-409**; Second Ezequiel González Matus Report, **CER-6**, ¶ 239; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 110.

[2159] *Fe de Hechos* Villahermosa casino (Jan. 22, 2020), **C-309**; First Alejandro Vargas Statement, **CWS-58**, ¶ 10.

[2160] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 111.

[2161] Decision 357/2019 issued by Second Civil Judge of first instance for the State of Tabasco (July 2, 2019), pp. 42-46, **C-412**; Second Ezequiel González Matus Report, **CER-6**, ¶ 233; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 111.

[2162] *Fe de Hechos* Villahermosa casino (Jan. 22, 2020), **C-309**; First Alejandro Vargas Statement, **CWS-58**, ¶¶ 9-13.

[2163] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 111.

[2164] Second Ezequiel González Matus Report, **CER-6**, ¶ 234; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 112.

winery called "PRISSA."[2165] Mexico has prevented Claimants from gaining access to the Villahermosa Casino or retrieving any of its own remaining property or assets.[2166]

896. Mexico's actions resulted in the loss of the full value of these remaining assets—*i.e.*, E-Games' legal right to occupy the premises of these casinos and the material and machines inside of those casinos. These damages are encompassed in the valuation of the Casinos and are addressed in Section V *infra*.

(a) Mexico Failed To Provide Legal Protection and Security to Claimants' Investments by Interfering with, and Ultimately Destroying, E-Games' Ability To Operate the Casinos

897. Mexico also failed to provide legal protection and security to Claimants' investments in Mexico.

898. Mexico has failed to provide a legal environment that allowed E-Games to defend its rights before Mexican courts and instead arbitrarily and illegitimately revoked Claimants' authorization to operate the Casinos for political reasons and allowing undue influence in the judicial decisions that impacted Claimants by pressure exerted through the Executive branch as well as allowing Judge Gallardo to be unduly influenced and "controlled" via bribes paid by E-Mex, all as established in detail above. Mexico also violated Claimants' legal security in the manner through which it, through SEGOB, revoked its gaming permit (i) based on nontransparent reasons that never have been communicated to Claimants; (ii) without affording Claimants any due process or right to heard before or after it illegally cancelled the permit; (iii) and for undisclosed political and other illegitimate reasons, fueled by the new Peña Nieto's agenda, including its desire to repay the Hank family for its support, its desire to strike back against supporters of the PAN administration, and its desire to eliminate Claimants from the Casino sector not only to benefit local competitors

[2165] *Fe de Hechos* Puebla casino (Jan. 24, 2020), **C-310**; First Alejandro Vargas Statement, **CWS-58**, ¶ 15.

[2166] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 112.

but also because it could not "control" Claimants and thereby profit illegally from its operations. As in *Azurix* and *CME,* Mexico altered the regulatory environment in which Claimants had invested and prevented them from defending their rights in court.[2167]

899. Mexico further breached its legal protection and security obligation by failing to notify E-Games that it would be allowing third parties free entry into the Casinos, include by lifting seals on the Casinos without a court order instructing SEGOB to do so.[2168] This prevented E-Games from challenging these decisions in order to try to force Mexico to comply with its obligations. Mexico does not seriously challenge this. Instead Mexico asserts that it was not obliged to notify Claimants of the delivery of the premises to the lessors or the lifting of the seals.[2169] That, of course, does not change the reality that Mexico *did* allow third parties to take and otherwise destroy Claimants' investments.

900. Mexico's argument that it was not obligated to notify the Claimants is also wrong. As Mr. Gutiérrez explains, Mexico was required to inform Claimants of the delivery of the premises and the lifting of the seals because the Casinos were filed with Claimants' personal property, and more generally, to inform Claimants of any change in legal situation related to the closure of the Casinos.[2170] Moreover, Mexico knew that E-Games had no address to directly receive any notice, given that Mexico had closed *all* of E-Games' offices, including its main office in Naucalpan,[2171] However, SEGOB was aware that E-Games had indicated the address of its Mexican counsel, Mr. Gutiérrez, as an alternate address to receive notifications.[2172] Mexico could have, but failed

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[2167] *CME,* Partial Award, ¶ 613 (emphasis added), **CL-108**; *Azurix,* Award, ¶ 408, **CL-126**.

[2168] Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 135.

[2169] Counter-Memorial, ¶ 391.

[2170] Fourth Julio Gutiérrez Statement, **CWS-53**, ¶ 108; Fifth Julio Gutierrez Statement, **CWS-62**, ¶¶ 135-138.

[2171] Fourth Julio Gutiérrez Statement, **CWS-53**, ¶ 107; Fifth Julio Gutierrez Statement, **CWS-62**, ¶ 137.

[2172] Fourth Julio Gutiérrez Statement, **CWS-53**, ¶ 107; Fifth Julio Gutierrez Statement, **CWS-62**, ¶ 137.

to, notify Mr. Gutiérrez. Therefore, there was no excuse for Mexico's failure to notify E-Games and this omission could only be deliberate.

901. Similarly, Mexico relies on Exhibit R-75 to argue that Claimants Gordon and Erin Burr "were aware who had illegally lifted the seals and removed the Claimants' equipment" from the Naucalpan Casino specifically, and that these people were "associated with the Claimants."[2173] That is false. The person who likely removed the machines from the Casinos—Alfredo Moreno Quijano—was *not* affiliated with the Claimants at that time.[2174] As explained above, Mr. Moreno Quijano is a former employee of the Casinos who was fired before this time, and is now one of Claimants' adversaries. Mr. Moreno Quijano has sown disinformation amongst the Claimant group, including by creating and disseminating nearly all of the false allegations in Exhibit R-75, and has attempted to steal Casino assets to further his own interests.[2175] In any event, as Mr. Burr explains in his Fourth Witness Statement, none of the Claimants stole or removed gaming machines from the Casinos.[2176] Given that the Casinos, including the Naucalpan Casino were under Mexico's control and custody, Mexico failed its obligation to provide Claimants' property in the Naucalpan Casino full protection and security from these bad actors—as it did for *all* of Claimants' Casinos.

[2173] Counter-Memorial, ¶¶ 374-375 ("*Sin embargo, al parecer al menos el Sr. Burr y la Sra. Burr, sí tenían conocimiento de quiénes habían levantado ilegalmente los sellos y habían retirado el equipo de las Demandantes. . . . De acuerdo a lo anterior, aparentemente fueron personas asociadas a las Demandantes las que extrajeron equipos del casino de Naucalpan, rompiendo los sellos de clausura, lo cual esta [sic] prohibido y constituye un delito.*").

[2174] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 79, 94; Fourth Erin Burr Statement, **CWS-60**, ¶¶ 136-137.

[2175] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 65, 94, 164; Fourth Erin Burr Statement, **CWS-60**, ¶¶ 136-137; Second Neil Ayervais Statement, **CWS-61**, ¶ 43.

[2176] Fourth Gordon Burr Statement, **CWS-59**, ¶ 94.

G. Mexico Violated its Obligation To Not Deny Claimants Justice Under Article 1105 of the NAFTA

902. In the Memorial, Claimants explained that Mexico breached NAFTA Article 1105(1) by failing to accord Claimants due process in proceedings before its judicial organs *(i.e.*, its courts) and its administrative bodies (*i.e.*, SEGOB) and thus denying Claimants justice.[2177] Mexico does not deny that NAFTA Article 1105 offers protection against a denial of justice under the minimum standard of treatment at international law, but instead argues that it has not denied Claimants justice *in this case*.[2178] That is not so. Mexico's improper and egregious procedural conduct clearly raises justified concerns as to the judicial propriety of the outcome—which is sufficient to find that Mexico has breached its denial of justice obligation.

1. The Legal Standard: Mexico Ignores that the Relevant Test Is Whether "Improper and Egregious Procedural Conduct" Raises "Justified Concerns as to the Judicial Propriety of the Outcome"

903. In its Counter-Memorial, Mexico does not deny (1) that it may be responsible for the acts of its judiciary, as an organ of the State, or that (2) a duty to avoid judicial denial of justice is one of its obligations under Article 1105.[2179] Instead, Mexico attempts to significantly diminish the scope of the its obligation not to deny justice.[2180] However, that obligation, as the Claimants explained, is an "open-ended" one covering a "range of possibilities."[2181] It looks, for example, to whether there are "justified concerns as to the judicial propriety of the outcome,"[2182] where "the

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[2177] Memorial, Section V(D).

[2178] Counter-Memorial, Section III(C).

[2179] Counter-Memorial, ¶ 620.

[2180] *See* Counter-Memorial, ¶ 651.

[2181] Memorial, ¶ 630.

[2182] *Mondev International Ltd. v. United States of America* ("*Mondev*"), ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), ¶ 127, **CL-17**.

decision is so patently arbitrary, unjust or idiosyncratic that it demonstrates bad faith,"[2183] or whether "proceedings are so faulty as to exclude all reasonable expectation of a fair decision."[2184]

904. In attempting to avoid liability for its actions, Mexico advances the untenable position that denial of justice can apply only "to a nation's entire judicial system."[2185] However, a recent NAFTA award against Mexico confirms that a broad range of conduct may breach the denial of justice obligation. In *Lion Mexico Consolidated v. Mexico*, a distinguished tribunal of international law scholars Juan Fernández-Armesto (President), David Cairns, and Laurence Boisson de Chazournes defined the test as follows:

> [D]enial of justice requires a finding of an improper and egregious procedural conduct by the local courts (whether intentional or not), which does not meet the basic internationally accepted standards of administration of justice and due process, and which shocks or surprises the sense of judicial propriety.[2186]

905. In *Lion v. Mexico*, the investor, Lion, had made a loan to a local party, which brought a complaint against Lion seeking forgiveness of the loan on the basis of a forged contract purporting to cancel the loan.[2187] A default judgment was rendered by a first instance court after Lion was served at an address that was not its principal place of business.[2188] The first instance court then decided that this default judgment had *res judicata* effect, preventing Lion from challenging it on the merits. According to the Mexican court, the value of the judgment was less than MEX 500,000, which is the statutory limit for granting *res judicata* effect to commercial decisions of the first

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[2183] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikayson Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16 ("*Rumeli Telekom*"), Award (July 29, 2008), ¶ 653, **CL-113**.

[2184] *Lion Mexico Consolidated LP v. Mexico* ("*Lion*"), ICSID Case No. ARB(AF)/15/2, Award (Sep. 20, 2021), ¶ 203, **CL-295**.

[2185] Counter-Memorial, ¶ 620.

[2186] *Lion*, Award, ¶ 299, **CL-295**.

[2187] *Lion*, Award, ¶ 96 et seq., **CL-295**.

[2188] *Lion*, Award, ¶ 303, **CL-295**.

instance. However, the evidence indicated that the value was significantly greater than that.[2189] Then, Lion was prevented from challenging the decision on constitutional grounds through an *amparo*, because Lion's debtors fraudulently filed and then quickly withdrew a false *amparo* application on Lion's behalf, preventing any further *amparo* applications from being filed on its behalf.[2190]

906. According to the *Lion* tribunal, Mexico denied the investor justice—and thus breached the NAFTA—on three separate occasions.

907. First, the Mexican judge hearing the complaint failed to perform "any scrutiny" with regard to service of process on Lion at a Mexican address given by the local party—even though a basic review would have shown that (1) service of process was against Mexican law because the service officer did not verify that the company had its place of business at the registered address, and (2) everything else in the file showed that the claimant was a foreign company.[2191]

908. Second, the decision of the local judge to grant *res judicata* effect to the default judgment on grounds that the value of the dispute was below the statutory limit was "deeply flawed" because the judge offered "no reasoning as to how he reached the conclusion that the value of the Cancellation Proceeding equaled less than MEX 500,000"[2192] and "blatantly failed to follow the procedure set out in the Commercial Code of Mexico" in respect to verifying if it met the threshold.[2193]

[2189] *Lion*, Award, ¶ 112, **CL-295**.

[2190] *Lion*, Award, ¶ 119 et seq., **CL-295**.

[2191] *Lion*, Award, ¶ 413, **CL-295**.

[2192] *Lion*, Award, ¶ 439, **CL-295**.

[2193] *Lion*, Award, ¶ 447, **CL-295**.

909. Finally, the district court in which Lion lodged its (legitimate) *amparo* application failed to entertain Lion's arguments that the prior *amparo* application entered in its name was a fraud. The underlying agreement "stands in stark contrast . . . to basic principles of due process under Mexican law,"[2194] as the court "could have not only admitted the evidence proposed by Lion but also requested any other relevant evidence, given the gravity of the claim."[2195] The *Lion* case, therefore, confirms that the relevant inquiry with respect to a denial of justice claim is whether there are "justified concerns as to the judicial propriety of the outcome"[2196]—as Claimants amply demonstrated in their Memorial was the case here.

910. Rather than engage with this reality, however, Mexico makes three discrete arguments in regard to the denial of justice standard, each of which is simply incorrect as a matter of international law.

911. First, as noted above, Mexico argues that only a failure of a State's judicial system—not the decision of a particular court—can lead to a denial of justice (*i.e.*, denial of justice "can only apply to a nation's entire judicial system"[2197] and "there is no instantaneous denial of justice committed by isolated court decisions under international law"[2198]). Under Mexico's incorrect and unattainable standard, essentially no State conduct would ever rise to the level of a denial of justice, as it would require the failure of the "entire judicial system."

[2194] *Lion*, Award, ¶ 501, **CL-295**.

[2195] *Lion*, Award, ¶ 502, **CL-295**.

[2196] *Mondev*, Award, ¶ 127, **CL-17**.

[2197] Counter-Memorial, ¶ 620 ("*la denegación de justicia en su sentido consuetudinario solo aplica al sistema judicial de una nación en su conjunto*").

[2198] Counter-Memorial, ¶ 620 ("*no existe el concepto de denegación de justicia instantánea por decisiones judiciales aisladas conforme a derecho internacional*").

912. Mexico's interpretation of the denial of justice standard is wrong. For instance, the *Lion* award, a decision under the NAFTA, found that three discrete court decisions—(1) the default judgment that failed to properly assess the flawed service of process, (2) the wrongful grant of *res judicata*, and (3) the failure by the *amparo* court to hear Lion's arguments on the forgery—each separately and together amounted to a denial of justice, without any need to show that the "entire judicial system" had committed a denial of justice[2199] (even if that could be possible).

913. The award in *Lion* is consistent with decisions by other tribunals. For example, the *Azinian* decision on which Mexico itself relies,[2200] states that "[w]hat must be shown is that the court decision itself constitutes a violation of the treaty,"[2201] thereby recognizing that it is the act of the judiciary, not the state's entire judicial system, that is responsible for the denial of justice. Likewise, in the *Petrobart* decision relied upon by Mexico,[2202] the tribunal considered "that such Government intervention in judicial proceeding [*i.e.*, a letter by a Minister to the judiciary in relation to a specific case] is not in conformity with the rule of law in a democratic society."[2203] This is fully consistent with the international law rules of state responsibility, according to which "[e]very internationally wrongful act of a State entails the international responsibility of that State."[2204] Indeed, Mexico's suggestion that a State could be liable for the *existence* of a "nation's entire judicial system"[2205] would be virtually impossible to prove on a case-by-case basis.

[2199] *Lion*, Award, ¶¶ 398, 421, 448, 505-509, **CL-295**.

[2200] Counter-Memorial, ¶ 628.

[2201] *Azinian*, Award, ¶ 99, **CL-192**.

[2202] Counter-Memorial, ¶¶ 685-686.

[2203] *Petrobart Ltd. v. The Kyrgyz Republic* ("*Petrobart v. Kyrgyzstan*"), SCC Case No. 126-2003, Arbitral Award (Mar. 29, 2005), ¶ 414, **CL-202**.

[2204] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001) ("ILC Articles"), Article 1, **CL-94**.

[2205] Counter-Memorial, ¶ 620.

914. Second, Mexico mischaracterizes Claimants argument as being that "according to international law, access to courts is substantive in nature."[2206] Mexico then contends that Claimants' argument is incorrect because "access to courts is procedural in nature."[2207] Mexico also misconstrues Claimants' argument, which cites to *Philip Morris v. Uruguay*, as a claim for a "substantive denial of justice" through access to the courts.[2208] Mexico contends that Claimants' argument must fail because "Claimants must prove the existence of procedural irregularities made by Mexican courts, and not of substantive mistakes."[2209]

915. But Claimants did not argue that access to courts was "substantive in nature" or make a "substantive denial of justice" claim.[2210] In reality, in the paragraph of Claimants' memorial that Mexico cites, Claimants cited *Philip Morris v. Uruguay* to note that a denial of justice may result where courts do not "fairly determine[]" claims on a substantive level.[2211] Claimants proceeded to explain—and explain again herein—the numerous serious procedural defects and "clear and malicious misapplication[s] of the law" that Mexico committed, which constituted denials of justice under arbitral jurisprudence.[2212]

916. Third, Mexico alleges that "the mere misapplication of domestic law is not per se denial of justice"[2213] and that "procedural defects" cannot lead to a denial of justice.[2214]

[2206] Counter-Memorial, ¶ 652 ("*que el acceso a los tribunales en el derecho internacional es de naturaleza sustantiva* (substantive in nature)").

[2207] Counter-Memorial, ¶ 652 ("*el acceso a los tribunales es de naturaleza procesal*").

[2208] Counter-Memorial, ¶ 654.

[2209] Counter-Memorial, ¶ 658 ("*Las Demandantes deben demostrar la existencia de irregularidades procesales, no de errores sustantivos.*").

[2210] *See* Memorial, ¶¶ 634-636.

[2211] Memorial, ¶ 635; *Philip Morris v. Uruguay*, Award, ¶ 557, **CL-191**.

[2212] *See* Memorial, Section V.D.5.

[2213] Counter-Memorial, ¶ 627.

[2214] Counter-Memorial, ¶ 660.

917. Although a single misapplication of domestic law or a procedural defect *in one specific case* may not—*alone*—lead to a denial of justice finding, this proposition does not hold when extrapolated. As many tribunals have held, repeated misapplications of unambiguous provisions of domestic law or gross procedural defects—when taken together (or even separately) can and does amount to a denial of justice.[2215] Further, a denial of justice occurs where there is a "clear and malicious misapplication of the law,"[2216] or as the *Lion* tribunal confirmed, "proceedings are so faulty as to exclude all reasonable expectation of a fair decision,"[2217] or "improper and egregious procedural conduct by the local courts (whether intentional or not), which does not meet the basic internationally accepted standards of administration of justice and due process, and which shocks or surprises the sense of judicial propriety."[2218] As explained in the section below, these elements were clearly present in the relevant Mexican judicial proceedings in this case.

918. Mexico attempts to narrow this "open-ended" legal standard by "distinguishing" case law relied upon by Claimants, but that does not advance its case.

919. ***Flughafen v. Venezuela***: Mexico claims that the *Flughafen* award—in which a tribunal found that a decision of a Venezuelan court that failed to provide adequate reasons and legal basis constituted a denial of justice—is "factually distinguishable" because the Venezuelan court decision was rendered *sua sponte*.[2219] Yet, nowhere did the *Flughafen* tribunal suggest that its denial of justice finding relied upon the *sua sponte* nature of the Venezuelan court decision. To

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[2215] *Pantechniki v. Albania*, Award, ¶ 94, **CL-198**; *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award (Mar. 26, 2008), ¶ 78 ("The treatment of an investor by national courts should be examined in its entirety to determine whether or not there has been a denial of justice."), **CL-195**.

[2216] *Azinian*, Award, ¶ 103, **CL-192**.

[2217] *Lion*, Award, ¶ 203, **CL-295**.

[2218] *Lion*, Award, ¶ 299, **CL-295**.

[2219] Counter-Memorial, ¶ 665.

the contrary, it clarified that the Venezuelan court decision "omits any reference to norms in the Venezuelan legal system;"[2220] that the decision's reasoning was "manifestly insufficient;"[2221] and that "the true justification" for the decision was "a new interpretation of the Venezuelan Constitution, expanding the powers of the Central Executive Power in airport matters."[2222]

920. ***Dan Cake v. Hungary***: In the *Dan Cake* case, a tribunal found a denial of justice where a Hungarian court failed to comply with the procedural rules of Hungarian bankruptcy law, including by convening a mandatory composition hearing.[2223] Mexico argues that, in this case, unlike in *Dan Cake*, "there was no misapplication of domestic laws or procedural violations."[2224] That is simply untrue, as explained in the Memorial[2225] and in the report of Claimants' expert on the Mexican judicial proceedings[2226], and below. However, Mexico's attempt to distinguish this case *on the merits* is, in effect, an admission that its gross violations of Mexican law and procedural violations, if proven (as Claimants have done here), would amount to a denial of justice.

921. ***Arif v. Moldova***: In the *Arif* case, a tribunal suggested that an *ultra petita* decision could be a denial of justice. In that case, a local court's decision went beyond a simple request by a competitor of the claimant's local company that a tender be declared illegal and declared the

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[2220] *Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. v. Bolivarian Republic of Venezuela* ("*Flughafen*"), ICSID Case No. ARB/10/19, Award (Nov. 18, 2014), ¶ 697, **CL-103** (**Spanish original**: "*omite toda referencia a la norma en el ordenamiento jurídico venezolano*").

[2221] *Flughafen*, Award, ¶ 698, **CL-103** ("*manifiestamente insuficiente*").

[2222] *Flughafen*, Award, ¶ 700, **CL-103** ("... the true justification ... a new interpretation of the Venezuelan Constitution, expanding the powers of the Central Executive Power in airport matters ..."). **Spanish Original** ("... *la verdadera justificación ... una nueva interpretación a la Constitución Venezolana, ampliando los poderes del Poder Ejecutivo Central en materia aeroportuaria ...*").

[2223] *Dan Cake (Portugal) S.A. v. Hungary* ("*Dan Cake v. Hungary*"), ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability (Aug. 24, 2015), ¶ 146, **CL-197**.

[2224] Counter-Memorial, ¶ 670 ("*no hubo una aplicación errónea de la legislación doméstica ni violaciones procesales*").

[2225] Memorial, ¶¶ 669-687.

[2226] *See e.g.*, First Omar Guerrero Report, **CER-2**, ¶¶ 180-251.

competitor to be the winner of the tender, even though the tribunal found no breach because the decision did not have a "negative impact" on the claimant's position, as its local company would still have been declared the loser of the tender.[2227] Mexico seeks to distinguish that decision on grounds 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."[2228] However, the *Arif* tribunal made no such finding. Rather, it only found that the erroneous decision was not "tainted by impermissible bias and bad faith" because it had no negative impact on the claimant's local company.[2229] Here, in comparison, Mexico's actions destroyed the value of Claimants' entire investment, and there are abundant examples of bias and bad faith that led to decisions with a "negative impact" on Claimants.[2230]

922. ***Thunderbird v. Mexico***: Similarly, Mexico alleges that, in the *Thunderbird* case, the tribunal "concluded that small irregularities incurred by the administrative branch are far from constituting a breach of Article 1105(1)."[2231] The irregularities, in that case, however, fall far below the serious defects which afflicted E-Games' *amparo* proceedings as well as the administrative proceedings before SEGOB (even though the *Thunderbird* case also concemed proceedings before SEGOB).

923. In the *Thunderbird* case, claimant invested in Mexico's video gaming industry on the basis of a SEGOB letter confirming that Mexican law did not prohibit video games based mainly on the

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[2227] *Mr. Frank Charles Arif v. Republic of Moldova* ("*Arif v. Moldova*"), ICSID Case No. ARB/11/23, Award, ¶ 470, **CL-189**.

[2228] Counter-Memorial, ¶ 672; *Arif v. Moldova*, Award, ¶ 672, **CL-189**.

[2229] *Arif v. Moldova*, Award, ¶ 470, **CL-189**.

[2230] *See* Memorial, § IV.X, ¶¶ 669-687.

[2231] Counter-Memorial, ¶ 667 ("*concluyó que pequeñas irregularidades cometidas por la rama administrativa están lejos de constituir una violación al artículo 1105(1)*").

user's skill, but did prohibit gambling machines based on chance—which the investor interpreted as confirmation that its business, which, it said, included games mainly based on user's skill, were legal.[2232] Several months later, SEGOB changed course and issued an administrative decision in 2001 declaring that all machines of the same type as the claimant's machines, EDM machines, were prohibited as a matter of Mexican law.[2233] The only denial of justice alleged in that case, however, was that SEGOB did not hear the claimant before issuing the 2001 decision.[2234]

924. That is a far cry from the judicial and administrative actions taken in this case directly and specifically against E-Games, including the numerous improprieties in both the *amparo* proceedings and the administrative proceedings. Notably, the gross irregularities in this case were also resolved against E-Games in various cases without E-Games having an opportunity to appropriately be heard (notwithstanding SEGOB's obligation to do so, unlike in *Thunderbird*). Moreover, unlike in *Thunderbird*, the record in this arbitration is replete with examples of denials of justice by Mexico's judicial (not solely administrative) organs.

925. ***Pantechniki v. Albania***: Mexico seeks to distinguish the *Pantechniki* decision—in which the sole arbitrator clearly stated that an "*ultra petita* decision is a 'clear violation of fair procedure' that can engage the state in liability under the heading of a denial of justice"[2235]—on grounds that the sole arbitrator "did not determine that a *sua sponte* decision constitutes instantaneous denial of justice."[2236] Yet, while it is true that the sole arbitrator found that there had been no denial of

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[2232] *International Thunderbird Gaming Corp. v. The United Mexican States* ("*Thunderbird*"), UNCITRAL, Award (Jan. 26, 2006), ¶ 55, **CL-7**.

[2233] *Thunderbird*, Award, ¶ 73, **CL-7**.

[2234] *Thunderbird*, Award, ¶ 186, **CL-7**.

[2235] *Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Albania* ("*Pantechniki v. Albania*"), ICSID Case No. ARB/07/21, Award (July 30, 2009), ¶ 100, **CL-198**.

[2236] Counter-Memorial, ¶ 675 ("*no determinó que una decisión sua sponte constituye una denegación de justicia instantánea*").

justice because a denial of justice "does not arise until a reasonable opportunity to correct aberrant judicial conduct has been given to the system as a whole" (which was not the case in *Pantechniki,* as the claimant had not appealed the impugned local decision), it also found that "[t]his does not mean that remedies must be pursued beyond a point of reasonableness."[2237] Here, however, not only did Mexico's judicial system have ample opportunities to correct the errors of lower courts, but its repeated procedural and substantive due process violations at every level laid bare the reality that any further appeals would be futile. Moreover, as relates to the *Amparo* 1668/2011 proceeding, Claimants pursued all appellate avenues and their efforts to obtain justice were frustrated at all levels, including by pressures placed on the Mexican Supreme Court by the president's personal lawyer.

926. Finally, in an attempt to escape a conclusion that (as the *Lion* tribunal found) its courts were tainted by political influence and corruption in this case, Mexico seeks to avoid liability on the grounds that Claimants have not exhausted all domestic remedies. Mexico argues that 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."[2238]

927. Mexico relies on two cases for this proposition: the *Loewen* and *Chevron II* awards.[2239] However, neither of those awards assist Mexico's argument.

928. In *Loewen*, a tribunal found that, while, on paper, a U.S. jury influenced by local favoritism may have otherwise constituted a denial of justice, the claimants in that case had not exhausted all

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[2237] *Pantechniki v. Albania*, Award, ¶ 96, **CL-198**.

[2238] Counter-Memorial, ¶¶ 675-676 ("*Las Demandantes no pueden reclamar denegación de justicia por la present corrupción judicial o por falta de independencia e imparcialidad judicial ante un tribunal del TLCAN debido a que no ejercieron los recursos internos que tenían a su alcance en su momento*").

[2239] Counter-Memorial, ¶¶ 678-682.

local remedies, namely, an appeal to the U.S. Supreme Court.[2240] The *Loewen* tribunal only found that a claimant would be obliged to exhaust local remedies where such remedies are "adequate and effective" and "not 'obviously futile.'"[2241] Here, Claimants did exhaust local remedies: Claimants' *Recurso de Inconformidad* 406/2014 was heard by the Mexican Supreme Court (who succumbed to political pressure and ultimately did not rule on the merits of the case). In the Closure Administrative Review Proceedings, any further remedies would have been futile, as SEGOB sought out any avenue to undermine the Claimants' right to be heard in the case and coordinated its rulings in the Closure Administrative Review Proceedings and at the Supreme Court to effectively ensure the unviability of the E-Games Independent Permit.

929. The *Chevron* case, in fact, is not about the exhaustion of remedies. In that case, the tribunal found that a ghostwritten judgment was "clearly improper and discreditable."[2242] According to Mexico, however, the case is distinguishable because the claimant in that case "vigorously litigated allegations of corruption and lack of judicial independence."[2243] However, the *Chevron* decision did not find that a claimant would be obliged to pursue remedies that were "obviously futile." Notably, while the *Lion* tribunal did apply an "exhaustion of remedies" rule, it found that "an aggrieved party is only required to pursue remedies which are reasonably available and which have an expectation that they will be effective, i.e. the measure or appeal has a reasonable prospect of correcting the judicial wrong committed by the lower courts."[2244] The *Lion* tribunal found that

[2240] *Loewen*, Award, ¶ 217, **CL-67**.

[2241] *Loewen*, Award, ¶ 169, **CL-67**.

[2242] *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador* ("*Chevron I*"), UNCITRAL, PCA Case No. 2007-02/AA277, Partial Award on the Merits (Mar. 30, 2010), ¶ 4, **CL-190**.

[2243] Counter-Memorial, ¶ 681 ("*litigó vigorosamente ante tribunales ecuatorianos de distintos niveles sus alegaciones de corrupción e independencia judicial*").

[2244] *Lion*, Award, ¶ 562, **CL-295**.

recourse before Mexican courts were obviously futile because the claimant in that case "unsuccessfully pursued the *Amparo* Proceedings for three years before the two available instances" and only withdrew its claims after "prospects for a best-case scenario were limited."[2245] As Claimants have explained and enumerate further herein, that was also the case here.

2. Denial of Justice by Mexico's Judicial Organs

930. Mexico seeks to portray its breaches of the judicial denial of justice obligation as (at most) innocent—and isolated—misapplications of Mexican law by its courts. That, however, is not correct. As Claimants have shown, Mexico's breaches of its denial of justice obligation were both intentional and widespread. However, the Tribunal must only look to the specific decisions impugned by Claimants and ask itself whether "improper and egregious procedural conduct by the local courts (whether intentional or not)"[2246] raises "justified concerns as to the judicial propriety of the outcome."[2247]

931. In so doing, the Tribunal cannot ignore the politicization and cronyism that afflicted these proceedings. The evidence of this is clear:

- The new head of SEGOB, Ms. Salas, appointed by President Peña Nieto, declared just a week into her tenure as the Director of the Games and Raffles Division to a major news outlet that E-Games' permit was "illegal," and the Ministry of Economy later communicated the same message, stating that Claimants' permit was cancelled because it had been "irregularly granted at the end of the previous administration."[2248] In early 2013, in notes from an another internal meeting, SEGOB predicted that E-Games' permit would be revoked.[2249] This change was

[2245] *Lion*, Award, ¶ 599, **CL-295**.

[2246] *Lion*, Award, ¶ 299, **CL-295**.

[2247] *Mondev*, Award, ¶ 127, **CL-17**.

[2248] Memorial, ¶¶ 502-503; E-Games Memo ("*La DGJS [Dirección General de Juegos y Sorteos de la SEGOB] nos comunicó que el Permiso Bis fue cancelado debido a que el mismo era un permiso que había sido otorgado al final de la administración anterior de manera irregular.*"), **C-261**; *Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón* (Jan. 27, 2013). Retrieved from http://www.jornada.unam.mx/2013/01/27/politica/013n1pol, **C-17**.

[2249] Email from C. Rayo Zapata re: Meeting and Notes with M. Salas re: E-Games (Feb. 22, 2013), **C-401** ("*Exciting [E-Games] Están en proceso ante juzgado, si declara que fueron dados de manera irregular van a ser revocados*.").

also evident in SEGOB's position in *Amparo* 1668/2011, where it did an about face and without an express instruction from the court to do so, chose to revoke its own lawfully granted Resolutions, including the November 16, 2012 Resolution that granted the E-Games Independent Permit.

- A former SEGOB official and an officer for one of E-Games' competitors confirmed (1) that the E-Games Independent Permit was valid and (2) that the E-Games Independent Permit was revoked for political reasons on the misguided belief that Claimants and E-Games were affiliated with the prior administration and that the permit was revoked in order to benefit the PRI's political allies, including Hank Rhon.[2250] Moreover, they revealed that the E-Games Independent Permit was also cancelled because E-Games refused to pay bribes.[2251]

- When SEGOB, of its own volition and within 24 hours of the Sixteenth District Judge's Order, did an about face and purported to revoke all of its own Resolutions granted in E-Games' favor, including the November 16, 2012 Resolution, which granted the E-Games Independent Permit, applying reasoning that attributed a ruling of unconstitutionality of the doctrine of "acquired rights" to Judge Gallardo when the judge made clear he made no such ruling.

932. However, the politicization was not only in the administrative body, SEGOB, but also in the judiciary, which also was corrupted by E-Mex:

- The Sixteenth District Judge, Judge Gallardo, admitted E-Mex's Third Amendment to the *Amparo* 1668/2011 proceeding despite the fact that it was clearly untimely. Judge Gallardo's admission of the Third Amendment permitted the Sixteenth District Court to consider the legality/validity of the May 27, 2009 Resolution. E-Mex's principals informed Claimant Mr. Burr that E-Mex "controlled" the Sixteenth District Judge (*supra* ¶ 170).

- Judge Adela Domínguez served as judge responsible for delivering the combined opinion of the Collegiate Tribunal even though she had already told Claimants' counsel that the court would under no circumstances allow gaming operators to become permit holders (*supra* ¶ 768).

- Claimants' recourse to the Supreme Court was heard by the same judge, Justice Perez Dayán, who had also served on the Collegiate Tribunal that had resolved this very same issue (*supra* ¶ 234).

- Although it decided that it would hear the merits of E-Games' appeal and had met with Claimants' Mexican counsel for months to discuss the substance of the appeal, the Mexican Supreme Court reversed course and decided to dismiss Claimants'

[2250] Memorial, ¶ 227 et seq.

[2251] Memorial, ¶ 227 et seq; Black Cube Recording Transcripts, **Appendix B**.

appeal on procedural grounds after President Peña Nieto's lawyer, Mr. Castillejos, held an *ex parte* discussion with the presiding judge (*supra* ¶ 234).

- On remand, one of the three judges of the Collegiate Tribunal, José Luis Caballero, told Claimants' counsel that he feared for the safety of his position if he did not rule as President Peña Nieto desired (*supra* ¶ 768).

933. Mexico has brazenly refused to produce any documents evidencing requests and communications by Mexico's executive branch and E-Mex to its judiciary or internal executive branch communications reflecting a discussion and/or assessment of the *amparo* proceedings (even though those documents clearly do exist) (*infra* ¶ 261). Specifically, Mexico does not even produce one document to substantiate Mr. Landgrave's claim that he suggested that the Games and Raffles Division prepare for the potential scenario in which E-Mex would allege noncompliance with the Sixteenth District Judge's judgment related to the revocation of the May 27, 2009 Resolution.[2252] This lack of documents reflects that SEGOB conducted no substantive analysis before purporting to revoke the November 16, 2012 Resolution granting the E-Games Independent Permit. That, of course, as noted, is not believable. Nor does it produce any communications from Mr. Castillejos to Justice Perez Dayan, as it cannot counter Claimants' explanation that Mr. Castillejos intimidated Justice Perez Dayan into not ruling on the substance of E-Games' *recurso de inconformidad* and, after reviewing the substance of the case for months, was pressured to send the case back to the same appellate court that had previously ruled on the case.

934. The Tribunal must assume that those requests would be damaging to Mexico's case—namely, they would show the scale of executive pressure laid to bear on the judiciary in this case

[2252] Counter-Memorial, ¶ 285; Landgrave Statement, ¶ 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.").

and apply an adverse inference that such political pressure did infect these judicial proceedings to deny Claimants any shot at justice in the Mexican courts.

935. There is no doubt that the politicization of Claimants' status in the Mexican gaming industry tainted the judicial decisions that led to the revocation of the May 27, 2009 Resolution and provided a bogus justification for the revocation of the November 16, 2012 Resolution which granted the E-Games Independent Permit.

(a) Judicial Denials of Justice in Relation to the May 27, 2009 Resolution

936. On December 30, 2011, E-Mex initiated the *Amparo* 1668/2011 proceeding.[2253] This *amparo* was pursued in parallel with *Amparo* 1151/2012, in which E-Mex sought to challenge *inter alia* the November 16, 2012 Resolution, which granted the E-Games Independent Permit. The First Collegiate Court rejected E-Mex's challenge to November 16, 2012 Resolution in *Amparo* 1151/2012, after an appellate court ruled that the amendment attempting to introduce the challenge to the November resolution was untimely and no longer subject to an *amparo* challenge, resulting in a finding that the November 16, 2012 Resolution was an "implicitly consented act."[2254] E-Mex, however, found a sympathetic audience in Judge Gallardo, the Sixteenth District Judge, in *Amparo* 1668/2011. Judge Gallardo, after improperly admitting the May 27, 2009 Resolution into the case, ordered the revocation of the May 27, 2009 Resolution—a decision the Collegiate Tribunal upheld.[2255] As noted, this did not prevent E-Games from operating its Casinos in Mexico because E-Games had obtained the E-Games Independent Permit and was no longer reliant upon its independent operator status. However, Judge Gallardo's revocation of the May 27, 2009

[2253] E-Mex Request for *Amparo* 1668/2011 (Dec. 30, 2011), **C-268**.

[2254] First Omar Guerrero Report, **CER-2**, ¶ 303; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 51; Order of the *Primer Tribunal Colegiado en Materia Administrativa del Cuarto Circuito* (Oct. 17, 2013), **C-295**.

[2255] Memorial, ¶¶ 253-254, 283.

Resolution ultimately provided an erroneous opening/justification for SEGOB to declare invalid its own November 16, 2012 Resolution (which granted the E-Games Independent Permit and without it, E-Games could not operate its profitable Casinos in Mexico), which SEGOB seized on as described above. Moreover, the clear breaches of due process in Mexican courts provided cover for that clear breach of Mexico's obligations under the NAFTA.

937. This demonstrates that each of the decisions and orders leading to the revocation of May 27, 2009 Resolution and providing cover for the November 16, 2012 Resolution are tainted by "improper and egregious procedural conduct" which raises "justified concerns as to the judicial propriety of the outcome."[2256]

938. **The Sixteenth District Judge's January 31, 2013 Order to Admit the May 27, 2009 Resolution**: E-Mex, an E-Games competitor on the brink of losing its gaming license, filed a constitutional challenge to a number of SEGOB actions on December 30, 2011 in *Amparo* 1668/2011.[2257] This *amparo* proceeding ultimately led to a decision on January 31, 2013—*i.e.*, after the Peña Nieto administration took over—that the May 27, 2009 Resolution was *unconstitutional* because *Mexico's gaming laws* did not recognize independent operator status under another party's permit.[2258] Importantly, E-Mex's amendment seeking to incorporate the May 27, 2009 Resolution into the *Amparo* was untimely, but nevertheless the Sixteenth District Judge improperly admitted it in an open and gross violation of Mexican *amparo* procedure.[2259] The May 27, 2009 Resolution should not have been admitted into the *Amparo* 1668/2011 proceedings in the first place because there was "manifest and unquestionable evidence" that

[2256] *Lion*, Award, ¶ 299, **CL-295**.

[2257] Memorial, ¶ 250.

[2258] Memorial, ¶ 366; First Omar Guerrero Report, **CER-2**, ¶¶ 159, 203, 309.

[2259] Memorial, ¶¶ 267-271; First Omar Guerrero Report, **CER-2**, ¶¶ 159, 203, 309; *See supra* ¶ Section II.L.1.

E-Mex had previously learned of the May 27, 2009 Resolution on numerous instances before May 15, 2012 when it submitted its request to the Sixteenth District Court to admit it into the *Amparo* 1668/2011 proceedings.[2260]

939. In the proceedings, E-Games showed that any challenge to the May 27, 2009 Resolution was moot because the effects of the May 27, 2009 Resolution had ceased by virtue of the November 16, 2012 Resolution, which granted the E-Games Independent Permit.[2261] The Sixteenth District Judge rejected that position and rendered a decision on the May 27, 2009 Resolution, but he did so on dubious grounds: E-Games, he claimed, had not submitted the November 16, 2012 Resolution as an exhibit in the case, and thus the Sixteenth District Judge could not be sure that it existed.[2262] That finding, however, grossly ignores established Mexican law, which obliges the court to obtain the evidence necessary to perform its analysis independent of whether such evidence is submitted by the parties.[2263]

940. The proceedings leading to that decision were equally flawed—riddled by judicial impropriety, gross misapplication of Mexican law, and repeated denials of E-Games' due process rights.

941. First, as noted, the admission of E-Mex's challenge to the May 27, 2009 Resolution was improper, as it was untimely.[2264] Judge Gallardo's decision to do so was based on a patently false representation by E-Mex about when it learned of the May 27, 2009 Resolution. While E-Mex

[2260] Memorial, ¶ 267; First Omar Guerrero Report, **CER-2**, ¶¶ 159, 203, 309; *See supra* Section II.L.1.

[2261] First Omar Guerrero Report, **CER-2**, ¶ 145; Order of the *Séptimo Tribunal Colegiado en Materia Administrativa* (July 10, 2013), **C-20**.

[2262] First Omar Guerrero Report, **CER-2**, ¶ 145; Order of the *Séptimo Tribunal Colegiado en Materia Administrativa* (July 10, 2013), **C-20**.

[2263] First Omar Guerrero Report, **CER-2**, ¶ 146.

[2264] First Omar Guerrero Report, **CER-2**, ¶¶ 59-60; *Supra* Section II.L.1.

had been made aware of the May 27, 2009 Resolution on at least three separate *earlier* occasions, E-Mex claimed (inaccurately) that it had only learned of the resolution on May 15, 2012.[2265] This, in reality, is no different from the decision of the Mexican court in *Lion*, which failed to look *sua sponte* at the validity of service of process and the address of the claimant and instead accepted a fraudulent representation from the moving party, a local businessman (like E-Mex) with "control" over the judiciary (*supra*, para. 59, 154).

942. Second, when E-Games sought to challenge the Sixteenth District Judge's admission of the May 27, 2009 Resolution to the Collegiate Tribunal, its appeal was improperly rejected. The Collegiate Tribunal rejected E-Games' challenge of the Sixteenth District Judge's decision to allow E-Mex to amend its claim to include a challenge of the May 27, 2009 Resolution on erroneous grounds.[2266] It purported to rely on Article 91 of the Amparo Law, but that provision does not provide any grounds for rejecting a challenge to the amendment of a complaint. Rather, it requires a court to hear "evidence presented for the purposes of proving the existence of grounds for inadmissibility"[2267] (in other words, the Collegiate Tribunal actually should have heard evidence that the amendment was *inadmissible*, not that it was admissible). The Collegiate Tribunal failed to do so.

943. Third, the Collegiate Tribunal failed to acknowledge that E-Mex had been informed of the May 27, 2009 Resolution on the three separate earlier incidences and had declined to challenge the resolution in time (*i.e.*, within 15 days)—as SEGOB itself argued in these proceedings, even though the tribunal had an obligation under Mexican law to consider this issue and the applicable

[2265] Memorial, ¶¶ 88-92.

[2266] Order of the *Séptimo Tribunal Colegiado en Materia Administrativa* (July 10, 2013), **C-20.**

[2267] First Omar Guerrero Report, **CER-2**, ¶ 84(a); Abrogated *Amparo* Law, Article 91, **CL-75**.

evidence even on *ex officio* basis.[2268] The evidence of those incidences where E-Mex had previously learned of the May 27, 2009 Resolution was on record for the Collegiate Tribunal to see.

944. Fourth, the Collegiate Tribunal failed to perform an *ex officio* review of the admissibility of the *amparo* proceeding as it was required to do under Mexican law.[2269] E-Mex's Third Amendment to the *amparo* was untimely, and as a result, the Collegiate Tribunal should have rejected it, as E-Mex had learned about the May 27, 2009 Resolution on three separate occasions before it purported to challenge the Resolution. This was no different than the Venezuelan court in *Flughafen*, whose decision was "manifestly insufficient"[2270] and showed that "the true justification for the decision was a political motive."[2271] In this case, that is confirmed by SEGOB's own Undersecretary for Government, Mr. Ávila Mayo (*supra*, para. 427).

945. In its Counter-Memorial, Mexico raises two unavailing arguments in response.

946. First, Mexico claims that the decisions of the Sixteenth District Judge and the Collegiate Tribunal were "correct" "since the arguments relating to the untimeliness of the official of the May 27, 2009 do not reveal a manifest and unquestionable inadmissibility"[2272] because the grounds must be manifest based *solely on the amparo* (or an amendment to the *amparo*) and its exhibits.[2273] In reality, Mexican courts have established that the judge's decision need not be based "solely on

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[2268] Memorial, ¶¶ 88-92.

[2269] First Omar Guerrero Report, **CER-2**, ¶¶ 52, 55, 101, 151, 152; Second Omar Guerrero Report, **CER-5**, ¶ 66; *Supra* ¶ Section II,L.1.c.

[2270] *Flughafen*, Award, ¶ 698, **CL-103**.

[2271] *Flughafen*, Award, ¶ 700, **CL-103**.

[2272] Counter-Memorial, ¶ 704 ("*pues los argumentos relativos a la extemporaneidad de la reclamación del oficio de 27 de mayo de 2009 no revelan una improcedencia manifiesta e indudable*").

[2273] Counter-Memorial, ¶ 231.

the *amparo*," but also on the case file.[2274] Where, as here, the *amparo* applicant (E-Mex) fails to mention that it was informed earlier (thereby misstating the facts to the court), the judge should have looked to the case file.[2275] Had he done so, he would have seen each of the three separate incidences in which E-Mex was informed of the May 27, 2009 Resolution, but failed to challenge it in a timely way.[2276]

947. The Sixteenth District Judge knew this. He confirmed in his January 31, 2013 Order that he received the certified copies of the *Amparo* 356/2012 case file.[2277] However, the Sixteenth District Judge said that "it cannot be reliably established that [E-Mex] also received a copy of the annexes that are included separately (*que obran por separado*), in which the [May 27, 2009 Resolution] can be found."[2278] That was not a serious justification for failing to identify the prior notifications. In the very same decision, the Sixteenth District Judge had "recorded the delivery of the totality of the records (*constancias*) that comprise the case file."[2279] In other words, the Sixteenth District Judge himself acknowledged in the very same decision that all documents in the

[2274] Second Omar Guerrero Report, **CER-5**, ¶¶ 22-23.

[2275] Second Omar Guerrero Report, **CER-5**, ¶¶ 22-23.

[2276] Second Omar Guerrero Report, **CER-5**, ¶ 26; *Supra*, ¶ 154.

[2277] First Omar Guerrero Report, **CER-2**, ¶ 113; *See* Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Jan. 31, 2013), **C-18**.

[2278] First Omar Guerrero Report, **CER-2**, ¶ 111; *See* Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Jan. 31, 2013), p. 62, **C-18** (*"porque de dicha razón de recepción de copias certificadas firmada por María del Roció Leal Arriga, autorizada para tal efecto por la citada tercero perjudicada, en la que consta su firma y la del secretario del juzgado que hizo constar la entrega de la totalidad de las constancias del expediente, no se advierte de manera fehaciente que haya recibido también copias de los anexos que obran por separado, en donde consta el oficio reclamado, por lo que este juzgador considera no puede tomarse como punto de partido para realizar el cómputo de quince días para promover amparo, la fecha de entrega de las copias del expediente si no se especificaron las fojas de las constancias entregadas, ni se entregaron copias de los anexos que constan en cuaderno por separado, pues se reitera, no se tiene plena certeza de que la quejosa tuvo conocimiento directo, exacto y completo del acto reclamado.*").

[2279] *See* Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Jan. 31, 2013), p. 62, **C-18**.

case file had been notified to E-Mex.[2280] Those documents became a part of the record in *Amparo* 1668/2011. Thus, the *amparo* judge received these documents and should have ruled that E-Mex's Third Amendment admitting the May 27, 2009 Resolution was untimely. As noted earlier, it likely did not do so, because Judge Gallardo was being "controlled" by E-Mex.[2281] Like the judge in the *Lion* case who decided that the amount in dispute fell below the threshold amount (in order to avoid appeal) even though he had recorded a far higher amount elsewhere in his decision, the Judge Gallardo (influenced by E-Mex) and the Collegiate Tribunal (influenced by the office of President Peña Nieto) chose to ignore the facts and focus on the preordained result.

948. Mexico next argues, relying on its expert report, that "courts have discretion to decide whether the grounds for inadmissibility have been fully established."[2282] That, too, is wrong. As the decision whether to accept the Third Amendment was taken *ex parte* (without hearing E-Games), the Sixteenth District Judge had an obligation to review the record and verify that it was properly submitted.[2283] This conclusion flows naturally from the Amparo Law and Mexican jurisprudence.[2284] Like the district judge in the *Lion* case, Judge Gallardo ignored the manifest and unquestionable evidence that E-Mex's assertions were false. He should have rejected E-Mex's Third Amendment and it improperly failed to do so.

949. Second, Mexico claims that the Sixteenth District Judge and the Collegiate Tribunal did not fail to examine E-Games' admissibility argument because "E-Games did not present evidence

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[2280] *See* Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Jan. 31, 2013), p. 62, **C-18**.

[2281] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶¶ 56, 85; Third Gordon Burr Statement, **CWS-50**, ¶ 118; Third Erin Burr Statement, **CWS-51**, ¶ 126.

[2282] Counter-Memorial, ¶ 705 ("*los tribunales tienen la discrecionalidad de decidir*").

[2283] Second Omar Guerrero Report, **CER-5**, ¶ 66; First Omar Guerrero Report, **CER-2**, ¶ 86(c); *See supra* Section II.L.1.

[2284] Second Omar Guerrero Report, **CER-5**, ¶ 66; First Omar Guerrero Report, **CER-2**, ¶ 151.

in support of its argument."[2285] Yet, E-Games did do so even though under applicable Mexican law, it did not need to. SEGOB itself filed a *recurso de queja* (a challenge of judicial conduct before the Collegiate Tribunal) against the Sixteenth District Judge's decision and did submit clear and incontrovertible evidence that E-Mex had previously been informed of the May 27, 2009 Resolution, and therefore, that its Third Amendment was untimely and should not be admitted.[2286] SEGOB's clear evidence to this effect was rejected by the Collegiate Tribunal, who refused to consider and apply it despite having a clear legal obligation to do so.[2287] The Collegiate Tribunal relied upon Article 91 of the *Amparo* Law to justify its decision to reject the evidence, but that provision only applies to a *recurso de revisión* (a challenge of the decision of district courts in *amparo* proceedings), not a *recurso de queja*.[2288] Article 91 of the *Amparo* Law clearly states that "in accordance with article 91, section II, of the *Amparo* Law, with respect to petitions for constitutional relief (*asuntos en revisión*), only the evidence submitted to the Judge hearing the case will be considered, *except for such evidence presented for the purposes of proving the existence of grounds for inadmissibility*."[2289] This evidence pertained to a clear ground of "inadmissibility" of E-Mex's amendment seeking to add the constitutionality of the May 27, 209 Resolution into *Amparo* 1668/2011 proceeding. As such, the Collegiate Tribunal also improperly rejected SEGOB's evidence showing that E-Mex had previously learned of the May 27, 2009 Resolution and that its Third Amendment was untimely.

[2285] Counter-Memorial, ¶ 707 ("*E-Games no presentó pruebas para soportar su argumento*").

[2286] First Omar Guerrero Report, **CER-2**, ¶¶ 82-83; SEGOB Recurso de Queja 68/2012 (June 13, 2012), **C-280**.

[2287] First Omar Guerrero Report, **CER-2**, ¶ 83; Order of the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (June 22, 2012), **C-281**.

[2288] First Omar Guerrero Report, **CER-2**, ¶ 84(a); Abrogated *Amparo* Law, Article 91, **CL-75**.

[2289] First Omar Guerrero Report, **CER-2**, ¶ 84(b); Abrogated *Amparo* Law, Article 91 (emphasis added), **CL-75**.

950. This due process violation led to the deeply flawed decision to revoke the May 27, 2009 Resolution as unconstitutional, which later served as the lynchpin for SEGOB to unlawfully introduce the November 16, 2012 Resolution into that amparo proceeding and revoke that resolution, thereby revoking E-Games' permit. Had Mexican courts done their job (and followed Mexican law), E-Games' May 27, 2009 Resolution would not have been revoked and, as such, SEGOB would not have been provided with the opening and excuse that it was looking for to invalidate E-Games' permit.

951. **The Sixteenth District Judge's Failure to Notify E-Games of SEGOB's July 19, 2013 Resolution**: After the January 31, 2013 Order was rendered, SEGOB rescinded the May 27, 2009 Resolution by virtue of its July 19, 2013 Resolution. Even though he was required under Article 196 the Amparo Law to notify E-Games of SEGOB's action, the Sixteenth District Judge failed to do so.[2290] This not only was an egregious violation of E-Games' due process rights, it had serious consequences. Under the Amparo Law, it prevented E-Games from challenging SEGOB's revocation of the May 27, 2009 Resolution and effectively deprived E-Games of its right to be heard. This was yet a further gross miscarriage of justice and violation of Claimants' rights due to the judge's violation of well-established Mexican *amparo* procedure. Again, this can only reasonably be explained by E-Mex's statement that it "controlled" Judge Gallardo via bribes.

952. Mexico incorrectly alleges that the Sixteenth District Judge "was not obligated to order SEGOB to issue new resolutions"[2291] (*i.e.*, it was not required to order SEGOB to inform Claimants of the revocation). In reality, Article 196 of the Amparo Law provides directly otherwise:

[2290] First Omar Guerrero Report, **CER-2**, ¶ 248; Abrogated *Amparo* Law, Article 196, **CL-75**; Order of the *Juez Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Aug. 12, 2013), **C-288**.

[2291] Counter-Memorial, ¶ 713 ("*no estaba obligado a ordenar a la SEGOB emitir nuevas resoluciones*").

953. When the judicial body of protection receives a report from the responsible authority that it has already complied with the execution, *it will give a hearing to the complainant and, where appropriate, to the interested third party*, so that within a period of three days they can express what is appropriate to their right. [2292]

954. As such, in accordance with Mexico's *amparo* law, the Sixteenth District Judge was required to notify E-Games of the revocation of the July 19, 2013 Resolution that revoked the May 27, 2009 Resolution as well as to provide E-Games with a "*hearing* . . . so that within a period of three days they [could] express what is appropriate to their right."[2293] As a matter of Mexican law, without the judge's notification and required right to a hearing, E-Games was prevented from challenging SEGOB's actions.[2294] And that is precisely what occurred.

955. The failure to notify E-Games of SEGOB's act—like, in *Lion*, (1) the lower court's failure to allow proper service of process and (2) the appeal court's acceptance of a fraudulent *amparo* application—prevented E-Games from putting forward its case and challenging the court's action, a clear and gross violation of Claimants' and E-Games' due process rights.

(b) Judicial Denials of Justice in Relation to the November 16, 2012 Decision

956. The so-called enforcement stage (or *etapa de cumplimiento*)—in which the *amparo* decision is executed and the courts retain jurisdiction to ensure compliance—followed the July 19, 2013 Resolution (which revoked the May 27, 2009 Resolution). The revocation of the May 27, 2009 Resolution by SEGOB through its July 19, 2013 Resolution—led Judge Gallardo to issue an

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[2292] Abrogated *Amparo* Law, Article 196, **CL-75** ("*Cuando el órgano judicial de amparo reciba informe de la autoridad responsable de que ya cumplió la ejecutoria, dará vista al quejoso y, en su caso, al tercero interesado, para que dentro del plazo de tres días manifiesten lo que a su derecho convenga*".) (emphasis added).

[2293] First Omar Guerrero Report, **CER-2**, ¶ 245; SEGOB Resolution (July 19, 2013), **C-272**.

[2294] First Omar Guerrero Report, **CER-2**, ¶ 248; Abrogated *Amparo* Law, Article 196, **CL-75**; Order of the *Juez Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Aug. 12, 2013), **C-288**.

order on August 26, 2013 that opened the door for SEGOB to issue its August 28, 2013 Resolution through which it unlawfully introduced the November 16, 2012 Resolution into the *amparo* proceeding and revoked that resolution, thereby revoking the E-Games Independent Permit, along with all other significant resolutions granted in favor of E-Games. That action too was the product of judicial decisions—some of which were the product of E-Mex bribes and others of which were the product of pressure placed on the judiciary by the personal lawyer of President Peña Nieto—that are riddled with due process violations and abusive misapplications of Mexican law that raise justified concerns as to the judicial propriety of the outcome.

957. **The Sixteenth District Judge's August 26, 2013 Order**: Shortly after the May 27, 2009 Resolution was revoked, E-Mex brought a motion before Judge Gallardo in the Sixteenth District Court on August 22, 2013 arguing that SEGOB had failed to comply with the January 31, 2013 Order because SEGOB had revoked only the May 27, 2009 Resolution—even though this is expressly what E-Mex sought to do in the Third Amendment.[2295] This request was contrary to Mexican law because the January 31, 2013 Order was "clear and precise" and thus could not be expanded by way of *ex post* interpretation.[2296] Despite that, the Sixteenth District Judge shockingly and in a very serious and fundamental departure from established *amparo* procedure agreed with E-Mex, finding in his August 26, 2013 Order, just days after E-Mex's application was filed, that SEGOB, in revoking only the May 27, 2009 Resolution and not revoking additional resolutions granted in favor of E-Games, had not fully complied with its obligations under his January 2013 amparo ruling.[2297] Specifically, the Sixteenth District Judge ordered SEGOB to

[2295] Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Aug. 26, 2013), **C-23**.

[2296] First Omar Guerrero Report, **CER-2**, ¶ 187.

[2297] Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Aug. 26, 2013), **C-23**; First Omar Guerrero Report, **CER-2**, ¶ 190; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 58; Third Gordon Burr Statement, **CWS-50**, ¶ 119; Third Erin Burr Statement, **CWS-51**, ¶ 127.

rescind all resolutions based on or derived from the May 27, 2009 Resolution—although he did not specify to which resolutions he was referring.[2298]

958. Shortly after E-Mex filed this request and before Judge Gallardo ruled on it, E-Mex's principals threatened E-Games' legal advisor by stating that "they controlled" the Sixteenth District Judge, Judge Gallardo.[2299] They threatened to instruct Judge Gallardo to revoke the November 16, 2012 Resolution, which granted the E-Games Independent Permit, if E-Games would not settle its ongoing arbitration with respect to royalties allegedly owed to E-Mex.[2300]

959. E-Mex's principals' threats materialized in the Sixteenth District Judge's August 26, 2013 Order, which raised doubt and risk as to what the judge might do in response to SEGOB's response. This August 26, 2013 Order was manifestly illegal and contrary to Mexican amparo procedural law. What Claimants never thought could or would happen is that SEGOB, rather than Judge Gallardo, would take the illegal and highly irregular step of revoking the November 16, 2012 Resolution, which it did when it issued its August 26, 2013 Resolution.[2301] SEGOB's revocation of the November 16, 2012 Resolution left without effect the E-Games Independent Permit without hearing E-Games and without any of the formalities of a judicial process.[2302] In effect, through his improper August 26, 2013 order, the Sixteenth District Judge opened the door for SEGOB to revoke the November 16, 2012 Resolution (which door has been closed by virtue of E-Mex unsuccessful bid to challenge the constitutionality of that same resolution in the *Amparo*

[2298] First Omar Guerrero Report, **CER-2**, ¶ 190; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 58; Third Gordon Burr Statement, **CWS-50**, ¶ 119; Third Erin Burr Statement, **CWS-51**, ¶ 127.

[2299] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶¶ 56, 85; Third Gordon Burr Statement, **CWS-50**, ¶ 118; Third Erin Burr Statement, **CWS-51**, ¶ 126.

[2300] Julio Gutiérrez Statement, **CWS-52**, ¶ 85; Gordon Burr Statement, **CWS-50**, ¶ 118; Erin Burr Statement, **CWS-51**, ¶ 126.

[2301] *See* Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Aug. 26, 2013), **C-23**.

[2302] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 59; First Omar Guerrero Report, **CER-2**, ¶¶ 162, 191, 312; SEGOB Resolution (Aug. 28, 2013), **C-289**.

1151/2012 proceeding); a door that SEGOB happily rammed through with its August 26, 2012 Resolution. As a result, the E-games Independent Permit was revoked without giving E-Games any opportunity to be heard or defend itself.

960. Mexico's defense to this egregious denial of justice is that "[w]hen a government measure is challenged by an *amparo* action, the challenge [is] not only to the act itself but to its effects and consequences."[2303] Yet, Mexico's argument is incorrect as a matter of Mexican law. Where a litigant seeks to challenge a government measure, Mexican law requires that it must identify that act with precision.[2304] Further, if a litigant fails to do identify the government measures with precision, Mexican courts have found that these measures (those not identified with precision) cannot become a part of the legal action.[2305] The November 16, 2012 Resolution granting the E-Games Independent Permit was not identified "with precision," and in fact not even *mentioned*, in either E-Mex's pleadings in the *amparo* case or the January 31, 2013 Order.[2306] Therefore, the November 16, 2012 Resolution could not be—and should not have been made—a part of the *Amparo* 1668/2011 proceedings or SEGOB's compliance with the Sixteenth District Judge's August 26, 2013 Order.[2307]

961. **The Collegiate Tribunal's February 19, 2014 Order:** On October 14, 2013, the Sixteenth District Judge found that E-Games had been operating its casinos under its own permit as of November 16, 2012, and that the November 16, 2012 Resolution was "totally independent

[2303] Counter-Memorial, ¶ 720 ("*Cuando una medida gubernamental es impugnada en Amparo, no solamente se impugna el acto en sí mismo, sino también sus efectos y consecuencias*").

[2304] Second Omar Guerrero Report, **CER-5**, ¶ 76; Abrogated *Amparo* Law, Article 146, **CL-75**; Second Ezequiel González Report, **CER-6**, ¶ 161.

[2305] Second Omar Guerrero Report, **CER-5**, ¶ 77.

[2306] Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), **C-24**.

[2307] Second Omar Guerrero Report, **CER-5**, ¶ 77.

and autonomous and is not related in any way to the resolution declared unconstitutional."[2308] After Judge Gallardo saw SEGOB's response to his August 26th Order, as noted, he scolded SEGOB and told it that it had exceeded its authority and his request, as he did not mean for SEGOB to invalidate the November 2012 Resolution. Oddly, SEGOB did not then reinstate the November 2012 Resolution, but instead insisted that its revocation was required by Judge Gallardo's August 26th Order.

962. The Sixteenth District Judge then initiated a type of enforcement proceeding called an *incidente de inejecución* (a proceeding aimed at forcing SEGOB to comply with the lower court's decision) before the Collegiate Tribunal. In that proceeding, E-Games challenged SEGOB's purported revocation of the E-Games Independent Permit, arguing that SEGOB exceeded its authority under the August 26, 2013 decision when it revoked the November 16, 2012 Resolution granting the E-Games Independent Permit, reasoning that the E-Games Independent Permit was entirely independent and distinct from the May 27, 2009 Resolution, just as Judge Gallardo had found.[2309]

963. The Collegiate Tribunal was clearly conflicted, as one of the judges on the panel, Judge Adela Domínguez, had already stated to E-Games' lawyers that "for no reason would they [the Collegiate Tribunal] allow operators to become permit holders since that would cause a total lack of control in the gaming industry in Mexico."[2310] Thus, the *incidente de inejecución* was hopelessly lost before it had even begun.

[2308] Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), **C-24** (emphasis added).

[2309] Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), **C-24** (emphasis added).

[2310] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 65 (quoting Adela Domínguez (**Spanish Original**: *por ningún motivo permitirían que operadores se transformaran en permisionarios ya que eso provocaría un total descontrol en la industria del juego en México*).

964. As a result of this political bias in the Collegiate Tribunal, and the likely pressure exerted on it by Peña Nieto administration, on February 19, 2014, the Collegiate Tribunal ruled against the Sixteenth District Judge's interpretation of his own ruling and found that SEGOB had not exceeded its authority in fulfilling the Sixteenth District Judge's January 31, 2013 Order when it rescinded the November 16, 2012 Resolution.[2311] The Collegiate Tribunal's ruling, like SEGOB's August 28, 2013 Resolution, reasoned (in direct contradiction to Judge Gallardo's explicit findings) that Judge Gallardo had ruled the doctrine of "acquired rights as unconstitutional."[2312] This is incorrect, Judge Gallardo made clear in his October 14, 2013 Order that he had not ruled that doctrine unconstitutional.[2313] This also is plainly evident from Judge Gallardo's January 31, 2013 order in the *Amparo* 1668/2011.

965. Moreover, the Collegiate Tribunal's ruling exceeded what is permissible under Mexican law. In the enforcement stage of the *Amparo* judgment (the stage in which this proceeding was in) the Collegiate Tribunal's scope of review is limited. It may only consider whether SEGOB properly complied with the Sixteenth District Judge's order to rescind the May 27, 2009 Resolution and all administrative resolutions that legally derived from it **and** that were clearly specified by the *amparo* judge in the *Amparo* judgment.[2314] The November 16, 2012 Resolution was not clearly specified (let alone even mentioned) by the *amparo* judge in his *Amparo* judgment. As such, there was no room for the Collegiate Tribunal to find that SEGOB properly invalidated the November 2012 Resolution. Instead, it was duty bound to rule that it could not invalidate it.

[2311] Memorial, ¶¶ 325-327.

[2312] First Omar Guerrero Report, **CER-2**, ¶ 200.

[2313] Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), p. 23, **C-24**.

[2314] First Omar Guerrero Report, **CER-2**, ¶ 215.

966. In addition to the legally untenable nature of the Collegiate Tribunal's substantive decision, the proceeding before the Collegiate Tribunal was also tainted by numerous due process violations.

967. First, the Collegiate Tribunal's decision was effectively a *de novo* review of the November 16, 2012 Resolution, which is beyond its powers during the enforcement phase of an *amparo* proceeding. Because *Amparo* 1668/2011 was in the enforcement stage, under Mexican law, the only proper role of the Collegiate Tribunal in this proceeding was simply a review of whether SEGOB had properly complied with the lower court decision or not.[2315] Judge Gallardo had made clear in this October 14, 2013 Order that SEGOB had not complied, so the Collegiate Tribunal's job should have been simple and straightforward.[2316]

968. Judge Gallardo's January 31, 2013 Order was "clear and precise"—it ordered the revocation of the May 27, 2009 Resolution and only that resolution. Therefore, to comply with the *Amparo* judgment, SEGOB had to revoke only the May 27, 2009 Resolution.[2317] Rescinding the November 26, 2012 Resolution thus constituted an excess in the fulfilment of the *Amparo* judgment, as the Sixteenth District Judge (Judge Gallardo) himself established.[2318]

969. Furthermore, under Mexican law, because the enforcement stage of an *amparo* proceeding allows for only a verification of compliance with the lower court decision, Mexican law does not allow for the introduction of new evidence or allegations at this stage.[2319] Despite this, the Collegiate Tribunal entertained new allegations as to the alleged unconstitutionality of the November 16, 2012 Resolution in the enforcement stage of this *Amparo* 1668/2011 proceeding

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[2315] First Omar Guerrero Report, **CER-2**, ¶ 182.

[2316] Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), p. 23, **C-24 ;** First Omar Guerrero Report, **CER-2**, ¶ 192.

[2317] First Omar Guerrero Report, **CER-2**, ¶ 192.

[2318] First Omar Guerrero Report, **CER-2**, ¶ 192.

[2319] First Omar Guerrero Report, **CER-2**, ¶ 216.

when the constitutionality of the November 16, 2012 Resolution had not been at issue in the *Amparo* 1668/2011 proceeding.[2320] By doing this, it its ultimate decision, was beyond the scope of what is customary or permissible under Mexican law.[2321]

970. Second, the Collegiate Tribunal's decision was clearly contrary to the decision of the First Collegiate Tribunal in *Amparo* 1151/2012, which found that the November 16, 2012 Resolution was an "implicitly consented act."[2322] Relying on Article 193 of the Abrogated *Amparo* Law, Mexico argues that "the scope of a decision made by the Collegiate Court [First Collegiate Tribunal] 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."[2323] In other words, Mexico argues that the ruling of one collegiate court cannot bind another collegiate court because there is no hierarchy between the two. Yet, Article 193 simply states that a collegiate court decision is not mandatory for other collegiate courts (*i.e.*, one collegiate court cannot order another collegiate court to do or not do something). According to the principle of *res judicata* under Mexican jurisprudence, however, the findings of one collegiate court can have preclusive effects on another because collegiate courts are required to respect the procedural firmness of prior rulings on the same issue.[2324] And here E-Mex's failure to timely challenge the November 16, 2012 Resolution before the First Collegiate Tribunal in *Amparo* 1151/2012, and that court's

[2320] Order of the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (Feb. 19, 2014), **C-290**; First Omar Guerrero Report, **CER-2**, ¶¶ 169, 171, 305.

[2321] First Omar Guerrero Report, **CER-2**, ¶ 182.

[2322] First Omar Guerrero Report, **CER-2**, ¶¶ 313, 319, 321; Order of the *Primer Tribunal Colegiado en Materia Administrativa del Cuarto Circuito* (Oct. 17, 2013), **C-295**; Second Omar Guerrero Report, **CER-5**, fn. 142.

[2323] Counter-Memorial, ¶ 718 ("*el alcance de una decisión de un Tribunal Colegiado está limitada al caso particular, la evidencia y argumentos presentados por las partes, y no puede automáticamente extenderse a un procedimiento distinto, como el Amparo 1668/2011*").

[2324] Second Omar Guerrero Report, **CER-5**, ¶ 188.

finding that the November 16, 2012 Resolution was an "implicitly consented act" constituted *res judicata*, preventing SEGOB or any subsequent court from invalidating that administrative act.[2325]

971. Third, the Collegiate Tribunal failed to address the Sixteenth District Judge's important finding that the May 27, 2012 Resolution was "totally independent and autonomous and is not related in any way to the resolution declared unconstitutional."[2326] In fact, the Collegiate Tribunal—like the Venezuelan court in *Flughafen*—failed to give any cognizable reason for its decision to revoke the November 16, 2012 Resolution. Its only justification for this aberrant ruling was attributing to the Sixteenth District Judge a ruling that he expressly stated he did not make: the Collegiate Tribunal found that Judge Gallardo had ruled unconstitutional the doctrine of acquired rights (he did not and expressly stated so in his October 14, 2013 Order) and further found that it was appropriate for SEGOB to have invalidated the November 2012 resolution because that resolution was based on the doctrine of acquired rights (it was not, as SEGOB noted in that very resolution that its *only* basis for granting the permit was E-Games' having met all legal requirements for the issuance of the permit).

972. In its Counter-Memorial, Mexico offers a new gloss on this decision: the Collegiate Tribunal "did not rule that the 'acquired rights' principle was unconstitutional, but rather that, in that specific case, it was unconstitutional to consider that the [November 16, 2012 Resolution] had created vested rights."[2327] Yet, that is clearly false. The Collegiate Tribunal clearly stated that "both [permit] the May 27, 2009 Resolution and the November 16, 2012 Resolution] were based on the legal principle of acquired rights, a legal principle declared unconstitutional by the district

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[2325] First Omar Guerrero Report, **CER-2**, ¶ 324.

[2326] Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), **C-24**.

[2327] Counter-Memorial, ¶ 724 ("*no determinó que el principio de los 'derechos adquiridos' fuera inconstitucional, sino que, en el caso concreto, era inconstitucional considerar que el Oficio 2009-BIS había generado derechos adquiridos*").

judge."[2328] However, as noted, this is a gross misstatement of Judge Gallardo's ruling as he actually found that the principle of "acquired rights" was constitutional.[2329] These aberrant rulings clearly meet the standard for a denial of justice.

973. **The Supreme Court's September 3, 2014 Decision**: E-Games appealed this decision to the Mexican Supreme Court on March 31, 2014 and the Supreme Court agreed to hear the appeal on the *merits*.[2330] However, after reviewing the case for months and working with Claimants' Mexican counsel on the merits of the case, on September 3, 2014, the Supreme Court abruptly decided to dismiss the appeal on *procedural* grounds. That decision was tainted with more of the same strident procedural defects and political bias as the lower courts' decisions. Notably, Justice Alberto Pérez Dayán, who served as the judge responsible for delivering the combined opinion of the Supreme Court, had also served on the Collegiate Tribunal that had resolved this very same issue.[2331] He had just been appointed to the Supreme Court by President Peña Nieto himself.[2332] During the pleadings phase of the Supreme Court proceedings, President Peña Nieto's lead and personal counsel (Mr. Castillejos), applied undue influence on Judge Pérez Dayán to drop the appeal and stop considering it on the merits, which the judge then promptly did.[2333]

974. As previously established, Mexico's attempt to defend against this with witnesses that have no personal knowledge of what occurred, rings hollow.[2334]

[2328] Order of the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (Feb. 19, 2014), pp. 98-99, **C-290**.

[2329] Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), p. 23, **C-24**.

[2330] *See* Order of the *Suprema Corte de Justicia de la Nación* (May 6, 2014), **C-25**; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 96.

[2331] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 88.

[2332] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 88.

[2333] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 88-90.

[2334] *Supra*, ¶¶ 219-240.

(c) Denial of Justice by Mexico's Administrative Bodies

975. SEGOB's efforts to prevent Claimants from operating in Mexico's gaming sector—after the Peña Nieto administration took power—also constitute a clear administrative denial of justice.

976. Under Mexican law, SEGOB, as an administrative body, has the authority and obligation to take decisions that have a significant impact on private parties, like E-Games. In doing so, however, it must observe basic due process protections. As SEGOB's own website provides, SEGOB offers "a procedural guarantee that must be present in **all types of proceedings**, not only in criminal proceedings, but also in civil, administrative or any other type of proceedings."[2335]

977. This "procedural guarantee" (to use SEGOB's words) is particularly important where SEGOB may be subject to political influence. There is no denying that a change in government had an effect on SEGOB's policies *with respect to E-Games*. That political agenda manifested itself in SEGOB's repeated maneuvers aimed at preventing E-Games from exercising its rights in administrative proceedings.

978. **SEGOB's Revocation of the November 16, 2012 Resolution**: SEGOB's revocation of the November 16, 2012 Resolution, which granted the E-Games Independent Permit, within 24 hours of learning of the August 26, 2013 Order denied Claimants justice for two reasons.

979. First, SEGOB failed to provide E-Games the opportunity to be heard prior to this significant decision. Mexican law dictates that in order to rescind the November 16, 2012 Resolution and to deprive E-Games of the rights originating from the November 16, 2012 Resolution, SEGOB or E-Mex would have needed to initiate a separate and independent judicial

[2335] SEGOB Website Excerpt *Qué es el debido proceso*, **C-404** ("Due process is a procedural guarantee that must be present in all kinds of processes, not only those of a criminal nature, but also civil, administrative or any other." **Spanish Original**: "*El debido proceso es una garantía procesal que debe estar presente en toda clase de procesos, no sólo en aquellos de orden penal, sino de tipo civil, administrativo o de cualquier otro*.").

proceeding to consider the November 16, 2012 Resolution, and any such proceeding would need to comply with the essential legal formalities under Mexican law.[2336] That never happened here.

980. Second, SEGOB failed to provide sufficient reasons for its conclusions, even though, as a matter of Mexican administrative law, administrative acts must provide sufficient reasoning to understand the basis for their conclusions and decisions.[2337] Far from providing a justifiable reasoning for its decision, SEGOB unreasonably and incorrectly concluded that the January 31, 2013 Order had struck down as unconstitutional the principle of "acquired rights"—even though that decision said the exact opposite.[2338]

981. In the document production phase of these proceedings, Mexico could not provide *even one document* reflecting its internal analyses or a legal basis for the revocation of the November 16, 2012 Resolution granting the E-Games Independent Permit. As such, SEGOB has provided Claimants and this Tribunal with literally no reasonable justification for the revocation of the E-Games Independent Permit, despite Mexican administrative law requiring such a justification.[2339]

982. **SEGOB's Closure of the Casinos and Subsequent Administrative Review Proceedings**: On April 24, 2014, SEGOB abruptly shut down all of Claimants' Casinos, despite an injunction enjoining such action and despite the fact that E-Games' *Recurso de Inconformidad* 406/2014 was still *sub judice* before the Supreme Court,[2340] denying E-Games its procedural

[2336] First Omar Guerrero Report, **CER-2**, ¶ 243.

[2337] First Omar Guerrero Report, **CER-2**, ¶ 36(2).

[2338] Memorial, ¶ 309.

[2339] Second Ezequiel González Matus Report, **CER-6**, ¶ 243.

[2340] Second Ezequiel González Matus Report, **CER-6**, ¶ 200.

protections and its ability to challenge that decision. SEGOB closed Claimants' Casinos in outright defiance of this injunction.[2341]

983. Mexico has no response to the reality that a failure by administrative bodies to comply with court orders amounts to, as the *Siag* tribunal found, "an egregious denial of justice".[2342] In this case, SEGOB's failure to respect the injunction clearly was an egregious denial of justice, as this unnecessarily led to the total destruction of Claimants' investments.

984. Second, during the course of the military-style shutdowns, in which SEGOB used excessive force, SEGOB also prevented Casino employees from contacting attorneys and refused to provide Casino employees with a copy of the closure orders, despite explicit requests for them.[2343]

985. Third, SEGOB officials shut down *E-Games'* Casinos, even though the closure orders provided only for the closure of *E-Mex's* casinos. Although E-Games staff raised this critical detail to the attention of SEGOB officials on site, SEGOB flatly ignored this and shut down the Casinos anyway.[2344]

986. Fourth, SEGOB dismissed E-Games' administrative recourse in the Closure Administrative Review Proceedings without any reasoning—even though, under Mexican law, administrative authorities have an obligation to provide explanation for their decision.[2345]

[2341] Injunctive Relief (Sept. 2, 2013), **C-299**; Second Ezequiel González Matus Report, **CER-6**, ¶ 203; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶¶ 70, 74, 85; *Resolución del 22 de septiembre de 2014 de Segunda Sala Regional Hidalgo-México del Tribunal Federal de Justicia Fiscal y Administrativa en el expediente* 4635/13-11-02-3-OT, **R-061**.

[2342] *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (June 1, 2009), ¶ 455, **RL-065**.

[2343] First Alfredo Galván Statement, **CWS-56**, ¶ 24; First Héctor Ruiz Statement, **CWS-55**, ¶ 13; First Patricio Chávez Statement, **CWS-54**, ¶ 24.

[2344] First Patricio Chávez Statement, **CWS-54**, ¶¶ 17-18; First Héctor Ruiz Statement, **CWS-55**, ¶¶ 20-22; First Alfredo Galván Statement, **CWS-56**, ¶¶ 19-22.

[2345] First Ezequiel González Matus Report, **CER-3**, ¶ 36(2).

987. Fifth, SEGOB violated Mexican law and Claimants' basic procedural rights by failing to open a second phase of the Closure Administrative Review Proceedings in a timely manner.[2346] It was during this second phase that E-Games would have had the opportunity to challenge the closures of the Casinos.[2347] SEGOB, however, simply let the 30 days to initiate the second phase of the Closure Administrative Review Proceedings pass.[2348] This caused the Closure Administrative Review Proceedings to expire without E-Games ever having the opportunity to challenge the closures, as E-Games could have only challenged the closure in the second phase of the proceedings.[2349] When, on July 8, 2014, E-Games asked SEGOB to consequently declare the Closure Administrative Review Proceedings as well as the provisional closures of Claimants' Casinos expired, SEGOB refused.[2350] SEGOB claimed that it had notified E-Games that on July 7, 2014, it had in fact initiated a second phase of the Closure Administrative Review Proceedings, but E-Games was never notified of any such decision.[2351] On information and belief, SEGOB back-dated the July 7, 2014 Resolution *after* it received E-Games' July 8, 2014 submission in order to try to preserve SEGOB's rights in the Closure Administrative Review Proceeding, after it realized that it had failed to meet relevant deadlines in Claimants' case.[2352] SEGOB sought to use its violations of prescribed time frames under Mexican law as a way to prevent E-Games from being heard and challenging SEGOB's decision.

[2346] Memorial, ¶ 406.

[2347] Memorial, ¶ 406.

[2348] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 87; Second Ezequiel González Matus Report, **CER-6**, § IX.

[2349] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 87; Second Ezequiel González Matus Report, **CER-6**, § IX.

[2350] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 87; Second Ezequiel González Matus Report, **CER-6**, § IX.

[2351] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 87.

[2352] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 87.

988. Sixth, SEGOB also intentionally and improperly delayed the Closure Administrative Review Proceedings so that it could wait to see how the Supreme Court would rule in Claimants' case.[2353] SEGOB also, after the fact, attempted to justify the closures by stating that Claimants were operating slot machines that accepted coins or cash,[2354] although the Closure Verification Orders do not identify that Claimants were operating slot machines[2355] and Claimants did not have slot machines in their Casinos that accepted coins or cash.[2356] This was yet another post-hoc justification by SEGOB designed to ensure that the Casinos would be shut down, even if the Supreme Court ruled in Claimants' favor.[2357]

989. Finally, SEGOB also denied Claimants justice when it *sua sponte* lifted the closure seals on the Casinos and allowed third parties to pillage the Casinos—without notifying E-Games. As a matter of Mexican law, SEGOB was obliged to inform E-Games of the lifting of the closure seals as E-Games had a legal interest in the property.[2358]

990. **SEGOB's Denial of E-Games Requests for New Permits**: When E-Games sought a new permit, SEGOB once again denied E-Games justice by maliciously misapplying Article 22 of the Gaming Regulation and denying E-Games' new permit application on grounds that the locations

[2353] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 177-179; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 88; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶¶ 131, 133-134; SEGOB Resolution Concluding the Closure Administrative Procedure for the Mexico City Casino, Case File AJP-0067-2014-VII, San Jerónimo, Mexico City Casino, pp. 48-50 (Feb. 26, 2015), **C-405**; SEGOB Writ Regarding Resolution of *Recurso of Inconfirmidad* 5/2014, Case File AJP-0067-2014-VII, San Jerónimo, Mexico City Casino, pp. 48-50 (Feb. 19, 2015), **C-406**.

[2354] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 87; SEGOB Decision Regarding the Admissibility of Evidence in the Closure Administrative Procedure for the Mexico City Casino, Case File AJP-0067-2014-VII, San Jerónimo, Mexico City Casino, pp. 13-14 (Oct. 9, 2014), **C-407**.

[2355] Certificates of Inspection (Apr. 24. 2014). **C-300**-**C-304**.

[2356] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 88.

[2357] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶¶ 88-89.

[2358] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 237-239.

where the Casinos would operate were closed.[2359] Yet, the Casinos were closed as a result of SEGOB's illegal and abusive closure—in violation of Mexican judicial decisions, and the new permit would have allowed E-Games to operate the Casinos just as it had done before SEGOB had closed them down.[2360]

991. Mexico's response to these clear breaches is that "[w]hen the administrative branch of a State does not act in its jurisdictional function, there can be no claim of denial of administrative justice," or, more specifically, where "SEGOB was acting in an administrative capacity by enforcing the decisions of Mexican courts."[2361] Yet, SEGOB itself has acknowledged that due process protections must be respected in "**all types of proceedings**, not only in criminal proceedings, but also in civil, administrative or any other type of proceedings."[2362] In each of these cases, Mexican law required SEGOB to provide such protections to E-Games, but SEGOB failed to do so, as explained above.

992. Mexico's follow-up argument is that Claimants can only claim that SEGOB denied them justice where the underlying decisions of the Mexican courts, which Mexico alleges SEGOB was following, did deny Claimants justice.[2363] Mexico's argument fails. First, numerous Mexican court decisions *did* deny Claimants justice, as explained in detail above. Second, SEGOB did not, in

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[2359] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 240-241; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 184(iii).

[2360] Second Ezequiel González Matus Report, **CER-6**, ¶ 204.

[2361] Counter-Memorial, ¶ 735 ("*Cuando la rama administrativa de un Estado no actúa en su función jurisdiccional, no puede haber ninguna reclamación de denegación administrativa de justicia. . . . la SEGOB estaba actuando en capacidad administrativa al hacer cumplir las decisiones de los tribunales mexicanos*.").

[2362] SEGOB's Website Excerpt What is due process? (*Qué es el debido proceso*) (Dec. 1, 2016), **C-404** ("Due process is a procedural guarantee that must be present in all kinds of processes, not only those of a criminal nature, but also civil, administrative or any other." **Spanish Original**: "*El debido proceso es una garantía procesal que debe estar presente en toda clase de procesos, no sólo en aquellos de orden penal, sino de tipo civil, administrativo o de cualquier otro*.").

[2363] Counter-Memorial, ¶ 739.

fact, comply with several Mexican court decisions when it denied Claimants justice, also as described above. For instance, SEGOB closed the Casinos on April 24, 2014 despite a judicial injunction preventing it from doing so.[2364] SEGOB also grossly exceeded the scope of Judge Gallardo's order when it issued its August 28th Resolution, revoking E-Games' permit.[2365]

993. Mexico offers a litigation-crafted but equally insupportable basis for the denials: that the Closure Administrative Review Proceedings were ongoing, and therefore new permits could not be issued.[2366] Mexico fails to show that this is a legal requirement under Mexican law for granting a permit (either now or when it denied E-Games' application for new permits). What is more, SEGOB unlawfully continued and delayed those Proceedings, which themselves were premised on its illegal closure of the Casinos.[2367]

994. Finally, Mexico appears to suggest, but does not cite any authority in arguing, that Claimants have not exhausted local remedies as to the Closure Administrative Review proceedings and Mexico's denial of E-Games' request for new permits on August 15, 2014.[2368] But that argument fails. Mexico does not put forth authority supporting its argument that the exhaustion of local remedies, whether administrative or judicial, is a substantive element of administrative denials of justice under NAFTA Article 1105 or customary international law. That is consistent with the text of the NAFTA, which does not require the exhaustion of local remedies, but rather the waiver of local remedies, in order to bring a claim.[2369]

[2364] Injunctive Relief (Sept. 2, 2013), **C-299**; Second Ezequiel González Matus Report, **CER-6**, ¶ 206; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 68.

[2365] Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), **C-24** (emphasis added).

[2366] Counter-Memorial, ¶ 597.

[2367] *See* Memorial, Section IV.X.3.e.

[2368] Counter-Memorial, ¶¶ 740-741.

[2369] NAFTA Article, 1121, **CL-78**.

995. In any event, based on the overwhelming evidence of judicial and administrative improprieties, including the political agenda and pressure over SEGOB and the judiciary discussed above, the pursuit of further remedies as to these administrative proceedings would have been futile. As noted earlier, the jurisprudence establishes that exhaustion for a denial of justice claim is unnecessary where further local efforts at justice would have been futile.

H. Mexico Violated Its Obligation to Accord National Treatment Under Article 1102 of the NAFTA

996. In their Memorial, Claimants explained that the Respondent had breached its obligations under Article 1102 of the NAFTA—*i.e.*, to "accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments"—by engaging in two courses of conduct:

- By providing preferential treatment to two Mexican competitors, Producciones Móviles (an independent permit holder who had been an operator under E-Mex's permit and obtained its permit in the same manner as E-Games, but who is still operating its Casinos in Mexico today) and Petolof (a company that, like E-Games, initially operated under a contractual agreement with a permitholder and eventually obtained an independent permit and whose legal precedent E-Games followed in separating from E-Mex)[2370]; and,
- By refusing E-Games' applications for new permits while granting such permits to competitors in like circumstances—including Comercializadora de Entretenimiento de Chihuahua S.A. de C.V., Eventos Festivos, Juega y Juega S.A. de C.V., El Palacio de Los Numeros S.A. de C.V.,

[2370] Memorial, Section V(E)(4)(a) and (b).

Pur Umazal Tov, and Discos y Producciones Premier (the "**Other Mexican Competitors**").[2371]

997. Mexico's arguments that it has not breached Article 1102 fail. Mexico agrees that in order to demonstrate a breach of Article 1102, Claimants must show (1) that Claimants' investment and the relevant comparator are in "like circumstances" and (2) that it accorded less favorable treatment to Claimants' investment.[2372] However, relying on a flawed understanding of the law, Mexico's factual arguments are that:

- Producciones Móviles, Petolof, and the Other Mexican Competitors are not in "like circumstances;"[2373]
- Claimants have not demonstrated less favorable treatment;[2374] and
- Less favorable treatment was justified by Mexico's "long-standing public policy concerning the gaming industry."[2375]

998. Those arguments get Mexico nowhere. Mexico cannot avoid liability for its clear breach of NAFTA Article 1102 because (1) E-Games, Petolof, Producciones Móviles, and the Other Mexican Competitors were in like circumstances, (2) the treatment granted to E-Games was objectively less favorable than the treatment granted to Petolof, Producciones Móviles, and the Other Mexican Companies, and (3) that less favorable treatment was not justified by a rational government policy of Mexico.

[2371] Memorial, Section V(E)(4)(c).

[2372] Counter-Memorial, ¶ 805.

[2373] Counter-Memorial, ¶¶ 817-824.

[2374] Counter-Memorial, ¶ 826.

[2375] Counter-Memorial, ¶ 827.

1. Like Circumstances: E-Games, Petolof, Producciones Móviles, and the Other Mexican Competitors Are Appropriate Comparators

999. In the Memorial, Claimants explained that the relevant questions that NAFTA and other tribunals have asked when considering whether companies are in "like circumstances" are (i) whether they are in the same business or economic sector; (ii) whether they are in a competitive relationship; and (iii) whether they are subject to a comparable legal regime or requirements.[2376] On any application of those criteria to the facts of this case, it is clear that Producciones Móviles and Petolof are in "like circumstances" with E-Games as they are (i) companies in the same economic sector (gaming) (ii) in a competitive relationship (as they operate gaming facilities in nearby locations), and (iii) are subject to a comparable legal regime or requirements (as they are both subject to the authority of SEGOB and the Federal Gaming Law and Gaming Regulation). Furthermore, it is also clear that E-Games and the Other Mexican Competitors are in like circumstances, as they are gaming companies that—like E-Games—did not have open and operating facilities at the time of their request for gaming permits from SEGOB.

1000. In its Counter-Memorial, Mexico works backwards and tries to "slice the onion much too thinly" in attempting to manufacture distinctions between E-Games and its competitors that ultimately are of no consequence. It concludes that (1) Producciones Móviles and Petolof are not appropriate comparators because their permits were not derived from the May 27, 2009 Resolution, and that (2) the Other Mexican Competitors are not proper comparators because "there is no evidence that these companies were in the same circumstances as the Claimants" and thus to consider those companies as comparators "would imply that all companies that obtained a permit

[2376] Memorial, ¶ 714.

since 2005, to this date, would automatically be in like circumstances."[2377] To justify those conclusions, it offers a number of arguments that would seek to narrow the scope of "like circumstances" impermissibly.

1001. In effect, Mexico inserts its own requirements into the national treatment standard, arguing that Claimants must show identical circumstances, not just like circumstances. That, of course, is wrong as a matter of law.[2378]

1002. First, Mexico argues that "all circumstances, not only the economic sector" must be considered when deciding whether investments are in "like circumstances."[2379] In defense of that proposition, it relies on quotations from two cases: *Merrill & Ring* and *Apotex*.[2380] Neither, however, are apposite.

1003. In Mexico's quotation from the 2010 *Merrill & Ring* award, the tribunal noted that NAFTA tribunals "have, on a number of occasions, considered various factors," including "environment, trade, the nature of services and functions, and public policy."[2381] However, Mexico fails to explain that, ultimately, the *Merrill & Ring* tribunal decided that relevant comparators were those in the same business or economic sector, *i.e.*, "other log producers,"[2382] which confirms that the relevant circumstances are economic.

[2377] Counter-Memorial, ¶ 822 *("no hay evidencia de que esas empresas se encontraran en las mismas circunstancias que las Demandantes . . . implicaría que automáticamente todas las empresas que obtuvieron un permiso desde 2004, a la fecha, estarían en circunstancias similares.*").

[2378] *Bilcon v. Canada*, Award on Jurisdiction and Liability, ¶ 687 ("[T]he operative word in Article 1102 is 'similar', not 'identical'. In addition to givinng the reasonably borad language of Article 1102 is 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.'"), **CL-159**.

[2379] Counter-Memorial, ¶ 809 ("*todas las circunstancias, no solo el sector económico*").

[2380] Counter-Memorial, ¶ 809.

[2381] Counter-Memorial, ¶ 810.

[2382] *Merrill*, Award, ¶ 91, **CL-124**.

1004. Similarly, the passage from the *Apotex* award relied upon by Mexico states that the parties considered it appropriate to look at whether the comparators "are in the same economic or business sector"[2383]—not the broad, amorphous standard that would include "all circumstances" as Mexico advocates.

1005. Second, Mexico argues that the "legal regime is a considerable factor."[2384] Yet, Claimants do not deny that the applicable legal regime or regulations are one of the relevant criteria. However, the "legal regime or regulations" does not mean that comparators must be subject to the same *sui generis* decision or authorization—as Mexico suggests on the facts. After all, that would require Claimants to show not that they were in "like circumstances" with the comparator, but instead in "identical circumstances." Rather, NAFTA and other tribunals have only required an investor to show that they were subject to the same general regime and/or regulations.[2385]

1006. The two decisions that Mexico itself cites in support for this proposition,[2386] the awards in *Grand River* and *Apotex*, demonstrate that the relevant legal regime is a general one. The *Grand River* tribunal identified as comparators "other firms engaged in the wholesale distribution of cigarettes in the United States and potentially subject to enforcement actions under the states' complementary legislation" (*i.e.*, competitors in the same economic sector subject to the same general legal regime).[2387] Tellingly, each of the prior NAFTA cases discussed by the *Grand River*

[2383] Counter-Memorial, ¶ 811.

[2384] Counter-Memorial, ¶ 812 ("*El régimen jurídico es un factor de peso*").

[2385] *See, e.g.*, *Bilcon v. Canada*, Award on Jurisdiction and Liability, ¶ 701 (finding that it is irrelevant that the claimant's proposed quarry and marine terminal project and the potential comparators identified by the claimant were subject to different environmental assessment procedures because regardless of the mode of review, the claimant's project and its comparators are all subject to the Canadian Environmental Assessment Act); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (Nov. 14, 2005), ¶¶ 215-216 (observing that the claimant and local competitors could be in similar circumstances notwithstanding the difference in "specific contractual provisions" in their contracts with the government), **CL-23**.

[2386] Counter-Memorial, ¶¶ 812-814.

[2387] *Grand River*, Award, ¶ 165, **CL-213**.

award in the excerpt reproduced by Mexico in its Counter-Memorial refers to a general legal regime: "the same U.S. 'Buy America' provisions" (*ADF*) or "the same restrictive legal regime" (*Pope & Talbot*) or "a limited group of cigarette exporters subject to the same legal requirements" (*Feldman*) or "similar regulatory requirements" (*Methanex*).[2388]

1007. Similarly, in *Apotex*, domestic and foreign drug manufacturers were not subject to the same legal regime because a key provision of the U.S. Food, Drug and Cosmetic Act, which permits authorities to impose an import ban on certain products, "does not apply to domestic products that are manufactured in the USA, regardless of whether the manufacturing facilities are US-owned or foreign-owned."[2389] The reason for this, the *Apotex* tribunal explained, was that domestic drug makers are directly subject to the U.S. authorities' jurisdiction and thus their production facilities can be inspected regularly—whereas foreign facilities are not subject to direct jurisdiction and their authorities cannot be inspected.[2390] The *Apotex* tribunal rejected a claim by the claimant, a drug exporter, that an import ban rendered pursuant to that key provision was discriminatory (given that the regulation did not allow authorities to prevent the sale of domestic drug makers in the same way) because the comparators were not subject to the same legal regime.[2391]

1008. Third, Mexico argues that the "specific measures under question must be compared between comparators"[2392]—in other words, the suggestion appears to be that the Tribunal must find that the "specific measures" alleged to be "discriminatory" are also "like."[2393] Yet, NAFTA

[2388] Counter-Memorial, ¶ 812.

[2389] *Apotex*, Award, ¶ 8.51, **CL-174**.

[2390] *Apotex*, Award, ¶ 8.48, **CL-174**.

[2391] *Apotex*, Award, ¶¶ 8.56-8.57, **CL-174**.

[2392] Counter-Memorial, ¶ 815 ("*Son las medidas específicas en cuestión las que deben compararse entre los comparables*").

[2393] Counter-Memorial, ¶ 815.

Article 1102 does not call for a comparison of the "specific measures" (*i.e.*, the type of decision taken by an administrative body or the authority invoked in support of that decision), but only of the circumstances in which they are applied (*i.e.*, whether the "specific measures" were applied to companies in comparable circumstances). This has been the finding of numerous NAFTA and other tribunals.[2394] Tellingly, in the *Mercer* award, the tribunal found that proper comparators were companies (1) in the same economic sector (2) that were competitors (3) subject to the comparable legal regime: "self-generating pulp mills operating not in FortisBC's area (like Celgar) but in BC Hydro's own service area, subject to Order G-38-01[a regulation concerning the sales of self-generated electricity]."[2395] Nowhere in assessing whether those companies were proper comparators did it consider whether the specific measures were similar or identical. Mexico's reading would turn NAFTA Article 1102 on its head. In effect, investors would be obliged to show that "specific measures" were "like" for the "like circumstances" prong, only then to show that such measures were "less favorable" for the "less favorable treatment" prong. Mexico may not rewrite the NAFTA to serve its own purposes.

1009. Finally, Mexico's argument that "contractual autonomy is another important factor"[2396] again does not go to "like circumstances," but to treatment. In the *Parkerings* decision (upon which Mexico relies), the tribunal found that "it is difficult to show discrimination in a public entity entering into an agreement with a certain person and refusing to conclude a similar with another party."[2397] In other words, the *Parkerings* tribunal suggested that where a State decides to

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[2394] *See, e.g., Cargill*, Award, ¶¶ 211-214, **CL-136**; *Pope & Talbot*, Award on the Merits of Phase 2, ¶¶ 77-82, **CL-210**; *Feldman*, Award, ¶ 171, **CL-96**; *Mercer*, Award, ¶ 7.23, **CL-208**; *Myers*, Partial Award, ¶¶ 250-251, **CL-30**; *ADF*, Award, ¶¶ 153, 155, **CL-18**; *Occidental v. Ecuador*, Final Award, ¶ 173, **CL-130**.

[2395] *Mercer*, Award, ¶ 7.23, **CL-208**.

[2396] Counter-Memorial, ¶ 816 ("*La autonomía contractual es otro elemento que debe considerarse en 'circunstancias similares'*").

[2397] *Parkerings*, Award, ¶ 411, **CL-162**.

enter into a contract with a private party, it is difficult to show that its decision to contract with one party and not the other constituted "more favorable" treatment.[2398] It did not suggest that "contractual autonomy" was a factor to be weighed in assessing whether comparators are in "like circumstances."[2399]

1010. On the facts, Mexico's arguments are easily disproven. Producciones Móviles, Petolof, and the Other Mexican Competitors are all in "like circumstances" with E-Games. All of the companies were in the same gaming sector, subject to the same gaming regulations, and dealing with the same administrator of that regulation, SEGOB.

1011. **Producciones Móviles and Petolof**: Producciones Moviles and Petolof are in "like circumstances" with E-Games. All three companies were in the same business or economic sector (*i.e.*, the operation of casinos in Mexico's gaming sector) and were engaged in a competitive relationship. Mexico argues that "the Claimants make reference to a future competitive relationship" with Producciones Móviles and "not to a real circumstance,"[2400] relying solely on one sentence in the Memorial, which states that "had Claimants' Casinos not been closed, E-Games and Producciones Móviles would have competed in some of the same geographic areas."[2401] Mexico seeks to take this sentence out of context, ignoring that Producciones Móviles operates 14 registered gaming facilities, including in Mexico City and Puebla (where two of Claimants' Casinos were located) as well as an online gambling site.[2402] Moreover, Mexico also ignores that Producciones Móviles and E-Games were both operators under E-Mex's permit and

[2398] *Parkerings*, Award, ¶ 411, **CL-162**.

[2399] *Parkerings*, Award, ¶ 411, **CL-162**.

[2400] Counter-Memorial, ¶ 819 ("*las Demandantes hacen referencia a una relación competitiva . . . no a una circunstancia real*").

[2401] Memorial, ¶ 734.

[2402] Memorial, ¶ 734.

both obtained their independent permits from SEGOB in November 2012.[2403] In any event, putting that reality to one side, Mexico cannot use its illegal closure of Claimants' Casinos to escape liability under NAFTA Article 1102.

1012. Mexico's main argument, however, is that Producciones Móviles and Petolof were not subject to a comparable legal regime or requirements because, it says, those two companies' permits "did not stem from" the May 27, 2009 Resolution.[2404]

1013. Mexico's position, however, is wrong on the law, as explained above. When assessing whether investments are subject to a "comparable legal regime or requirements," tribunals have looked to the general legal regime, not a *sui generis* authorization like the May 27, 2009 Resolution. In effect, Mexico's "interpretation" of the applicable legal standard would strike the word "comparable" from the phrase "comparable legal regime or requirements"[2405] and replace it with "identical."[2406]

1014. Mexico's position is also wrong on the facts. As explained above, both Producciones Móviles and Petolof were subject to the same legal regime: the Federal Gaming Law and the Gaming Regulation. What is more, Mexico's suggestion that, unlike Producciones Móviles and Petolof, the E-Games Independent Permit was dependent upon the May 27, 2009 is not only incorrect, but it ignores that the November 16, 2012 Resolution was an independent and

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[2403] Memorial, ¶ 736.

[2404] Counter-Memorial, ¶¶ 817 ("*no fue consecuencia*").

[2405] *See Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States* ("Archer Daniels"), ICSID Case No. ARB (AF)/04/5, Award (Nov. 21, 2007), ¶ 197, **CL-86**.

[2406] *See Bilcon v. Canada,* Award on Jurisdiction and Liability, ¶ 687 ("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 givinng the reasonably borad language of Article 1102 is 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.'"), **CL-159**.

autonomous permit, which governed E-Games' operations in Mexico.[2407] SEGOB itself recognized this (prior to the replacement of SEGOB officials with PRI political appointees), as did Mexico's own courts.[2408]

1015. Moreover, Producciones Móviles and Petolof also obtained their respective permits in similar circumstances as E-Games.[2409]

1016. Mexico ignores that Producciones Móviles, like E-Games, not only obtained an independent permit after operating as an independent operator, but it was also operating under the same E-Mex permit as E-Games[2410] and even expressly referenced E-Games' change of status position in its application for a permit and asked SEGOB to apply the same criteria.[2411]

1017. Mexico also ignores that Petolof, like E-Games, initially began its operations under a contractual arrangement with a third-party permit holder and was recognized by SEGOB as an independent operator under a third-party's permit on the grounds that (according to SEGOB) Petolof had "acquired rights."[2412] Mexico also argues that Petolof's permit, which SEGOB granted on May 27, 2016, arose from a court order and not SEGOB's discretionary analysis, making it distinct from E-Games' situation.[2413] As explained, under any account of the facts, Mexico cannot deny that SEGOB, on August 28, 2013, rescinded the November 16, 2012 Resolution (granting

[2407] SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), p. 6, **C-16**.

[2408] *See* SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), p. 6, **C-16**; Second Ezequiel González Matus Report, **CER-3**, ¶¶ 80, 92-93, 95; Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), **C-24**.

[2409] Memorial, ¶¶ 736-738, 750-753.

[2410] Memorial, ¶ 736.

[2411] Memorial, ¶ 737.

[2412] Memorial, ¶ 752.

[2413] Counter-Memorial, ¶ 820.

the E-Games Independent Permit) on basis of its self-imposed view that the Sixteenth District Judge held unconstitutional the doctrine of "acquired rights."

1018. Again even it were true that the Sixteenth District Judge held unconstitutional the doctrine of "acquired rights" (*quod non*), SEGOB could not use this as a hook to rescind the November 16, 2012 Resolution, because the E-Games Independent Permit was completely independent and separate from the May 27, 2009 Resolution (granting E-Games the status of an independent operator) and because E-Games was granted its permit due to its satisfaction of all legal requirements for the issuance of a permit. However, while rescinding E-Games' November 16, 2012 Resolution based on a doubly mistaken reasoning, which only evidences SEGOB's political and discriminatory motive, SEGOB still allowed Petolof to continue operating as an independent operator. This is despite the fact that SEGOB granted said status to Petolof on October 28, 2008 in recognition of the doctrine of "acquired rights"—namely, the Petolof precedent that E-Games relied upon to obtain its independent operator status under E-Mex's permit.

1019. In other words, in the eyes of SEGOB when it rescinded the November 16, 2012 Resolution on August 28, 2013, E-Games and Petolof were subject to the same legal regime (*i.e.*, the doctrine of "acquired rights," which in turn stemmed from a contractual agreement between the permit holder and a third-party operator under such permit). In this regard, Mexico's reliance on the purported circumstances under which the Petolof permit was granted later in May 2016 (*i.e.*, "in compliance with a judicial order"[2414]) is inapposite. In any event, as discussed above at Section II.R.3, Mexico has failed to produce any document (much less a court order) to substantiate its claim that it granted the Petolof permit "in compliance with a judicial order"[2415]

[2414] Counter-Memorial, ¶ 80.

[2415] Counter-Memorial, ¶ 80.

1020. **The Other Mexican Competitors**: As explained in the Memorial, the Other Competitors were in the same business or economic sector (*i.e.*, the operation of casinos in Mexico's gaming sector) and were engaged in a competitive relationship (as their properties competed with Claimants' Casinos) and subject to the same legal regime (the Federal Gaming Law and Gaming Regulation and, in particular, its provisions with regard to applying for a permit).

1021. Mexico argues that "there is no evidence that these companies were in the same circumstances as [E-Games]."[2416] By this, Mexico means that the Other Mexican Competitors are too broad as a category of comparators (*i.e.*, "if accepted, it would imply that all companies that obtained a permit since 2004, to this date, would automatically be in like circumstances").[2417]

1022. Yet, proper comparators may be a group of domestic investors or investments. NAFTA and other tribunals have identified groups of comparators that are similarly as large as (and even larger than) the Other Mexican Companies, for example: lumber exporters subject to the same restrictive legal regime as the claimant (*Pope & Talbot*);[2418] a "foreign-owned and domestic-owned firms that are in the business of reselling/exporting cigarettes" (*Feldman*);[2419] companies "providing PCB waste remediation services" (*Myers*);[2420] cane sugar producers competing in "supplying sweeteners to the soft drink and processed food markets" (*Archer Daniels*);[2421] and

[2416] Counter- Memorial, ¶ 822 ("*no hay evidencia de que esas empresas se encontraran en las mismas circunstancias que las Demandantes*").

[2417] Counter- Memorial, ¶ 822 ("*de aceptarla, implicaría que automáticamente todas las empresas que obtuvieron un permiso desde 2004, a la fecha, estarían en circunstancias similares*").

[2418] *Pope & Talbot*, Award on the Merits of Phase 2, ¶¶ 87-88, **CL-210**.

[2419] *Feldman*, Award, ¶ 171, **CL-96**.

[2420] *Myers*, Partial Award, ¶ 251, **CL-30**.

[2421] *Archer Daniels*, Award, ¶¶ 201, 204, **CL-86**.

companies engaged in exporting (*Occidental v. Ecuador*).[2422] Mexico's argument, therefore, falls flat.

2. Less Favorable Treatment: Mexico Accorded E-Games Less Favorable Treatment than It Accorded to Producciones Móviles, Petolof, and the Other Mexican Competitors

1023. In the Memorial, Claimants explained that Mexico afforded more favorable treatment to Producciones Móviles by not seeking to revoke its independent permit, even though it had operated under E-Mex's permit as an operator, obtained its independent permit in virtually identical circumstances to the sway the E-Games did, relied upon E-Games' permit application in making its own application for a permit, and thus was just as "dependent" upon any permit arising out of E-Mex's permit as E-Games was.[2423] Claimants also explained that Mexico afforded more favorable treatment to Petolof by not seeking to revoke its independent operator status, even though that status was based on the same "acquired rights" principle that SEGOB claimed, albeit falsely, was found unconstitutional by the Sixteenth District Judge in revoking the November 16, 2012 Resolution.[2424] It also afforded more favorable treatment to the Other Mexican Competitors by granting them permits while rejecting E-Games' application for a new permit in 2014.[2425]

1024. Mexico makes three uncompelling arguments in response.

1025. First, Mexico suggests that its more favorable treatment of Producciones Móviles and Petolof was not intended to discriminate, but instead was the result of (1) the actions of a private actor, E-Mex, and (2) the decisions of judiciary.[2426] That, however, is wrong factually as detailed

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[2422] *Occidental v. Ecuador*, Final Award, ¶¶ 167-179, **CL-130**.

[2423] Memorial, Section V(E)(4)(a).

[2424] Memorial, Section V(E)(4)(b).

[2425] Memorial, Section V(E)(4)(c).

[2426] Counter-Memorial, ¶ 817.

through this Reply and, in any event, irrelevant as a matter of law. As the *Corn Products* tribunal established: "the existence of an intention to discriminate is not a requirement for a breach of Article 1102."[2427]

1026. Moreover, Mexico's attempt to hide behind (1) a private actor and (2) its judiciary get it nowhere. It was SEGOB—an administrative authority—that called Claimants' permit "illegal" without any justification, took the unilateral and arbitrary decision to revoke the November 16, 2012 Resolution, shut down the Casinos illegally in defiance of an injunction and while the judicial review of SEGOB's unilateral decision to revoke the November 16, 2012 Resolution was pending, and allowed looting of the Casino assets while the Casinos were under their control. E-Mex had attempted to revoke the November 16, 2012 Resolution in *Amparo 1151/2012*, but failed to do so as the First Collegiate Tribunal deemed that act was deemed an "implicitly consented act."[2428] At most, Mexican courts ordered SEGOB only to rescind all subsequent resolutions allegedly legally dependent upon the May 27, 2009 Resolution,[2429] but should not have affected the November 16, 2012 Resolution, which Judge Gallardo determined to be "totally independent and autonomous and is not related in any way to the resolution declared unconstitutional" and thus not affected by his January 2013 *amparo* ruling.[2430] SEGOB acted arbitrarily and illegally determining otherwise. It did not treat E-Games' competitors in this fashion. SEGOB illegally closed down Claimants' Casinos in a military-raid style, and allowed the hardware of those Casinos to be taken to destroy Claimants' investments, but did not treat Petolof (or Producciones Móviles) or their investments,

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[2427] Memorial, ¶ 727; *Corn Products*, Decision on Responsibility (Redacted), ¶ 138, **CL-204**.

[2428] *See* Order of the *Primer Tribunal Colegiado en Materia Administrativa del Cuarto Circuito* (Oct. 17, 2013), **C-295**; First Omar Guerrero Report, **CER-2**, ¶ 316; Abrogated *Amparo* Law, Article 73, Section XII, **CL-75**.

[2429] *See* Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Aug. 26, 2013), **C-23**.

[2430] Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), **C-24**.

in this fashion. Instead, it has allowed them to continue to operate and retain their assets unfettered by governmental intrusion.

1027. Moreover, Mexico's refusal to produce any documents in relation to the issuance and non-revocation of Petolof's independent operator status compels a finding that Mexico's treatment of Petolof was more favorable than its treatment of E-Games.[2431]

1028. Likewise, Mexico's argument that its revocation of the November 16, 2012 Resolution—but not Producciones Móviles' permit granted in the same month as the E-Games Independent Permit and under almost identical legal arguments and factual circumstances as E-Games—was not discriminatory because the revocation of the November 16, 2012 Resolution—but not Producciones Móviles' permit—was the result of a court decision[2432] is wrong as a matter of Mexican law. Under the Mexican law principle of legal certainty, SEGOB was obliged to adopt a similar position with respect to both permits.[2433] In other words, to the extent that SEGOB truly believed that a Mexican court had found that E-Games' November 16, 2012 Resolution was contrary to Mexican law and ordered SEGOB to revoke it, then SEGOB should have revoked any other resolutions afflicted by the same alleged defect. SEGOB's decision to revoke the E-Games Independent Permit and not Producciones Móviles', or stated another way, SEGOB's decision to not revoke Producciones Móviles' independent permit, when it was obtained in exactly the same way as the E-Games Independent Permit, was also improper and discriminatory.

1029. Second, Mexico argues that the closure of E-Games' Casinos "resulted from their operation without a valid permit" unlike, it alleges, the Other Mexican Competitors.[2434] That is wrong. The

[2431] *See supra* Section II.R.3.

[2432] Counter-Memorial, ¶ 421.

[2433] Second Ezequiel González Matus Report, **CER-6**, ¶ 117.

[2434] Counter-Memorial, ¶ 821 ("*fue el resultado de operarlos sin un permiso vigente*").

decision rejecting E-Games' applications for new permits clearly stated that the permits were rejected because the Casinos were closed, not that the permits were rejected because E-Games had operated the Casinos without a valid permit.[2435] Mexico's *ex post* attempt to create a justification for its discriminatory acts in a bid to avoid liability cannot stand. Moreover, as explained in the Memorial and in Section II.M.3 above, Mexico's closure of the Casinos was unlawful, and in fact, was even prohibited by an injunction.[2436]

1030. Mexico's attempt to distinguish the circumstances of Pur Umazal Tov, a Mexican company, from those of E-Games likewise fails.[2437] SEGOB granted Pur Umazal Tov's application for a new permit despite that it did not have an open and operational facility and, moreover, despite that it sought to operate establishments that belonged to Megasport, whose permit had also been revoked by SEGOB.[2438] As Claimants have explained in Section II.P above, it is an immaterial distinction that Megasport closed its own establishments whereas SEGOB (illegally) closed Claimants' Casinos, as it is the administrative act of SEGOB issuing a *permit* that allows an establishment to open and operate.[2439]

1031. Conspicuously, Mexico does not respond to Claimants' explanation that it issued a 25-year-long permit to Mexican company Discos y Producciones Premier on November 27, 2018,

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[2435] *See* SEGOB's denial of E-Games' requests (Aug. 15, 2015), **C-27 – C-33**; First Ezequiel González Matus Report, **CER-3**, ¶¶ 190, 192-193; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶¶ 75, 80.

[2436] Fourth Julio Gutiérrez Statement, **CWS-52**, ¶¶ 68-72; Injunctive Relief (Sept. 2, 2013), **C-299**.

[2437] *See* Counter-Memorial, ¶¶ 823-824.

[2438] Memorial, ¶ 760; SEGOB Permits to Pur Umazal Tov, **C-315-C-320**; Horacio Jiménez et al., *Polemizan con Segob por permisos*, El Universal (Dec. 4, 2014), **C-322**. Retrieved from https://archivo.eluniversal.com.mx/nacion-mexico/2014/impreso/polemizan-con-segob-por-permisos-220905.html; Emmanuel Campos, *Winpot Pachuca podría reabrir sus puertas en cuestión de días*, Quadratin Hidalgo (Dec. 4, 2014), **C-323**. Retrieved from https://hidalgo.quadratin.com.mx/principal/Winpot-Pachuca-podria-reabrir-sus-puertas-en-cuestion-de-dias/#; Álvaro Delgado, *Osorio Chong favorece a casineros de Hidalgo*, Proceso (Feb. 21, 2015), **C-324**. Retrieved from https://www.proceso.com.mx/396600, **C-324**; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 77.

[2439] *See* Second Ezequiel González Matus Report, **CER-6**, ¶¶ 207-208.

days before the end of the Peña Nieto administration, despite that the company had no open casino at the time of its request for the permit.[2440] That act only further demonstrates Mexico's discrimination against E-Games.

1032. Finally, Mexico argues that its "measures are justified by its long-standing public policy concerning the gaming industry."[2441] As noted, this but an admission of liability by Mexico. What that policy is, Mexico has not explained. It is not a formally adopted public policy, and Claimants' witnesses and experts explain that in order to have a formal public policy in Mexico, it must be recorded and approved in line with certain specific requirements under Mexican law.[2442] Mexico has provided no evidence of any public policy here. *None was set out in or cited* in *any* of the decisions that Mexican authorities took to revoke the E-Games Independent Permit and refuse to grant a new permit (while doing the opposite for domestic investors). None was set out in Mexico's Counter-Memorial. Mexico may still attempt to provide such *ex post* justification for its discriminatory acts in its Rejoinder. That, however, will be far too late.

1033. Yet, even if Mexico had articulated a policy reason for its actions when it expropriated Claimants' investments, that would still not assist its case. In Mexico's own telling, it effectively concedes a direct violation of the FET obligation under NAFTA when it argues that there was a political, nontransparent policy in place not to increase the number of gaming permits despite the fact that E-Games met the requirements for one.[2443] As the *Pope & Talbot* tribunal explained, actions of the government must (1) not distinguish on its face between foreign-owned and domestic

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[2440] *See* Counter-Memorial, ¶¶ 823-825; Memorial, ¶ 761; SEGOB Permit No. DGJS/DGAAD/DCRCA/P-03/2018 (Nov. 27, 2018), **C-325**; Fourth Julio Gutiérrez Statement, **CWS-52**, ¶ 78.

[2441] Counter-Memorial, p. 233 ("*las medidas de la Demandada se justifican por su política pública de larga data sobre la industria del juego*").

[2442] Second Ezequiel González Matus Report, **CER-6**, ¶¶ 46-49; Fifth Julio Gutiérrez Statement, **CWS-62**, ¶ 105.

[2443] Counter-Memorial, ¶¶ 159-160.

companies and (2) not otherwise undermine the investment liberalizing objectives of the NAFTA.[2444] No public policy objective is relevant. Here, Mexico's actions are clearly discriminatory and act contrary to the investment liberalizing objective of the NAFTA by favoring domestic investors.

I. Mexico Violated its Obligation To Accord Most Favored Nation Treatment

1034. In the Memorial on the Merits, Claimants explained that NAFTA Article 1103 (the NAFTA's most-favored nation provision) requires Mexico to offer Claimants the more favorable protections of other treaties and that, in failing to do so, Mexico breached Article 1103.[2445]

1035. Those more favorable protections are:

1036. An unqualified and autonomous fair and equitable treatment standard: Mexico seeks to escape liability by arguing that NAFTA Article 1105 only includes an obligation to provide fair and equitable treatment in accordance with the minimum standard of treatment, which, it says, excludes liability for *inter alia* legitimate expectations that Mexico has breached as well as its illegitimate tax measures.[2446] However, even if that were true, Mexico could not avoid its responsibility for these acts under the NAFTA because NAFTA Article 1103 requires Mexico to grant Claimants the allegedly more favorable autonomous standard of fair and equitable treatment found in the Mexico-Denmark BIT, the Mexico-Austria BIT, the Mexico-Australia BIT, and the Mexico-Czech Republic BIT.[2447]

1037. A prohibition of unjustifiable, unreasonable or discriminatory measures: Similarly, Mexico's investment treaties with Switzerland, the Netherlands, Austria, Italy, and Finland

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[2444] Memorial, ¶¶ 700-704.

[2445] Memorial, ¶¶ 768-778.

[2446] Counter-Memorial, ¶¶ 547-616.

[2447] Mexico-Denmark BIT, Article 3(1), **CL-223**. *See* also Mexico-Austria BIT, Article 3(1), **CL-224**; Mexico-Australia BIT, Article 4(1), **CL-225**; Mexico-Czech Republic BIT, Article 2(3), **CL-226**.

unjustifiable, unreasonable or discriminatory measures (regardless of whether such discrimination is on the basis of nationality or any other factors, such as, actual or perceived political affiliation).[2448] Mexico discriminatorily interfered with Claimants' investments by revoking E-Games' permits and illegally closing their Casinos for illegitimate, political, and illicit reasons. This is confirmed by the evidence that the Mexican government revoked E-Games' permit as a political favor to the Hank Rhon family, a longstanding political dynasty affiliated with the PRI, an important local investor in the Mexican gaming industry and one of Claimants' fiercest competitors, and a strong supporter of President Peña Nieto's presidential campaign;[2449] that the Peña Nieto administration sought to destroy Claimants' investments because they would not pay bribes and hence could not be "controlled"; and that the President Peña Nieto administration believed that Claimants and E-Games were affiliated with the prior Calderón administration given that they had been associated with E-Mex's owner, a known and strong supporter of the PAN.[2450]

1038. Inclusion of denial of justice in the FET standard: Mexico has argued that denial of justice does not form a part of the fair and equitable treatment protection under the NAFTA.[2451] However, even if that were true (which it is not), the improper and egregious procedural conduct of Mexico's courts, which raise justified concerns as to the judicial propriety of the outcome, would breach both the minimum standard of treatment's denial of justice and fair and equitable treatment protections because the CAFTA-Mexico treaty, Mexico-Panama FTA, Pacific Alliance Additional

[2448] Mexico-Switzerland BIT, Article 4(1), **CL-227**; Netherlands-Mexico BIT, Article 3(1), **CL-229**; Austria-Mexico BIT, Article 3(2), **CL-224**; Italy-Mexico BIT, **CL-230**; Finland-Mexico BIT, Article 2(3), **CL-228**.

[2449] *See* First Black Cube Statement, **CWS-57**, ¶¶ 44-46, 48; Second Black Cube Statement, **CWS-64**, ¶ 23.

[2450] *See supra*, ¶¶ 4, 376, 506; Memorial, ¶ 360; *Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón* (Jan. 27, 2013). Retrieved from http://www.jornada.unam.mx/2013/01/27/politica/013n1pol, **C-17**; E-Games Memo, **C-261**; First Black Cube Statement, **CWS-57**, ¶ 47; Third Gordon Burr Statement, **CWS-50**, ¶ 110.

[2451] Counter-Memorial, ¶ 565.

Protocol, and CPTPP all expressly provide that the FET standard under that treaty includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings.[2452]

1039. An obligation to accord sympathetic consideration to E-Games' permit requests: The Mexico-Finland BIT requires Mexico to "give sympathetic consideration to requests for the granting of necessary permits in connection with" investments.[2453] Mexico's failure to grant E-Games new permits is a clear breach of Mexico's obligation to "give sympathetic consideration" to Claimants' investments.

1040. In its Counter-Memorial, Mexico maintains that NAFTA Article 1103 does not allow Claimants to invoke these more favorable protections. That is wrong. In support of this misguided position, Mexico offers three uncompelling arguments.

1041. First, Mexico argues that "Article 1103 cannot be used to import standards from other treaties into the NAFTA."[2454]

1042. Its justification for that position—*i.e.*, that "Article 1103 applies to real cases of 'treatment'" and thus "the fact that another treaty may hypothetically set out a different treatment is not enough to establish that Article 1103 was breached"—does not withstand scrutiny.[2455] NAFTA Article 1103 is clear and needs no gloss. It requires Mexico to provide treatment that is "no less favorable than that it accords, in like circumstances, to investors [or investments] of any other Party or of a non-Party with respect to the establishment, acquisition, expansion,

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[2452] CAFTA-Mexico, Article 11.3(2), **CL-181**; Mexico-Panama FTA, Article 10.5(2), **CL-182**; Pacific Alliance Additional Protocol, Article 10.6(2), **CL-183**; CPTPP, Article 9.6 (2), **CL-180**.

[2453] Finland-Mexico BIT, Article 2(4), **CL-228**.

[2454] Counter-Memorial, ¶ 843 ("*el artículo 1103 no puede ser utilizado para importar al TLCAN estándares de otros tratados*").

[2455] Counter-Memorial, ¶ 843 ("*El artículo 1103 aplica a casos reales de "tratamiento" otorgado a uno o más inversionistas de un tercer país, o sus inversiones, que sea más favorable que el tratamiento otorgado, en circunstancias similares, a las Demandantes o sus inversiones. Por tanto, el hecho de que otro tratado prevea hipotéticamente un tratamiento diferente no es suficiente para establecer una violación al artículo 1103*").

management, conduct, operation, and sale or other disposition of investments." Under the international law rules of treaty interpretation, a treaty must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[2456] According to the ordinary meaning of the terms of NAFTA Article 1103, if Mexico offers a more generous protection, for example, in respect to the operation of an investment of another Party or a non-Party investor, it must offer that same protection to Claimants.

1043. Similarly, the object and purpose of the NAFTA confirm that the NAFTA's objectives are to "ESTABLISH clear and mutually advantageous rules governing [the NAFTA Parties'] trade;"[2457] "promote conditions of fair competition;" and "increase substantially investment opportunities in the territories of the Parties."[2458] Such object and purpose requires reading Article 1103 to allow Claimants to invoke the protection of more favourable treaty provisions (as failure to do so would not establish "mutually advantageous rules;" "promote conditions of fair competition;" or "increase substantially investment opportunities").

1044. This has been confirmed by numerous investor-State tribunals interpreting similar provisions. For example, in the *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary* case, a tribunal confirmed that the most-favored nation clause in the France-Hungary bilateral investment treaty ("France-Hungary BIT") allowed investors to invoke protection from more protective treaties.[2459] Similar to NAFTA Article 1103, the relevant clause of the France-Hungary BIT provided that "Each Contracting Party shall apply . . . to investors of

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[2456] Vienna Convention, Article 31, **CL-41**.

[2457] NAFTA, Preamble.

[2458] NAFTA, Article 102(b) and (c).

[2459] *UP and C.D. Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction (Mar. 3, 2016), ¶ 175, **CL-318**.

the other Party, as regards their investments and activities connected to these investments, treatment accorded to its own investors or treatment accorded to investors of the most favored nation, if such treatment is more advantageous."[2460] The *UP* tribunal, in particular, looked to the fact that the France-Hungary BIT was one of Hungary's earlier investment treaties—just as the NAFTA was one of Mexico's earlier investment treaties—and thus the most-favored nation clause would have a "prospective dimension, ensuring non-discriminatory treatment by reference to treatment that will be afforded in the future."[2461] Likewise, as Claimants explained in the Memorial, in *Pope & Talbot*, a NAFTA tribunal found that Article 1103 could lead to import into the NAFTA of more favorable substantive protection offered in bilateral investment treaties to which Canada is a party.[2462]

1045. Mexico fails to rebut the application of international law rules of treaty interpretation and the sources that confirm that such application gives Claimants the benefit of the more favorable provisions of other treaties. It cites just one authority for its uncompelling argument to the contrary: Canada's Rejoinder on the Merits in *Mesa Power Group, LLC v. Government of Canada*.[2463] However, the self-serving submissions of one NAFTA Party cannot offer <u>any</u> persuasive authority under the international law rules of treaty interpretation, particularly where arbitral jurisprudence has held otherwise.

1046. <u>Second</u>, Mexico wrongly argues that NAFTA Article 1103 is irrelevant to the fair and equitable treatment standard applicable under the NAFTA.[2464] Yet, it ignores that under the

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[2460] France-Hungary BIT, Article 4(1), **CL-319**.

[2461] *UP and C.D. Holding Internationale v. Hungary*, Decision on Preliminary Issues of Jurisdiction, ¶ 173, **CL-318**.

[2462] *Pope & Talbot*, Award on the Merits of Phase 2, ¶ 117, **CL-210**.

[2463] Counter-Memorial, ¶ 844.

[2464] Counter-Memorial, ¶¶ 847-858.

NAFTA, the 2001 *Pope & Talbot* tribunal used Article 1103 to determine that Article 1105 does not compel application of a restrictive minimum standard of treatment standard in line with the *Neer* case from 1926, as explained in the Memorial,[2465] because that minimum standard had evolved. Similarly, Mexico's reliance on the 2003 *ADF v. the United States of America* and the 2009 *Chemtura v. Canada* cases is misguided.

1047. While Mexico has nothing to say about *Pope & Talbot*, it seeks to distinguish *ADF* and *Chemtura* on grounds that "[b]oth tribunals clearly found that Article 1103 has no impact on the functioning of NAFTA's Article 1105(1)."[2466] Yet, that misses the point. The *Chemtura* tribunal acknowledged the evolving nature of the minimum standard of treatment "as a result *inter alia* of the conclusion of numerous BITs providing for fair and equitable treatment"[2467] and the *ADF* tribunal found that there was no proof that the fair and equitable treatment standard in treaties differed from the minimum standard of treatment.[2468] As a result, these tribunals declined to apply NAFTA Article 1103. Thus, both awards found that Article 1103 *could be* used to offer better treatment than that otherwise provided under Article 1105, but that because the "[i]nvestor ha[d] not been able persuasively to document the existence of such autonomous standards,"[2469] it could not apply (as there was no more favorable treatment to be had).

1048. Mexico also argues that the Free Trade Commission's July 31, 2001 interpretation bars application of any standard but "the minimum standard of treatment to be afforded to investments

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[2465] Memorial, ¶¶ 772-774.

[2466] Counter-Memorial, ¶ 851 ("*Los dos tribunales claramente determinaron que el artículo 1103 no tiene ningún impacto en el funcionamiento del artículo 1105(1) del TLCAN*.").

[2467] *Chemtura*, Award, ¶ 236, **CL-21**.

[2468] *ADF*, Award, ¶ 236, **CL-18**.

[2469] *ADF*, Award, ¶ 194, **CL-18**.

of investors of another Party."[2470] Yet, that document does not purport to impose any such bar. Rather, it is only consistent with Claimants' position that the minimum standard of treatment has evolved and is indistinguishable from any autonomous treaty standard. This also follows from (1) the decision in *Pope & Talbot*, which preceded the Free Trade Commission's July 31, 2001 interpretation, and therefore, through Article 1103, applied a more favorable standard of treatment; (2) the decision in *ADF*, which found that no autonomous standards had been shown to exist;[2471] and (3) the *Chemtura* decision, which refers to the "evolution of international customary law" as a result of bilateral investment treaties.[2472]

1049. Mexico additionally relies, once again, on the self-serving positions of "NAFTA Parties," this time from submissions under Article 1128 in the *Chemtura* case.[2473] Yet, under international law, those self-serving submissions cannot provide any binding interpretation of the NAFTA's provisions, particularly where arbitral jurisprudence has held otherwise.

1050. Finally, Mexico "observe[s]" that "Claimants did not file a claim for an Article 1103 violation."[2474] That argument is incorrect. Claimants' Notice of Intent of May 23, 2014 clearly states that "Mexico's actions violate multiple provisions of the NAFTA, including . . . Article 1103: Most-Favored-Nation Treatment"[2475] and their Request for Arbitration, as well as Claimants' Memorial clearly state that Mexico failed to accord Claimants' Most Favored Nation Treatment under Article 1103.[2476] It did so by failing to provide Claimants the more favorable

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[2470] Counter-Memorial, ¶ 847.

[2471] *ADF*, Award, ¶ 236, **CL-18**.

[2472] *Chemtura*, Award, ¶ 236, **CL-21**.

[2473] Counter-Memorial, ¶ 849.

[2474] Counter-Memorial, ¶ 858 ("*las Demandantes no presentan una reclamación por violación del artículo 1103*").

[2475] Notice of Intent, ¶ 16.

[2476] Request for Arbitration, ¶ 100; Memorial, Section V.F.

treatment mandated under other treaty provisions. If Mexico were right (which it is not), it would mean that the Tribunal would lack jurisdiction over Claimants' Article 1103 claim. That argument, of course, is barred for the reasons stated above. Tellingly, however, Mexico raises this argument only in its Counter-Memorial for the first time and did not raise such an argument in the jurisdictional phase—as it no doubt knows that this argument must fail.

V. CLAIMANTS HAVE PROVEN THE DAMAGES CAUSED BY MEXICO'S BREACHES OF THE NAFTA

1051. Claimants' damages claim is straightforward. As Claimants explained in their Memorial, customary international law requires "full reparation" to "wipe out" all the consequences of Mexico's unlawful acts and restore Claimants to the financial position where it would have been today in the absence of Mexico's unlawful acts.[2477] Here, if Mexico had acted in accordance with its obligations under NAFTA Chapter 11, Claimants would be operating the Casinos and Expansion Projects successfully and profitably today. The evidence in this case overwhelmingly proves this to be true.

1052. In these circumstances, as Claimants further explained in their Memorial, the most appropriate form of "full reparation" is to award Claimants the fair market value ("**FMV**") of the expropriated Casinos and Expansion Projects, measured by the discounted cash flow ("**DCF**") method prior to the unlawful expropriation of Claimants' investments (*i.e.*, April 23, 2014, the day before the illegal closure of the Casinos, the "**Date of Valuation**").

1053. Mexico's Counter-Memorial presents no evidence of any consequence to counter the Claimants' damages claim. Instead, Mexico demonstrates a fundamental misunderstanding of Claimants' arguments as well as of the applicable legal framework, and it relies on misinformation,

[2477] *Case Concerning the Factory at Chorzów (Germany/Poland) (Merits)*, PCIJ Series A. No. 17, Judgment (Sept. 13, 1928), **CL-231**.

conjectures, and false projections to grossly undervalue Claimants' investments in Mexico. Likewise, Mexico's valuation expert, Rión M&A ("**Rión**"), presents unsupportable theories and conclusions about the value of Claimants' Casinos and Expansion Projects, all divorced from the reality of the proven loss of profits that Claimants suffered as a consequence of Mexico's breaches of the NAFTA.

1054. In particular, Rión agrees with Claimants' expert's ("**BRG**") use of the DCF methodology to calculate the FMV of the five Casinos from April 23, 2014. Rión, however, makes certain adjustments to BRG's projections based on disagreements with certain assumptions and inputs. As explained further below, Rión's proposed adjustments are erroneous and contrary to expert economic analysis, and therefore the Tribunal should reject them and Rión's alternative valuation.

1055. With respect to the Expansion Projects, Mexico claims that it owes no compensation at all for Claimants' losses caused by Mexico's proven breaches of the NAFTA, which undoubtedly thwarted the Expansion Projects. In doing so, Mexico recycles an argument it made unsuccessfully before in its purported objection to the Tribunal's jurisdiction, that Claimants made no investments in the Expansion Projects. That argument is as falacious today as it was in the jurisdictional stage. Then, Mexico says that none of the Expansion Projects "were in advanced stages of development," repeating its misinformation campaign that has been completely disproven by Claimants in Section III.A.4 above.[2478] To avoid compensating Claimants for their lost profits from the Expansion Projects, Mexico also incorrectly argues that there are "serious doubts about the possibility of those projects coming to fruition and about the profitability that the Claimants impute to them."[2479] Yet, as further explained in Section V.B.3 below, Claimants have proved with ample evidence that, but

[2478] Counter-Memorial, ¶ 968.

[2479] Counter-Memorial, ¶ 967.

for Mexico's unlawful measures, they would have fulfilled their expansion projects in Cabo, Cancun, and online gaming, and would have developed them into profitable operations. As such, Claimants have established a sufficient causal link between Mexico's unlawful measures and the lost profits that they claim with respect to the Expansion Projects.

1056. Mexico further contends that lost profits from the Expansion Projects are too speculative to be awarded. In this regard, Mexico's contention also fails because Claimants and their valuation expert have provided the Tribunal with a more than sufficient basis upon which to fairly and appropriate arrive at a compensation that would make Claimants whole for the loss of profits that Claimants reasonably expected to earn from the Expansion Projects. Further, along with this Reply, Claimants' gaming industry expert, Michael Soll ("**Mr. Soll**"), submits an independent expert report concluding that certain inputs provided by BRG for its DCF valuation of the Expansion Projects were reasonable and appropriate.[2480]

1057. Building on spurious contentions advanced by Mexico's legal counsel, Rión is also reduced to making a strained argument that Mexico need only compensate Claimants for the liquidation value of the Expansion Projects—a woefully inadequate remedy that bears no resemblance to the FMV of the Expansion Projects that Mexico thwarted by means of its unlawful acts—thereby disregarding the highly probative evidence on which BRG's calculations are based. As fully explained below, expert economic analysis, as well as well-established arbitral jurisprudence, requires Mexico to pay FMV as real market participants would do (*i.e.*, by looking to the income-generating potential of the Expansion Projects). Therefore, Claimants appropriately valued the Expansion Projects using the correct valuation approach and model.

[2480] First Expert Report of Michael Soll ("First Michael Soll Report"), **CER-8**.

1058. The remainder of this section is structured as follows: (i) **Section A** responds to Mexico's erroneous contention that Claimants have failed to quantify the damages caused by its breaches of the NAFTA other than expropriation; (ii) **Section B** sets out the law applicable to Claimants' damages claim, including the causation standard, and rebuts Mexico's meritless assertions that (a) the casual link is lacking between Mexico's proven breaches of the NAFTA and the claimed lost profits from the Expansion Projects; and that (b) Claimants' overall damages should be reduced due to alleged contributory fault; (iii) **Section C** describes the calculation of Claimants' damages and well-established valuation methodologies that Claimants' expert, BRG, applied to calculate those damages, and further demonstrates that BRG's valuations of the Casinos and Expansion Projects are supported by substantial evidence that comfortably meets the standard of proof under international law; (iv) **Section D** makes brief comments on interest; and (v) **Section E** concludes with the summary of Claimants' damages arising out of Mexico's breaches of the NAFTA.

A. CUSTOMARY INTERNATIONAL LAW APPLIES AND REQUIRES FULL REPARATION FOR CLAIMANTS' LOSSES

1059. In its Counter-Memorial, Mexico distorts Claimants' arguments when it states that "the Claimants' experts only quantify damages caused by the alleged expropriation. They do not quantify the damages caused by other alleged NAFTA violations."[2481] This results from a highly selective reading of Claimants' submissions, because Claimants clearly explained that the full compensation standard applies to all of their claims, with an entire subsection of their Memorial devoted to this discussion and a specific request in the Request for Relief for full compensation for Mexico's various breaches of the NAFTA.[2482] Likewise, BRG also explicitly noted in its report

[2481] Counter-Memorial, ¶ 882.

[2482] Memorial, Section IV.B.2 ("The NAFTA Provides a Compensation Standard for Lawful Expropriations Only, and No Standard for Unlawful Expropriations or Breaches of FET or FPS; Thus the Customary International Law Standard Applies"); ¶ 865(ii) ("ORDER Mexico to compensate Claimants for their losses resulting from Mexico's

submitted along with the Memorial (the "**First BRG Report**") that their assessment of the FMV of the Casinos and Expansion Projects are equally applicable to each and any breach by Mexico to be found by the Tribunal, "[b]ecause neither the measure of damages nor the methodology to calculate them differs depending on the legal protection breached."[2483] To prevent the very type of confusion that Mexico attempts to sow here, BRG also clarified that they "use the shorthand of 'Expropriation' throughout this report for the sake of simplicity. This choice, however, should not be read to exclude Claimants' entitlement to damages for Respondent's alleged breaches of any provision of the NAFTA."[2484]

1060. Claimants' position on this issue, of course, is well supported by the facts of the case as well as the law. As proven above, Mexico unlawfully expropriated Claimants' investments in Mexico by unlawfully shuttering their Casino operations entirely on April 24, 2014 (*supra* Section IV.A). In doing so, Mexico also denied justice to Claimants (*supra* Section IV.G); failed to accord fair and equitable treatment and full protection and security to Claimants' investments (*supra* Sections IV.G); and treated Claimants and their investments less favorably than similarly-situated Mexican gaming companies (*supra* Section IV.E-IV.F). Any of these proven breaches entitle Claimants to receive full reparation, as assessed by BRG, because each of these breaches, when viewed in isolation, was sufficient to cause the complete loss of Claimants' investments as of April 24, 2014, and they in fact destroyed the entirety of Claimants' flourishing Casino venture in Mexico. As Ripinsky and Williams explain, "the exact type of a violated obligation has proven to be largely irrelevant to the matter of compensation . . . because the object of compensation is to

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breaches of the NAFTA and international law for an amount of at least USD $ 415.8 million as of April 21, 2020 (inclusive of pre-Award interest)").

[2483] First Berkeley Research Group Report, **CER-4**, ¶ 2 fn. 2.

[2484] First Berkeley Research Group Report, **CER-4**, ¶ 2 fn. 2.

make good on the damage suffered as a result of [a] particular State measure, regardless of what rule this measure has violated."[2485]

1061. Thus, Mexico's argument that BRG has only quantified the damages caused by Mexico's illegal expropriation of Claimants' investments—but not those "caused by other alleged NAFTA violations"[2486] not only is inaccurate, but also defies the reality that the existence and extent of damages Claimants incurred as a result of Mexico's unlawful expropriation and breaches of other provisions of the NAFTA is one and the same.

1062. Starting from its mistaken premise, Mexico further argues that "Article 1100(2) of the NAFTA prescribes the standard of compensation applicable in the event of expropriation."[2487] This argument is, as explained in Claimants' Memorial, conflates a requirement for an expropriation to be lawful (*i.e.*, the payment of compensation), with the standard of compensation. NAFTA's Article 1100(2) does not provide a standard of compensation for a breach, but rather articulates what renders an expropriation lawful, and, therefore, not a Treaty breach. In other words, "the duty to pay compensation as a modality of reparation differs from the treaty obligation to provide compensation for a taking since it stems from the secondary norms of international law of state responsibility."[2488]

1063. Notably, while completely ignoring the full reparation standard established in *Chorzów Factory*,[2489] Mexico does not even bother to cite a single NAFTA award that states the applicability

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[2485] S. Ripinsky & K. Williams, *Damages in International Investment Law*, p. 14 (2008), **CL-109**.

[2486] Counter-Memorial, ¶ 882.

[2487] Counter-Memorial, ¶ 906.

[2488] David Khachvani, Compensation for Unlawful Expropriation: Targeting the Illegality, 32(2) ICSID REV. 385, 388 (2017), **CL-324**.

[2489] *Case Concerning the Factory at Chorzów (Germany/Poland) (Merits)*, PCIJ Series A. No. 17, Judgment (Sept. 13, 1928), **CL-231**.

of Article 1110(2) in cases of unlawful expropriation. This glaring omission is not without a reason, because numerous arbitral tribunals have confirmed that the payment of compensation, which operates as a criteria for determining the legality of an expropriation, does not provide a standard of compensation for unlawful expropriations.[2490] As Claimants fully explained in their Memorial, in the absence of such an express provision, the compensation must be assessed with reference to applicable principles of customary international law—that is, the *Chorzów Factory* standard.[2491]

1064. The *Chorzów Factory* standard applies with equal force and effect to violations of other provisions of Chapter 11 of NAFTA, including NAFTA Articles 1105 (minimum standard of treatment), 1102 (national treatment), and 1103 (most-favored-nation treatment). Just as in the case of unlawful expropriation, the NAFTA does not provide a compensation standard for such violations, and thus the Tribunal must look at principles of customary international law.[2492] Mexico does not argue otherwise, and in fact concedes 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."[2493]

1065. But Mexico doubles down on its spurious contention by claiming that because Claimants assessed the FMV of their Casinos and Expansion Projects and because NAFTA Article 1102(2)

[2490] *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Reconsideration and Award (Feb. 7, 2017), ¶ 160, **CL-234**; *ADC Affiliate Ltd. et. al. v. Hungary*, ICSID Case No. ARB/03/16, Award (Oct. 2, 2006), ¶¶ 481, 483, **CL-117**; *Amoco Int'l Finance Corp. v. Iran*, Iran-US Claims Tribunal, Partial Award (Jul. 14, 1987), 15 IRAN-U.S. C.T.R., ¶¶ 189, 191-93, **CL-107**; *Nykomb Synergetics Technology Holding AB v. Republic of Latvia*, Stockholm Chamber of Commerce, Arbitral Award (Dec. 16, 2003), ¶ 5.1, **CL-235**; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (Apr. 4, 2016), ¶ 846, **CL-95**; *see also* Memorial, ¶¶ 802-803.

[2491] Memorial, ¶¶ 803-804.

[2492] *See MTD Equity Sdn. Bhd. & Anor. v. Chile*, ICSID Case No. ARB/01/7, Award (May 25, 2004), ¶ 238 (applying the "the classic standard enounced by the Permanent Court of Justice in the Factory at Chorzów" when the BIT did not provide for a standard of compensation for violations of the fair and equitable treatment requirement), **CL-149**.

[2493] Counter-Memorial, ¶ 912.

provides that "[c]ompensation shall be equivalent to the fair market value of the expropriated investment," this "implies that their claim for damages is circumscribed to the damages arising from the alleged expropriation."[2494] This is yet another absurd argument. As Claimants fully explained in their Memorial, and as Mexico does not contest, the full reparation standard under customary law prescribes the FMV standard for quantum (again, for all treaty breaches). That NAFTA Article 1110(2) also happens to require the compensation equivalent to the FMV of expropriated investment does not and cannot mean that Claimants did not rely on the *Chorzów Factory* standard in quantifying their damages.

1066. Lastly, Mexico contends that Claimants sought no damages associated with certain impugned measures, such as "the refusal to issue new permits to E-Games" and "the alleged interference with the Claimants' efforts to mitigate their losses."[2495] Thus, argues Mexico, the Tribunal should dismiss such claims.[2496] This is nonsensical. Contrary to Mexico's arguments, NAFTA Articles 1116 and 1117 do not require Claimants to prove—much less quantify—their "loss or damage by reason of[] or arising out of" Mexico's breaches of the NAFTA.[2497] Rather, the operative word of Articles 1116 and 1117 is "claim,"[2498] and the Tribunal has already conclusively determined that each of the Claimants in this case have standing under Article 1116 and/or 1117. In any event, Mexico unlawfully and arbitrarily refused to grant new permits to E-Games, further frustrated every attempt by Claimants to reopen the Casinos and/or sell the Casino assets, and thereby blocked off all remaining avenue for Claimants to recuperate their investments

[2494] Counter-Memorial, ¶ 911.

[2495] Counter-Memorial, ¶ 913.

[2496] Counter-Memorial, ¶ 913.

[2497] NAFTA Articles 1116 and 1117, **CL-78**.

[2498] NAFTA Articles 1116 and 1117, **CL-78**.

or mitigate their damages in any meaningful way. As such, Mexico's actions have contributed in making Claimants' loss irrevocable, total, and permanent, and the NAFTA does not require Claimants to quantify specific loss for each measure alleged, especially like here where Mexico has caused the total destruction of Claimants' investments.

B. CLAIMANTS HAVE MET THE BURDEN AND STANDARD OF PROOF, AND ESTABLISHED THAT MEXICO CAUSED THE DAMAGES THEY SUFFERED

1. The Burden of Proof for Damages

1067. Claimants accept that they bear the burden of proving the damages that they have suffered as a result of Mexico's wrongful conduct. By the same token, Mexico bears the burden of proving all facts underlying its defense to Claimants' claim for compensation.[2499]

1068. Indeed, as the tribunal in *Asian Agricultural Products v. Sri Lanka*—the case on which Mexico relies[2500]—explains, under international law, the claimant bears the initial burden of making a *prima facie* showing of its damages, and if the claimant succeeds in establishing its *prima facie* entitlement to damages, the evidentiary burden shifts to the respondent:

> In exercising the "free evaluation of evidence" provided for under the previous Rule, the international tribunals "decided the case on the strength of the evidence produced by both parties", and in case a party "adduces some evidence which prima facie supports his allegation, the burden of proof shifts to his opponent."[2501]

1069. The NAFTA tribunal in *Apotex v. United States* agreed, stating that the burden of proof shifts from one party to the other:

[2499] *Técnicas Medioambientales Tecmed SA v. United Mexican States*, ICSID Case No ARB(AF)/00/2, Award (May 29, 2003), ¶ 190, **CL-84**; S. Ripinsky and K. Williams, *Damages in International Investment Law*, p. 7 (2008), **CL-109**.

[2500] Counter-Memorial, ¶ 929.

[2501] *See also Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka*, ICSID Case No ARB/87/3, Final Award (June 27, 1990), ¶ 56, **CL-251**; *William A. Parker (U.S.A.) v. United Mexican States*, Mexico/USA General Claims Commission, UN Reports, Vol. IV (Mar. 31, 1926), ¶ 6, **CL-325**.

> The Tribunal considers such a distinction exists between the legal burden of proof (which never shifts) and the evidential burden of proof (which can shift from one party to another, depending upon the state of the evidence).[2502]

1070. While Claimants have provided ample proof of their damages, both in their Memorial and in this submission, Mexico has simply ignored that it has this burden. Further, Mexico raises a meritless assertion that Claimants' damage claim should be reduced due to alleged contributory fault. In doing so, Mexico has again utterly failed to meet its burden of proving its defenses to Claimants' damages.

2. The Standard of Proof for Damages

1071. Mexico accepts that "damages do not need to be quantified with absolute precision."[2503] As tribunals have emphasized, "the fact that damages cannot be fixed with certainty is no reason not to award damages when a loss has been incurred. In such cases, approximations are inevitable; the settling of damages is not an exact science."[2504]

1072. In this regard, the applicable standard of proof is a "balance of probabilities,"[2505] as the tribunal in *Karddassopulous v. Georgia* explained:

> The Tribunal finds that the principle articulated by the vast majority of arbitral tribunals in respect of the burden of proof in international arbitration proceedings applies in these concurrent proceedings and does not impose on the Parties any burden of proof beyond a balance of probabilities. With respect to proof of damages in particular, the Tribunal

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[2502] *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award (Aug. 25, 2014), ¶ 8.8, **CL-174**.

[2503] Counter-Memorial, ¶ 929.

[2504] Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic, ICSID Case No ARB/97/3, Award (Aug. 20, 2007), ¶ 8.3.16, **CL-92**; see also Gold Reserve Inc v. Bolivarian Republic of Venezuela, ICSID Case No ARB(AF)/09/1, Award (Sept. 22, 2014), ¶¶ 685-686, **CL-137**; Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No ARB(AF)/11/2, Award (Apr. 4, 2016), ¶¶ 865-876, **CL-95**; South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia, PCA Case No 2013-15, Award (Nov. 22, 2018), ¶¶ 824-825, **CL-326**; BG Group Plc. v. The Republic of Argentina, UNCITRAL, Final Award (Apr. 24, 2007), ¶ 428, **RL-082**.

[2505] *See, e.g., Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia,* ICSID Case Nos ARB/05/18 and ARB/07/15, Award (Mar. 3 2010), ¶ 229, **CL-69**; *Impregilo SpA v. Argentine Republic*, ICSID Case No ARB/07/17, Award (June 21, 2011), ¶ 371, **CL-302**; *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic*, ICSID Case No ARB/97/3, Award (Aug. 20, 2007), ¶ 8.3.10, **CL-92**.

> finds the following passage quoted by the Claimants in their written submissions from the award in *Sapphire International Petroleums Ltd. v. National Iranian Oil Co.* to be apposite: "It is not necessary to prove the exact damage suffered in order to award damages. On the contrary, when such proof is impossible, particularly as a result of the behaviour of the author of the damage, it is enough for the judge to be able to admit with sufficient probability the existence and extent of the damage.[2506]

1073. The tribunal in *Gold Reserve v. Venezuela* explicitly rejected the claim that any other standard of proof governs the assessment of damages in investor-State arbitrations:

> The Tribunal agrees with the Parties that Claimant bears the burden of proving its claimed damages. The Tribunal finds no support for the conclusion that the standard of proof for damages should be higher than for proving merits, and therefore is satisfied that the appropriate standard of proof is the balance of probabilities.[2507]

1074. Hence, in the damages context, the "balance of probabilities" standard has been defined to mean that the evidence of damages "is enough for the judge to be able to admit with *sufficient probability* the existence and extent of the damage."[2508]

1075. Mexico argues in its Counter-Memorial that Claimants' inclusion in their damages a claim to future profits for the Expansion Projects is a "speculative exercise," failing to meet the standard of proof, because the Expansion Projects were not "going concerns with a proven track record of profitable operations."[2509] Mexico's position that such Projects cannot give rise to damages for lost profits is wrong, as further discussed below at Section V.C. And as a matter of evidentiary standard, as the tribunal in *Vivendi v. Argentina* explained, the only requirement is that "future

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[2506] *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos ARB/05/18 and ARB/07/15, Award (Mar. 3, 2010), ¶ 229 (emphasis added), **CL-69**.

[2507] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (Sept. 22, 2014), ¶ 685, **CL-137**.

[2508] *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos ARB/05/18 and ARB/07/15, Award (Mar. 3, 2010), ¶ 229 (emphasis added), **CL-69**.

[2509] Counter-Memorial, ¶ 930.

profitability can be established (the fact of profitability as opposed to the amount) with some level of certainty."[2510]

1076. Likewise, the *Gemplus* tribunal explained:

> [T]he Tribunal rejects any argument that because the quantification of loss or damage in the form of lost future profits is uncertain or difficult, that the Claimants should be treated in this case as having failed to prove an essential element of their claims in respect of lost future profits, with the result that their claims for compensation should be dismissed. The Tribunal considers that this approach is not required by the terms of either BIT or international law; and that it would also produce a harsh and unfair result in this case. The Tribunal emphasises that it is here addressing contingent future events and not actual past events; it is seeking to determine not what did or did not happen as past facts but what could have happened in the future. This exercise necessarily involves the Tribunal in assessing whether such future events would have occurred and in quantifying that assessment in money terms, as compensation. It is not always possible for a claimant to prove that a future event could or could not happen with certainty; and a tribunal can only evaluate the chances of such a future event happening. That is not therefore an exercise in certainty, as such; but it is, in the circumstances, an exercise in "sufficient certainty" . . . .[2511]

1077. The tribunal in *Gemplus* further explained that a respondent state should not be permitted to rely on evidentiary hurdles created by its own breaches to argue that the quantum of damage is speculative, by stating:

> when a respondent has committed a legal wrong causing loss to a claimant (as found by a tribunal), the respondent is not entitled to invoke the burden of proof as to the amount of compensation for such loss to the extent that it would compound the respondent's wrongs and unfairly defeat the claimant's claim for compensation.[2512]

1078. Likewise, the tribunal in *Gavazzi v. Romania* stated:

> The existence of . . . a difficulty [in quantifying damages], even in an extreme form, provides no justification in refusing any compensation to an innocent party, leaving the wrongful party with the fruits of its wrongdoing. Tribunals have traditionally resolved

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[2510] Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic, ICSID Case No ARB/97/3, Award (Aug. 20, 2007), ¶ 8.3.3, **CL-92** (emphasis added); see also Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No ARB(AF)/11/2, Award (Apr. 4, 2016), ¶ 868, **CL-95**.

[2511] *Gemplus SA and others v. United Mexican States*, ICSID Case Nos ARB(AF)/04/3, Award (June 16, 2010), ¶13-91, **CL-232**.

[2512] *Gemplus SA and others v. United Mexican States*, ICSID Case Nos ARB(AF)/04/3, Award (June 16, 2010), ¶13-92, **CL-232**.

> such difficulties applying a rule of reason, rather than a rule requiring absolute certainty in calculating compensation.[2513]

1079. This principle is particularly relevant here for two reasons. To start, it was Mexico's own unlawful conduct, including its unlawful cancellation of the E-Games Independent Permit and closures of the Casinos, that irrevocably hindered the further progress of the Expansion Projects. Therefore, once the fact of damages has been established, as it will be demonstrated below, any ambiguity as to the amount should be resolved against the wrongdoer, *i.e.*, Mexico. This is because Mexico should not be allowed to profit from its wrongdoing by creating uncertainty through a series of wrongful acts. As explained by the tribunal in *Gavazzi v. Romania*, "[t]he alternative of simply dismissing the claim for want of sufficient proof is not regarded as a fair or appropriate result."[2514]

1080. Moreover, in the present case, any purported lack of evidence is "directly attributable" to Mexico's own wrongful conduct for another important reason.[2515] As discussed in Section III.A.4, the corporate records and other documents for the Mexican Enterprises, including those that would have further substantiated the efforts and expenditures to which Claimants had committed to the development of the Expansion Projects, were destroyed in the May 2017 fire at the Naucalpan Casino. At the time, Claimants' Casinos were under the control and custody of Mexico, as had they been since April 24, 2014 when SEGOB arrived at Claimants' Casinos with police to force Claimants and their representatives out of their Casinos, immediately and without the company documents or other materials.

[2513] *Marco Gavazzi and Stegano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Excerpts of the Award (Apr. 18, 2017), ¶ 121, **CL-327**.

[2514] *Marco Gavazzi and Stegano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Excerpts of the Award (Apr. 18, 2017), ¶ 124, **CL-327**.

[2515] *Gemplus SA and others v. United Mexican States*, ICSID Case Nos ARB(AF)/04/3, Award (June 16, 2010), ¶ 13-99, **CL-232**.

1081. Afterwards, Mexico repeatedly denied Claimants access to the Casinos. Even after the May 2017 fire at the Naucalpan Casino, Mexico first gave landlords access to the Casinos, instead of Claimants, thereby further contributing to the loss or destruction of any remaining documents.

1082. Similarly, because of the illegal closures of the Casinos, which deprived Claimants of all sources of income, Claimants could not afford to maintain their company email servers. As Ms. Burr and Mr. Moreno explain, these email servers used to store all of their corporate emails, including those exchanged with partners in the Expansion Projects.[2516] In this regard, the Iran-U.S. Claims tribunal, in *Vivian Mai Tavakoli v. Iran*, reaffirmed that in assessing damages the tribunal would "take some account of the disadvantages suffered by the claimant, namely its lack of access to the detailed documentation, as an inevitable consequence of the circumstances in which the expropriation took place."[2517]

1083. In any event, as demonstrated further below in Section V>C, the evidence before the Tribunal establishes with sufficient probability the existence and extent of Claimants' lost profits from the Expansion Projects, which Mexico must compensate in order to wipe out all the consequences of its illegal acts.

3. Claimants Have Proven that Mexico's NAFTA Breaches Were the Factual and Proximate Cause of Claimants' Losses

1084. Mexico does not deny that its breaches of the NAFTA were the factual and proximate cause of Claimants' losses with respect to the five existing Casinos—the Naucalpan, Villahermosa, Cuernavaca, Mexico City, and Puebla Casinos. With regard to the Expansion Projects, *i.e.*, the

[2516] Fourth Erin Burr Statement, **CWS-60**, ¶ 84; Third José Ramón Moreno Statement, **CWS-63**, ¶ 21.

[2517] *See Vivian Mai Tavakoli v. Iran*, Case No. 832, Award No. 580-832-3 (Apr. 23, 1997), 33 IRAN-U.S. C.T.R. 206, ¶ 145, **CL-329**.

Cabo, Cancun, and Online Gaming Projects, however, Mexico asserts that its unlawful conduct was neither the factual nor legal cause of Claimants' losses.

1085. As an initial matter, Mexico asserts that, in order to establish but-for causation, Claimants must show "in all probability" that they would have not suffered the claimed losses but for Mexico's breaches of the NAFTA. Mexico does not further clarify the standard of proof for which it contends. But the single authority that Mexico cites for its "in all probability" assertion,[2518] a scholarly writing by Ripinsky & Williams, does not articulate a higher standard of proof than the general standard applied in international law, namely the "balance of probabilities" standard, as discussed above.[2519] Indeed, even Ripinsky & Williams note that the balance of probabilities standard is "the prevalent standard in international arbitration" for proving causation[2520] and that this standard is met "if the tribunals considers, on the basis of the evidence produced, that the fact is more probable than not."[2521] Therefore, contrary to Mexico's vague assertion, causation here, like any other fact, only needs to be established on a balance of probabilities.

1086. Factual causation requires the wrongful conduct to have "played *some* part in bringing about the harm or inquiry."[2522] The threshold *factual* question is, therefore, whether, but for the

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[2518] Counter-Memorial, ¶ 919.

[2519] *See, e.g.*, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award (Nov. 30, 2017), ¶ 675 ("[A] corollary that follows from the full reparation standard is that the amount of damages need not be proven with absolute certainty for the losses to be compensable. Under *Chorzów* and as confirmed recently by *Vivendi II*, the test is the balance of probabilities."), **CL-328**; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (Sept. 22, 2014), ¶ 685 ("The Tribunal finds no support for the conclusion that the standard of proof for damages should be higher than for proving merits, and therefore is satisfied that the appropriate standard of proof is the balance of probabilities. . . . In the Tribunal's view, all of the authorities cited by the Parties . . . accord with the principle that the balance of probabilities applies, even if some tribunals phrase the standard slightly differently."), **CL-137**; *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award (Mar. 3, 2010), ¶ 229 ("The Tribunal finds that the principle articulated by the vast majority of arbitral tribunals in respect of the burden of proof in international arbitration proceedings applies in these concurrent proceedings and does not impose on the Parties any burden of proof beyond a balance of probabilities."), **CL-69**.

[2520] Ripinsky & Williams, *Damages in International Investment Law*, BIICL (2008), p. 163, **RL-080**.

[2521] Ripinsky & Williams, *Damages in International Investment Law*, BIICL (2008), p. 163, **RL-080**.

[2522] Ripinsky & Williams, *Damages in International Investment Law*, BIICL (2008), p. 135, **RL-080**.

State's wrongful acts, a claimant would have not sustained the injury alleged. With respect to legal causation, international law requires that the injury falls within the scope of injury that can, as a matter of law, result from the wrongful act, namely, injury that is foreseeable, not too remote, and is the natural consequence of the wrongful act—referred to as "proximate" causation.[2523]

1087. While Mexico does not dispute this elementary principle of causation,[2524] it hastily asserts that the causation is lacking between the impugned measures and the losses that Claimants suffered with respect to the Expansion Projects. But as apparent from its discussion in Section IV.F.2 of the Counter-Memorial, Mexico simply fails to make out a case on causation regarding the two of the three Expansion Projects (*i.e.*, Cancun and Online Gaming Projects). Then with respect to the Cabo Project, Mexico merely attempts to rehash its failed jurisdictional objection, claiming that the alleged measures, such as the revocation of the E-Games Independent Permit or the closures of the Casinos, could not have possibly affected the Cabo Project, because said Project only contemplated the construction of a hotel.[2525] Again, as fully discussed in Section III.A above, the evidence on record emphatically disproves Mexico's contention, again confirming that the intended project in Cabo was the construction and operation of a hotel and a casino.

1088. Then, in Section IV. D of its Counter Memorial, Mexico observes that, by the time of the illegal closures, (i) Claimants had actually operated 6 casinos, including the five Casinos that Claimants had operated since 2006-2008 and the Temporary Location in Huixquilucan; and that (ii) Claimants were also preparing to open another Temporary Location in Veracruz.[2526] Based on this circumstance, Mexico claims that "the mostly likely scenario in the absence of the alleged

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[2523] *Burlington Resources, Inc. v. Republic of Ecuador,* ICSID Case No ARB/08/5, Decision on Reconsideration and Award (Feb. 7, 2017), ¶ 333, **CL-234**; *Lemire,* Award, ¶ 169, **CL-233**.

[2524] Counter-Memorial, ¶¶ 919-921.

[2525] Counter-Memorial, ¶ 927.

[2526] Counter-Memorial, ¶ 904.

violation is that the Claimants would have continued operating the Huxquilucan casino and opened another one in Veracruz, and that there would be no casinos in Cabo or Cancun."[2527]

1089. Mexico's suggested consequence is of course a *non sequitur*. As explained in Section III.A above, and as Mr. and Ms. Burr have repeatedly affirmed, these two Temporary Locations were just that: purely temporary. Claimants operated, or planned to operate, them in order to show the Mexican government that Claimants were fully utilizing all of their dual-function licenses that had been granted to E-Games.[2528] By doing so, Claimants sought to avoid the risk of the cancellation of the otherwise unutilized licenses under the E-Games Independent Permit, thereby also preserving their ability to develop the Cabo and Cancun Projects under the E-Games Independent Permit. Once the Cabo and Cancun Projects came to fruition, as Claimants fully expected they would, Claimants would have closed down the Temporary Locations and deployed E-Games' remaining licenses to the Cabo and Cancun Projects.[2529] Hence, Mexico's apparent attempt to dispute the causation on the basis fails as well.

1090. Mexico also comments, even if only in passing, that "[t]here is no support for the premise that, but for the actions of the Respondent, the hotels and the casinos would have been built (causation)."[2530] However, as discussed in Section III.A.4 in detail in response to Mexico's unjustified and unsubstantiated misinformation campaign against the Expansion Projects, the evidence before the Tribunal convincingly shows that Mexico's unlawful interferences with the

[2527] Counter-Memorial, ¶ 904.

[2528] Fourth Gordon Burr Statement, **CWS-59**, ¶ 31; Fourth Erin Burr Statement, **CWS-60**, ¶ 45; Third Gordon Burr Statement, **CWS-50**, ¶¶ 15, 87.

[2529] Fourth Gordon Burr Statement, **CWS-59**, ¶ 31; Fourth Erin Burr Statement, **CWS-60**, ¶ 45; Third Gordon Burr Statement, **CWS-50**, ¶ 87.

[2530] Counter-Memorial, ¶ 968.

E-Games Independent Permit and Claimants' Casino business were the only possible explanation for why the Expansion Projects could not come to fruition.

1091. For instance, with respect to **the Cabo Project**, Claimants and the Medano Beach Group were at very advanced stages of negotiations and planning when Mexico closed down the Casinos in April 2014. As explained before, the Medano Beach Group owned a successful timeshare property located right next to Cabo's popular marina, which they sought to convert into a luxury hotel-casino complex.[2531] During the course of negotiations, B-Cabo advanced the sum of US$ 600,000 in loans to the Medano Beach Group; these funds were then used for the purchase of the adjacent property whose acquisition was necessary to proceed with the Cabo Project.[2532] In addition to acquiring the adjacent property, the Medano Beach Group, in consultation with Claimants, hired the structural engineer and architect for the Cabo Project.[2533] Likewise, together with the Medano Beach Group, Mr. and Ms. Burr also prepared detailed financial projections, subscription agreements, and had potential investors lined up.[2534] As such, Claimants were well-prepared to raise capital and proceed with the Cabo Project upon the execution of the Investment Agreement, and Claimants and the Medano Beach Group were able to agree upon the near final terms of the Investment Agreement as early as in the first half of 2013.[2535] However, beginning in the summer of 2013, the uncertainty surrounding the E-Games Independent Permit began permeating the parties' discussions, causing temporary interruptions in negotiations[2536] and

[2531] Fourth Gordon Burr Statement, **CWS-59**, ¶ 30; Fourth Erin Burr Statement, **CWS-60**, ¶ 59.

[2532] Fourth Gordon Burr Statement, **CWS-59**, ¶ 34; Fourth Erin Burr Statement, **CWS-60**, ¶¶ 58-60.

[2533] Second Neil Ayervais Witness Statement, **CWS-61**, ¶ 25.

[2534] Fourth Erin Burr Statement, **CWS-60**, ¶¶ 57-63; Second Neil Ayervais Witness Statement, **CWS-61**, ¶ 60.

[2535] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 34-35; Fourth Erin Burr Statement, **CWS-60**, ¶¶ 60-61; Second Neil Ayervais Witness Statement, **CWS-61**, ¶¶ 21, 25.

[2536] Email from G. Burr to F. Ferdosi et al. re: Investment Agreement (July 13, 2013), **C-465**; Fourth Gordon Burr Statement, **CWS-59**, ¶ 35; Fourth Erin Burr Statement, **CWS-60**, ¶ 53.

ultimately forcing the parties to renegotiate the terms of the Investment Agreement.[2537] Notwithstanding the additional complications and delays caused by the hostile measures implemented by Mexico, Claimants continued the negotiations with the Medano Beach Group into early 2014 in order to move forward with the Cabo Project, and they were about to finalize the terms of the Investment Agreement when Mexico shut down the Casinos in April 2014, thereby suspending the Cabo Project indefinitely and entirely.[2538]

1092. The same is true for **the Cancun Project**. Since Colorado Cancun was formed in 2011, Mr. and Ms. Burr engaged in extensive discussions with a sizable number of prominent developers who were eager to work with the Claimant group to develop a hotel-casino project in Cancun, including the Marcos family and Mr. Carstens.[2539] Over the ensuing years, Mr. and Ms. Burr solidified a business plan for a casino in Cancun;[2540] selected a location for the Cancun Project together with the Marcos family and Mr. Carstens, which would have been just off the beach and in the midst of the prime hotel zone in Cancun;[2541] prepared architect renderings for the proposed project;[2542] and held numerous meetings with the Marcos family and Mr. Carstens until early 2014 to put their expansion plan into action.[2543] All such efforts, of course, were thwarted when Mexico unlawfully revoked the E-Games Independent Permit and permanently shut down Claimants'

[2537] *See supra* Section II.A4(a); *see also* Second Neil Ayervais Witness Statement, **CWS-61**, ¶¶ 28-29; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 38-39; Fourth Erin Burr Statement, **CWS-60**, ¶¶ 53-56; *see also* Email from F. Ferdosi to G. Burr attaching investment agreement (Oct. 21, 2013), **C-469**; Email exchange between N. Ayervais, F. Ferdosi and G. Burr attaching the Revised Investment Agreement and Letter Agreement (Oct. 28, 2013), **C-489**.

[2538] Fourth Gordon Burr Statement, **CWS-59**, ¶ 40; Fourth Erin Burr Statement, **CWS-60**, ¶¶ 62-66; Second Neil Ayervais Witness Statement, **CWS-61**, ¶ 32.

[2539] Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 41-42; Fourth Erin Burr Statement, **CWS-60**, ¶¶ 69-73.

[2540] Cancun Presentation (Apr. 15, 2013), p. 3, **C-335**.

[2541] Google map showing proposed Cancun location, **C-246**.

[2542] Email from F. Carstens to J. R. Moreno and G. Burr re: Render Schematic Design Hotel Casino Cancun (Nov. 13, 2013) , **C-472**; Cancun Architect Rendering, **C-374**; *see also* Fourth Gordon Burr Statement, **CWS-59**, ¶ 42; Fourth Erin Burr Statement, **CWS-60**, ¶ 72.

[2543] Fourth Gordon Burr Statement, **CWS-59**, ¶ 42; Fourth Erin Burr Statement, **CWS-60**, ¶ 73.

Casino business. And Mexico cannot baldly assert—without any factual substantiation—that the Cancun Project would still have not been built for reasons other than Mexico's own illegal measures challenged in this arbitration.

1093. With respect to **the Online Gaming Project**, Claimants and Bally, one of the biggest names in the global online gaming market, were working together for over a year to launch an online gaming named "Kashbet" by July 2014. [2544] To this end, they created a detailed project plan[2545]; configured all technical specifications for the servers to install Bally's online gaming platform[2546]; and held biweekly meetings to discuss the progress of their roll-out plan.[2547] By April 2014, Claimants were also working on various evolving tasks, such as marketing, hiring, and training staff to support their online operations.[2548] Given that Bally's online gaming platform covered all necessary components that Claimants needed to run a successful online gaming business, including account management, collection of funds, user registration, payment methods, and other technical features, all that was left for Claimants to launch their online gaming site was to install the servers to host Bally's online gaming platform.[2549] Again, it was not just Claimants but also Bally, a globally renowned gaming company with extensive experience in the online gaming industry, who was committed and reasonably expecting to accomplish all necessary steps to successfully launch Claimants' "Kashbet" site by July 2014. And yet, just a few days after the

[2544] First Miguel Romero Statement, **CWS-68**, ¶¶ 11-13; Third José Ramón Moreno Statement, **CWS-63**, ¶ 18; Fourth Gordon Burr Statement, **CWS-59**, ¶ 47; Fourth Erin Burr Statement, **CWS-60**, ¶ 75.

[2545] Exciting Games Project Plan with Bally (Mar. 10, 2014), **C-479**; First Miguel Romero Statement, **CWS-68**, ¶ 11-13; Third José Ramón Moreno Statement, **CWS-63**, ¶ 18; Fourth Gordon Burr Statement, **CWS-59**, ¶ 50.

[2546] Third Gordon Burr Statement, **CWS-50**, ¶ 90; Third Erin Burr Statement, **CWS-51**, ¶ 83; José Ramón Moreno Statement, **CWS-53**, ¶ 27.

[2547] First Miguel Romero Statement, **CWS-68**, ¶ 19; Third José Ramón Moreno Statement, **CWS-63**, ¶ 18; Fourth Gordon Burr Statement, **CWS-59**, ¶ 49.

[2548] First Miguel Romero Statement, **CWS-68**, ¶ 20; Third José Ramón Moreno Statement, **CWS-63**, ¶ 18; Second José Ramón Moreno Statement, **CWS-53**, ¶ 6.

[2549] Fourth Gordon Burr Statement, **CWS-59**, ¶ 53; Fourth Erin Burr Statement, **CWS-60**, ¶ 77.

closures of the Casinos on April 24, 2014, Bally's representatives informed Claimants that they would put on hold further discussions on the Online Gaming Project, which never resumed. [2550] Separately, at the time of the illegal closures, Claimants also were close to finalizing the contract with PokerStars, the largest real money online poker brand in the world, which would have allowed PokerStars to offer online poker throughout Mexico using Claimants' online gaming site. [2551]

1094. Therefore, the evidence shows, on the balance of probabilities, that but for Mexico's unlawful conduct, Claimants would have developed the Expansion Projects. Moreover, as indicated by arbitral decisions discussed below, several aspects of Claimants' Expansion Projects further reinforce the conclusion that Claimants would have been fully able to develop the Expansion Projects in due course, had Mexico not irretrievably hindered them through its illegal measures.

1095. In *Khan Resources v. Mongolia*, the respondent argued that the causal link between the alleged breaches and the claimed losses is lacking because there is no evidence that the claimants could have taken their uranium exploration and extraction project (the "Dornod Project") into profitability. [2552] While the tribunal acknowledged that "there may have been a number of uncertainties that needed to be overcome by the claimant before the mine could come into production," the tribunal observed that "the Donovan Project itself had a considerable inherent

[2550] Email from A. Araujo re: Canceled: Exciting Games iGaming Bi-Weekly meeting (May 5, 2014), **C-476** ("Based on the recent events, this meeting series is cancelled until further notice.").

[2551] Fourth Gordon Burr Statement, **CWS-59**, ¶ 54; Fourth Erin Burr Statement, **CWS-60**, ¶ 78; Third José Ramón Moreno Statement, **CWS-63**, ¶ 18; Second José Ramón Moreno Statement, **CWS-53**, ¶ 33; *see also* Email thread between J. Carreño, J. R. Moreno, J. M. Ramírez et al. re: PokerStars (Jan. 14 to Jan. 21, 2014), p. 1, **C-557**; Email thread between J. Carreño, J. R. Moreno, J. M. Ramírez et al. re: PokerStars (Jan. 14 to Jan. 21, 2014)), pp. 1-2, **C-558**; Email chain between J. Carreño, J. R. Moreno, and J. M. Ramírez, et al (Feb. 25 – Mar. 7, 2014), p. 1-2, **C-559**.

[2552] Khan Resources Inc., Khan Resources B.V. and Cauc Holding Company Ltd. v. the Government of Mongolia and Monatom Co., Ltd., PCA Case No. 2011-09, Award (Mar. 2, 2015), ¶ 376, **CL-330**.

value" given the uranium reserves reflected in the claimants' feasibility studies.[2553] Further, the tribunal observed that "other companies in similar situations have taken similar projects through to production," fining that "this may well have occurred in the present case."[2554] Lastly, with respect to the respondent's contention that the claimants' exploration license had not yet been converted into a mining license, the tribunal concluded that this does not affect the tribunal's causation analysis, because the mining license "would likely have been granted in due course" since (i) under the domestic law, "a mining license will be granted provided the requisite conditions are met" and (ii) the claimants were "taken the relevant steps" to meet the requisite conditions.[2555]

1096. The *Lemire v. Ukraine* decision is also instructive. In that case, as explained in Section III.A.2 above, the claimant who operated radio frequency licenses in Ukraine had submitted applications for a substantial additional number of licenses in public tender processes.[2556] The tribunal found that Ukraine had assigned the radio frequencies arbitrarily and without transparency, resulting in a violation of the FET standard. As for the causation between Ukraine's breach and the claimed lost profits that the claimant would have earned from the grant of additional frequencies, the *Lemire* tribunal explained:

> Given the characteristics of the Ukrainian process for the awarding of licences, it is impossible to establish, with total certainty, how specific tenders would have been awarded if the National Council had not violated the FET standard. The best that the Tribunal can expect Claimant to prove is that through a line of natural sequences it is probable – and not simply possible – that Gala would have been awarded the frequencies under tender. If it can be proven that in the normal cause of events a certain cause will produce a certain effect, it can be safely assumed that a (rebuttable) presumption of

[2553] Khan Resources Inc., Khan Resources B.V. and Cauc Holding Company Ltd. v. the Government of Mongolia and Monatom Co., Ltd., PCA Case No. 2011-09, Award (Mar. 2, 2015), ¶ 377, **CL-330**.

[2554] Khan Resources Inc., Khan Resources B.V. and Cauc Holding Company Ltd. v. the Government of Mongolia and Monatom Co., Ltd., PCA Case No. 2011-09, Award (Mar. 2, 2015), ¶ 378, **CL-330**.

[2555] Khan Resources Inc., Khan Resources B.V. and Cauc Holding Company Ltd. v. the Government of Mongolia and Monatom Co., Ltd., PCA Case No. 2011-09, Award (Mar. 2, 2015), ¶ 379, **CL-330**.

[2556] *Lemire*, Award, ¶¶ 123, 135, 158, **CL-233**.

> causality between both events exists, and that the first is the proximate cause of the other.[2557]

1097. The *Lemire* tribunal then held that, in order to succeed in its claim, the claimant needed to prove the following two steps in the chain of causation. First, that "if the tenders had hypothetically been decided in a fair and equitable manner, and Claimant had participated in them, he (and not some of the other participants) would have won the disputed frequencies."[2558] Second, that, "with these frequencies, Mr. Lemire would have been able to grow Gala Radio into the broadcasting company he had planned: a FM national broadcaster, for music format, plus a second AM channel, for talk radio."[2559]

1098. The uncertainty and assumptions in the causal link were acknowledged by the *Lemire* tribunal, but it noted that the alternative would be to deny compensation to the claimant and reward Ukraine for its unlawful conduct. The *Lemire* tribunal found that causation between Ukraine's wrongful acts and the final effect (*i.e.*, the claimant's frustration to fulfill his expansion plans) was established, because (i) being one of the leading and most successful operators, with relevant experience required for the award of additional licenses, it is "probable" that Gala would have received radio frequencies through the tender processes[2560] and because (ii) Gala "was a reasonably well funded corporation, and it had the financial strength and the necessary know how to successfully operate the two radio channels" as it had planned.[2561] Based on this conclusion, the tribunal went on to compensate the claimant by assessing damages as the difference in value

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[2557] *Lemire*, Award, ¶ 169 (emphasis added), **CL-233**.

[2558] *Lemire*, Award, ¶ 171, **CL-233**.

[2559] *Lemire*, Award, ¶ 171, **CL-233**.

[2560] *Lemire*, Award, ¶¶ 179, 191, 200, **CL-233**.

[2561] *Lemire*, Award, ¶¶ 205, 207, 208, **CL-233**.

between the worth of Gala had it succeeded in obtaining the radio frequencies it pursued, and the actual worth of the company as a result of Ukraine's measures.[2562]

1099. In line with the decisions by the *Lemire* and *Khan Resources* tribunals, Claimants have demonstrated legitimate confidence that they would expand the Casino operations into Cabo, Cancun, and online gaming until these projects were irretrievably made impossible by Mexico. As in *Gavazzi v. Romania*, rewarding Mexico by "dismissing the claim for want of sufficient proof [would] not [be] a fair or appropriate result."[2563]

1100. ***Inherent Value of the Expansion Projects***: As Claimants' gaming industry expert, Mr. Soll, explains, gaming licenses are highly regulated with a limited allocation and high up-front cost of entry in most markets.[2564] For this reason, gaming licenses "are typically very valuable, attractive, and subject to a high opportunity cost in abandonment."[2565] This is particularly true in limited-license jurisdictions, such as Mexico, as evidenced by the fact that transaction multiples for casino businesses in limited market environments have "consistently exceeded 8.0x EBITDA."[2566] Further, given their high value, gaming licenses in limited market environments are very rarely abandoned, and Mr. Soll, throughout his 30-year-experience working with various casino operators, has observed almost no history of willful abandonment of gaming licenses.[2567] Accordingly, Mr. Soll concludes that it is extremely unlikely that Claimants would have voluntarily abandoned their expansion projects in Cabo and Cancun and consequently failed to

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[2562] *Lemire*, Award, ¶ 224, **CL-233**.

[2563] *Marco Gavazzi and Stegano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Excerpts of the Award (Apr. 18, 2017), ¶ 124, **CL-327**.

[2564] First Michael Soll Report, **CER-8**, ¶ 17.

[2565] First Michael Soll Report, **CER-8**, ¶ 17.

[2566] First Michael Soll Report, **CER-8**, ¶ 20.

[2567] First Michael Soll Report, **CER-8**, ¶ 21.

capture the full economic value of the two remaining gaming licenses under the E-Games Independent Permit.[2568] Further, as Mr. Soll explains, prior to the illegal closures of the Casinos in April 2014, there only was a limited number of parties undertaking new Casino projects in Mexico, particularly casino resort projects targeting the tourist markets, such as the ones that Claimants had planned to develop in Cabo and Cancun.[2569] This explains why many premier developers were eager to work with Claimants to advance the expansion plans in Cabo and Cancun, as these Projects presented extremely valuable opportunities for those partners in the Cabo and Cancun Projects.

1101. Mr. and Ms. Burr also explain that given a complete dearth of casinos in tourist markets in Cabo and Cancun, various high-end resorts were looking to expand entertainment offerings to their guests by working with Claimants. As an example, these resorts expressed strong interests in Claimants' plans to set up satellite offices in their premises, where guests who were not staying in the Cabo and Cancun Projects could still pre-load money onto their cards to play at the Cabo and Cancun Projects. These satellite offices were also planning to arrange transportation for those guests.[2570]

1102. Likewise, under the E-Games Independent Permit, Claimants held the valuable right to access Mexico's online gaming market, which remains very popular and lucrative in Mexico. Given that there were a relatively small number of companies with well-established casino operations in Mexico at the time,[2571] combined with the fact that being a permit holder is a

[2568] First Michael Soll Report, **CER-8**, ¶ 23.

[2569] First Michael Soll Report, **CER-8**, ¶ 18.

[2570] Fourth Erin Burr Statement, **CWS-60**, ¶ 72; Third Erin Burr Statement, **CWS-51**, ¶ 79; Third Gordon Burr Statement, **CWS-50**, ¶ 82.

[2571] First Michael Soll Report, **CER-8**, ¶¶ 18-19.

necessary requirement to launch an online gaming business in Mexico,[2572] some of the strongest players in the global online gaming field, Bally and Rational Group/PokerStars, approached E-Games to tap into Mexico's burgeoning online gaming market.[2573]

1103. As explained by the tribunal in *Khan Resources*, experiences of other companies in similar circumstances are relevant to assessing the likelihood of the development of Claimants' Online Gaming Project. And in fact, since 2014, online gaming in Mexico has grown tremendously, with most of the major players with brick-and-mortar casinos in Mexico participating in the online gaming market, including the Caliente group, Codere, Producciones Móviles, Eventos Festivos, Pur Umazal Tov, among others.[2574] In light of these circumstances, there is no reason to cast doubt on E-Games' plan or ability to launch an online gaming site. Given that E-Games would have been one of the first few movers in the market, working in partnerships with globally renowned and well-experienced online gaming companies, Claimants' Online Gaming Project would have certainly been very profitable.[2575]

1104. ***Claimants' Track Record of Success and Know-How***: The Expansion Projects did not exist in vacuum. Prior to Mexico's breaches of the NAFTA, Claimants' Casino business had been operating successfully for over 9 years, and their operations were ever expanding. Since they opened their first Casino in Naucalpan in December 2005, Claimants demonstrated that they were able to successfully scale their model to enter cities of various sizes and demographics across Mexico by capitalizing, constructing and operating four additional Casinos in Villahermosa, Puebla, Cuernavaca, and Mexico City by mid-2008. Subsequently from 2010 and 2012, Claimants

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[2572] Second Ezequiel González Report, **CER-6**, ¶¶ 259-260.

[2573] Third Gordon Burr Statement, **CWS-50**, ¶ 89; José Ramón Moreno Statement, **CWS-53**, ¶ 27.

[2574] Fourth Gordon Burr Statement, **CWS-59**, ¶ 47; Fourth Erin Burr Statement, **CWS-60**, ¶ 76.

[2575] Fourth Gordon Burr Statement, **CWS-59**, ¶ 47; Fourth Erin Burr Statement, **CWS-60**, ¶ 76; José Ramón Moreno Statement, **CWS-53**, ¶ 18.

carried out extensive renovations in the Naucalpan, Mexico City, Villahermosa, and Cuernavaca Casinos to improve and expand their facilities, and relocated the Puebla Casino to a more densely populated area of the city. As undisputed by Mexico, Claimants' Casinos were one of the most well-organized and profitable operations in Mexico.

1105. As explained above, in dealing with the causation issues at length, the *Lemire* tribunal took into account that the claimant's radio company was a successful radio operator and a leader in its filed.[2576] So too here. Claimants were successfully operating and expanding their Casino business in Mexico, and, absent Mexico's measures, would have continued to do so, including by fulfilling their plans to operate casino resorts in Cabo and Cancun and an online gaming site.

1106. In conclusion, as fully explained in Section III.A and again above, Claimants' Expansion Projects were at very advanced stages of negotiations and planning when Mexico shut down Claimants' successful Casino business in Mexico in April 2014. Additionally, given the intrinsic value of the Expansion Projects and Claimants' track record of success in Mexican gaming market, Claimants held legitimate confidence that they could develop the Expansion Projects into profitable operations. However, Claimants fell prey to the PRI administration's political vendetta and cronyism, which led to the cancellation of the E-Games Independent Permit and the permanent closure of Claimants' Casino venture in Mexico.

1107. The key investment held by Claimants for their Expansion Projects was the E-Games Independent Permit, which allowed Claimants to operate two additional dual-function gaming facilities in any geographical areas in Mexico as well as online gaming websites that could receive

[2576] *Lemire*, Award, ¶¶ 205, 207, 208, **CL-233**; *see also Al-Bahloul v. Tajikistan*, SCC Case No. 064/2008, Final Award (June 8, 2010), ¶ 84 (observing that the claimant's "experience in similar ventures" can be relevant in assessing the likelihood for the claimant to proceed with the hydrocarbon exploration project), **CL-176**.

bets from all across Mexico.[2577] Yet by cancelling the E-Games Independent Permit and ultimately forcing Claimants out of the Mexican gaming market, Mexico directly took away this key investment required to implement their expansion plans in Cabo and Cancun and in online gaming. As such, Mexico permanently forestalled any further progress of the Expansion Projects, which Claimants legitimately believed, and had the full ability, to evolve into very successful and profitable operations. In these circumstances, the casual link is sufficiently established, because the loss of the Expansion Projects and all profits that Claimants reasonably expected to earn from were direct and foreseeable outcomes of Mexico's actions in revoking the E-Games Independent Permit (which itself allowed for the expansion of Claimants' business into online and new markets in Mexico) and shutting down Claimants' entire business in Mexico.

1108. Mexico has failed to carry its burden and prove the contrary.

4. Mexico Has Failed To Establish Any Contributory Negligence or Fault that Would Warrant a Reduction of Damages

1109. Mexico advocates that any compensation to Claimants should be reduced by at least 50% to reflect Claimants' alleged contribution to its own damages.[2578] Mexico's argument has no basis in law or fact.

1110. The threshold for finding contributory fault is high. As the Commentary to ILC Article 39 (on which Mexico itself relies[2579]) explains:

> 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

[2577] *See, e.g., Pope & Talbot, Inc. v. Canada*, UNCITRAL, Interim Award (June 26, 2000), ¶ 96 (finding that an investor's access to the U.S. softwood lumber market is a property right protected by the NAFTA), **CL-85**.

[2578] Counter-Memorial, ¶ 949.

[2579] Counter-Memorial, ¶¶ 933-935.

> omissions which can be considered as wilful or negligent, i.e. which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights.[2580]

1111. As stated in *Occidental v. Ecuador*, another authority that Mexico relies upon, "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."[2581] In other words, in order to prove contributory fault, Mexico must discharge the twin burdens of establishing (i) that Claimants committed a willful or negligent act, and (ii) that such fault was material enough to interrupt the chain of causation.[2582]

1112. Here, Mexico has failed even to prove that Claimants committed any willful or negligent act, much less one that could satisfy the applicable standard for contribution. As fully discussed in Sections II.A-II.B above, Claimants conducted extensive and proper due diligence when it decided to move their operations under E-Mex's permit in 2008. Despite arguing at length that Claimants instead should have proceeded with their planned purchase of Eventos Festivos (and therefore, its permit), Mexico is unable to refute Claimants' convincing showing that the proposed transaction with BlueCrest and Advent would have allowed Claimants far greater potential for growth than the acquisition of Eventos Festivos.

1113. Further, as detailed in Section II.B, Mexico's entire argument in this regard is based on the false factual premise that Claimants voluntarily entered into "a partnership with Mr. Rojas

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[2580] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), Article 39, Comment 5 (emphasis added), **CL-94**.

[2581] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No ARB/06/11, Award (Oct. 5, 2012), ¶ 670 (emphasis added), **CL-130**. *See also Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No AA 227, Final Award (Jul. 18, 2014), ¶ 1600, **CL-248**; *Burlington Resources, Inc v. Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Reconsideration and Award (Feb. 7, 2017), ¶ 576, **CL-234**.

[2582] *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award (Apr. 18, 2013), ¶ 670, **CL-134**; *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Award (No. 30, 2017), ¶ 410, **CL-328**.

Cardona" despite Claimants' awareness of his criminal background.[2583] Again, Mexico's contention does not conform with reality. Had the proposed transaction come to fruition, neither Mr. Rojas Cardona nor any of the other shareholders in E-Mex would have had any ownership or involvement in the new company.[2584] Claimants moved their operations under E-Mex's permit based on their well-advised view that Claimants would have a viable legal avenue to separate themselves from Mr. Rojas Cardona and E-Mex even in the event that the proposed transaction with BlueCrest and Advent did not come to fruition. [2585]

1114. More importantly, even *after* Claimants moved under E-Mex's permit, Mexico, through SEGOB, repeatedly confirmed the legality of Claimants' operations and endorsed every step that Claimants took to separate their operations from E-Mex and to eventually obtain their own independent permit. There thus was nothing improper in Claimants' decision to move under E-Mex's permit; instead, as Mr. and Ms. Burr confirm, any reasonable investor would have made the same decision under like circumstances. On this record, there is absolutely no basis to find any willful or negligent act by Claimants.

1115. Again, the burden that Mexico must carry to prove the contributory fault warranting any reduction of the damages is high. In the rare instances where tribunals have reduced the amount of damages on the grounds of contributory fault, the investor has typically committed serious wrongdoing, such as breaching the laws of the host state. Mexico's own authorities confirm this view. In *Occidental v. Ecuador*, for example, the tribunal determined that the claimant's *failure* to obtain ministerial authorization to transfer 40% of its rights under its Participation Contract with

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[2583] Counter-Memorial, ¶ 946.

[2584] Fourth Erin Burr Statement, **CWS-60**, ¶ 38; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 16, 19, 22; *see also* Initial Agreement between E-Mex and B-Mex Companies (July 7, 2008), **C-381**; Advent International Letter of Intent (July 7, 2008), **C-382**; Proposed BlueCrest-Tangent Structure Power Point (Aug. 5, 2008), **C-384**.

[2585] Fourth Erin Burr Statement, **CWS-60**, ¶ 48; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 27-28.

Ecuador to a third party had breached Ecuadorian law and forced Ecuador to terminate the contract by decree, and thus warranted a reduction in compensation awarded.[2586] Similarly, in *Yukos v. Russian Federation*, the tribunal found that certain acts by Yukos "breached the legislation and abused the law tax regimes" through "sham-like" operations.[2587] In *Copper Mesa v. Ecuador*, the tribunal considered the claimant's misbehavior involving armed men confronting members of the local communities, which opposed the mining project, amounted to contributory fault, although in spite of the severity of these findings, the tribunal considered that the investor had contributed only 30% to damages.[2588]

1116. These facts are wholly absent here. Unlike in *Occidental v. Ecuador*, Claimants did not fail to obtain any legally required authorization; to the contrary, Claimants obtained a valid gaming permit in November 2012 as SEGOB duly recognized that E-Games met all of the requirements to obtain one as per the Gaming Regulation.[2589] Nor did they engage in an illegal tax evasion scheme as was the case in *Yukos v. Russian Federation*. Needless to say, the facts in *Copper Mesa v. Ecuador* have no resemblance to those of the present case.

1117. Mexico's attempt to liken the investors' negligent business decisions in *MTD v. Chile* and *Azurix v. Argentina* to the present case is equally erroneous. In *MTD*, the tribunal has faulted the claimant for not investigating local zoning restrictions before buying real estate and not negotiating contractual provisions that could have protected it if the property were not rezoned.[2590] Here, prior

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[2586] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No ARB/06/11, Award (Oct. 5, 2012), ¶ 680, **CL-130**.

[2587] *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No AA 227, Final Award (Jul. 18, 2014), ¶¶ 1611, 1614, **CL-248**.

[2588] *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-02, Award (Mar. 15, 2016), ¶¶ 6.99, 6.102, **RL-090**.

[2589] *See* SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16**.

[2590] *MTD Equity Sdn. Bhd. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award (May 25, 2004), ¶¶ 168–78, **CL-149**.

to moving their operations under E-Mex's permit, Claimants, as well as BlueCrest and Advent, conducted extensive due diligence on E-Mex's permit and its business operations to make sure that neither the company nor its permit was associated with any illegality.[2591] Further, Claimants were fully prepared to protect their investments if the proposed transaction with BlueCrest and Advent did not materialize, and they indeed successfully executed their strategy by separating their operations from E-Mex and ultimately obtaining an independent, legally-issued gaming permit from SEGOB in November 2012.

1118. In *Azurix v. Argentina*, the tribunal reduced the compensation because the amount expended by the investor was excessive and imprudent in light of risks facing the concession it acquired.[2592] As an initial matter, this case does not even concern the principle of contributory fault, but rather the relevant portion cited by Mexico only addresses the issue of whether the price paid by the investor to acquire its concession accurately reflects the fair value of the concession. In any event, and as explained above, moving under E-Mex's permit presented lesser financial risks than purchasing Eventos Festivos, and regardless of the fact that the BlueCrest/Advent transaction eventually failed to occur, it has never been disputed in this arbitration that Claimants' Casino venture in Mexico, which continued until the illegal closures in April 2014, was one of the most successful and profitable operations in Mexican gaming industry.

1119. Thus, Mexico has failed to prove any facts that rise to the level of fault, much less proven those allegations. Additionally, if Mexico's attempt to find fault with Claimants' decision to move under E-Mex's permit were to have any merit, Mexico would still be unable to explain why Producciones Móviles, which also used to operate under E-Mex's permit and was granted its

[2591] Fourth Erin Burr Statement, **CWS-60**, ¶¶ 30-41; Fourth Gordon Burr Statement, **CWS-59**, ¶ 24; Second Neil Ayervais Statement, **CWS-61**, ¶ 11.

[2592] *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (Jul. 14, 2006), ¶¶ 426-430, **CL-126**.

gaming permit under the identical legal arguments and factual circumstances to E-Games', yet continues to own its permit and operate casinos today.

1120. As arbitral tribunals have repeatedly confirmed, when the investor engages in regular business practices and the respondent's measures are the primary cause of the investor's injury, damages should not be reduced.[2593] Of particular relevance, in rejecting Peru's argument that the investor had contributed to the social unrest around its mining project, thus warranting a reduction in its damages, the tribunal in *Bear Creek* concluded:

> [O]n the basis of the continued coordination with and support by Respondent's authorities, the Tribunal concludes that Claimant could take it for granted to have complied with all legal requirements with regard to its outreach to the local communities. Respondent, after its continuous approval and support of Claimant's conduct, cannot in hindsight claim that this conduct was contrary to the ILO Convention 169 or was insufficient, and caused or contributed to the social unrest in the region.[2594]

1121. The same is true here.

1122. Even following E-Games' move under E-Mex's permit, SEGOB not only repeatedly and consistently recognized and authorized E-Games' status as a legal casino operator under E-Mex's permit,[2595] but further allowed E-Games to operate independently from E-Mex's permit, and ultimately granted it the E-Games Independent Permit. Claimants, however, faced a complete reversal of fortunes, as the new PRI administration came into power and launched a politically

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[2593] *Enron Corporation and Ponderosa Assets LP v. Argentine Republic*, ICSID Case No ARB/01/3, Award (May 22, 2007), ¶¶ 371-375 (rejecting Argentina's argument that the investor's "aggressive leveraging policy" increased the company's "vulnerability to changing economic conditions," and instead finding that the investor's leveraging was reasonable by industry standards and close to that advised by the regulator," and that in the absence of the respondent's economic policy measures, the investment would not have lost its value), **CL-242**; *CME Czech Republic BV v. Czech Republic*, UNCITRAL, Partial Award (Sept. 13, 2001), ¶¶ 575-579, 593 (rejecting the respondent's allegation that the investor's decision to give up a license agreement caused the destruction of the company because by changing the Medial Law, the Czech Republic "the legal basis of the Claimant's investment"), **CL-108**; *see also Yukos Universal Limited (Isle of Man) v Russian Federation*, PCA Case No AA 227, Final Award (Jul. 18, 2014), ¶ 1631, **CL-248**.

[2594] *Bear Creek v. Peru*, ICSID Case No. ARB/14/21, Award (Nov. 30, 2017), ¶ 412 (emphasis added), **CL-328**.

[2595] *See* SEGOB Resolution No. DGAJS/SCEV/00619/2008 (Dec. 9, 2008), **C-8**.

motivated and unjustified attack on the E-Games' Independent Permit. The PRI-controlled SEGOB did an "about face," rescinded the November 16, 2012 Resolution granting the E-Games Independent Permit, and permanently closed all five of Claimants' Casinos. Pressured by the highest levels of the PRI administration, the Mexican judiciary then rubber-stamped this illegal and unjustified *volte face* by SEGOB.

1123. Now "in hindsight," Mexico tries to claim that E-Games' prior operations under E-Mex's permit—which in any event were always legal and proper in the eyes of SEGOB—somehow contributed to the sudden and precipitous demise of Claimants' flourishing Casino business. Mexico then refers to E-Mex's belatedly-filed Third Amendment in the *Amparo* 1668/2011 proceeding, again repeating its false story that E-Mex's Third Amendment involving the May 27, 2009 Resolution was what ultimately led to the revocation of the E-Games Independent Permit.[2596]

1124. Again, E-Mex did not seek to revoke the E-Games Independent Permit in the *Amparo* 1168/2011 Proceeding, but SEGOB did. As previously explained, in a different *amparo* proceeding (*i.e.*, the *Amparo* 1151/2012 proceeding), the Mexican judiciary conclusively resolved that the November 16, 2012 Resolution granting the E-Games Independent Permit constituted an implicitly consented act (*acto consentido tácitamente*) by E-Mex.[2597] This meant that E-Mex could not challenge the November 16, 2012 Resolution in any other *amparo* proceedings in Mexico, including the *Amparo* 1168/2011 proceeding. And a matter of fact, even when E-Mex requested on August 22, 2013 that the Sixteenth District Judge, Judge Gallardo, rescind not only the May 27, 2009 Resolution (which originally was the only administrative act directly involving E-Games in the *Amparo* 1668/2011 proceeding), but also all other orders/resolutions that flowed from the

[2596] Counter-Memorial, ¶ 948.

[2597] First Omar Guerrero Report, **CER-2**, ¶ 208-220.

May 27, 2009 Resolution, E-Mex did not mention the November 16, 2012 Resolution.[2598] Neither did the Sixteenth District Judge in issuing the requested order by E-Mex mention the November 16, 2012 Resolution.

1125. Yet, less than 24 hours after it received the Sixteenth District Judge's August 26, 2013 Order ordering SEGOB to rescind all resolutions based on or derived from the May 27, 2009 Resolution,[2599] SEGOB, on its own initiative, and in order fulfill the new PRI administration's political and corrupt agenda, rescinded the November 16, 2012 Resolution.[2600] SEGOB thus improperly introduced into the *Amparo* 1668/2011 proceeding of the November 16, 2012 Resolution, a resolution that had not even been challenged by E-Mex in the *Amparo* 1668/2011 proceeding, or ordered to be revoked by the Sixteenth District Judge. As discussed above at Section II.L, the Mexican judiciary, under political pressure and in grave violations of Claimants' due process rights, illegally and retroactively legitimized SEGOB's *ultra petita* decision to rescind the November 16, 2012 Resolution.

1126. In these indisputable circumstances, the revocation of the E-Games Independent Permit cannot be attributed to E-Mex—and certainly not to Claimants' fault, which was absent in the first place. Therefore, no reduction of damages is warranted here.

C. Mexico's Proposed Adjustments to Claimants' Damages Are Inapposite and Mexico's Expert's Proposed Valuation Is Incorrect

1127. In their Memorial, Claimants presented BRG's calculations of the FMV of Claimants' expropriated investments (*i.e.*, the Casinos and Expansion Projects) as of April 21, 2020. In its Second Expert Report, BRG updates its valuation of Claimants' Casinos and Expansion Projects

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[2598] *See* E-Mex Motion to Rescind (Aug. 22, 2013), **C-21**.

[2599] See Order of the Juzgado Decimosexto de Distrito en Materia Administrativa (Aug. 26, 2013), **C-23**.

[2600] *Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón* (Jan. 27, 2013). Retrieved from http://www.jornada.unam.mx/2013/01/27/politica/013n1pol, **C-17**; *See also* Memorial, ¶ 211.

(before pre-award interest) to US$ 317.30 million. BRG's valuation of the Casinos and Expansion Projects correctly accounts for future cash flows that Claimants would have received from their investments had Mexico's unlawful conduct not prevented Claimants from continuing to operate the five Casinos and from completing their plans to expand their Casino operations into Cabo, Cancun and online gaming. Claimants' updated damages calculation is set forth in the table below[2601]:

USD Million	April 2014 - Nov. 2037	Nov. 2037 - Nov. 2052	Terminal Value	Updated Total Damages	First Report Total Damages
Claimants' Casinos	$119.7	$25.6	$17.1	$162.4	$163.7
Cabo Project	$54.1	$14.0	$9.1	$77.2	$77.9
Cancun Project	$28.4	$8.2	$5.4	$42.0	$42.4
Online Gaming Project	$24.4	$6.3	$5.0	$35.7	$36.0
Total	**$226.5**	**$54.1**	**$36.7**	**$317.3**	**$320.0**
Pre-Award Interest (up to Dec 06, 2021)				$128.8	$129.9
Damages as of Dec 06, 2021				**$446.1**	**$449.9**

1128. Mexico and its expert, Rión, would have the Tribunal believe that Claimants' Casinos and Expansion Projects (excluding pre-award interest) were worth only about US$ 30.6 million.[2602] In particular, while it agrees with BRG's use of the DCF methodology to calculate the Casinos' FMV, Rión, however, values the Casinos at US$ 28.69 million based on its disagreement with certain assumptions and inputs utilized by BRG.

1129. As discussed in Section V.C below, Rión's absurdly low valuation of the Casinos arises from methodological inconsistencies, unreliable source data, and simple misrepresentations of the

[2601] *See* Second Expert Report of Berkeley Research Group ("Second Berkeley Research Group Report"), **CER-7**, Table 1. In its Second Report, BRG updates a discount rate, calculated as the weighted average cost of capital ("WACC") as of the Date of Valuation, from 8.12% to 8.16%. This adjustment decreases Claimants' damages before pre-award interest by USD 2.7 million, from US$ 320.0 million in the First BRG Report, to US$ 317.30 million, or 0.8%, all else equal. *See* Second Berkeley Research Group Report, **CER-7**, ¶ 206.

[2602] Rión M&A Report, **RER-3**, ¶¶ 10, 166.

calculations set forth in the First BRG Report. Therefore, Rión's adjustments should be rejected and, along with them, Rión's alternative valuation.

1130. As to the Expansion Projects, Mexico and Rión reject the DCF methodology to value the Expansion Projects on the grounds that the Expansion Projects were not yet going concerns and therefore lost profits are too speculative to be awarded.[2603] Instead, say Mexico and Rión, Claimants should be awarded at most the purported "liquidation value" of the Expansion Projects. Based on this approach, Rión arrives at a value between US$ 0 and US$ 4.78 million for the Expansion Projects.[2604] Mexico further submits that the Expansion Projects "should be assigned a value of zero."[2605] Mexico and Rión are clearly incorrect.

1131. As discussed in more detail below at Section V.B.I, a number of other tribunals have awarded compensation to claimants for investments that were ultimately not operational and therefore did not have a history of cash flows. More importantly, Claimants' flourishing Casino business in Mexico was a going concern until Mexico unlawfully shut it down in April 2014. The Expansion Projects, which were to be operated under the same E-Games Independent Permit and under the same management team who successfully developed one of the most profitable and beloved Casino brands in Mexico over the course of a near decade, reflected the reasonably anticipated and well prepared growth plans of that going concern. In these circumstances, well-established arbitral jurisprudence (which Mexico ignores) and well-settled valuation principles (which Rión ignores) warrant the use of the DCF method to assess the value of the Expansion Projects.

[2603] Rión M&A Report, **RER-3**, ¶ 171.

[2604] Rión M&A Report, **RER-3**, ¶ 192.

[2605] Counter-Memorial, ¶¶ 1013, 1015.

1132. Below, Claimants will first address Mexico's and Rión's critiques concerning BRG's valuation of the Casinos in Section V.C.1 and then those concerning the Expansion Projects in Sections V.C.2-3.

1. Claimants Appropriately Valued the Casinos

1133. In its First Expert Report, BRG calculated the FMV of the Casinos as of April 23, 2014 (*i.e.*, the Date of Valuation) to be USD 163.7 million, using a DCF method and before interest is applied.[2606] Mexico and its expert, Rión, agree that the DCF method is the appropriate method by which to calculate the Casinos' FMV. They also do not dispute that BRG has used the correct Date of Valuation.[2607]

1134. However, Mexico misleadingly asserts that BRG has failed to quantify Claimants' "loss of value of their shares in the Mexican Enterprises" because "a claim brought on [Claimants'] own behalf under Article 1116 would be limited to the value of the Claimants' shareholding in the Mexican enterprises subject to this arbitration."[2608] Mexico then asserts that the value of Claimants' shareholding in the Mexican Enterprises "would depend on the flow of dividends"—which it refers to as "flow-through damages"—and that "those flows would, in turn, depend on a number of factors that the Claimants' experts [sic] have not taken into account," such as "the type of shares" and "different priority in terms of profit distribution."[2609]

1135. Mexico's contentions are absurd and wholly ignore the fact that Chapter 11 of the NAFTA allows an investor to seek damages both for losses it suffered (under Article 1116) *as well as* for losses suffered by an enterprise owned or controlled by the investor (under Article 1117).

[2606] First Berkeley Research Group Report, **CER-4**, Table 1.

[2607] Counter-Memorial, ¶ 971.

[2608] Counter-Memorial, ¶¶ 901-902.

[2609] Counter-Memorial, ¶ 901.

1136. As Mexico is well-aware, the Tribunal already ruled in its Partial Award that Claimants are entitled to claim the losses suffered by the Mexican Enterprises under Article 1117, as Claimants controlled the Mexican Enterprises. In this regard, Mexico's suggestion that BRG also should have separately quantified the damages that Claimants are claiming under Article 1116 makes no sense, because Chapter 11 of the NAFTA contemplates "a single measure of compensation" when the loss claimed under Article 1116 overlaps with the loss claimed under Article 1117.[2610] Here, the Juegos Companies suffered the loss of profits from the Casinos that they owned, [2611] and the FMV of the Casinos represents the damages suffered by the Juegos Companies due to Mexico's unlawful conduct (*i.e.*, the loss of profits from the Casinos), which Mexico must fully compensate.

1137. On the technical front, Mexico's expert, Rión, takes issue with the following inputs and assumptions BRG utilized int their DCF analysis: (i) the damages period; (ii) revenue growth forecast between 2014 and 2019; (iii) adjustments to the Mexico City Casino revenue; (iv) earnings before interest, taxes, depreciation and amortization ("**EBITDA**") margin forecast; (v) assumption of capital expenditures (**CAPEX**); (vi) the inclusion of a terminal value in the assessment of Claimants' damages; (vii) the discount rate, (viii) the applicability of employee profit-sharing payments (*Participación de los Trabajadores en las Utilidades* or "**PTU**"), and (ix) the applicability of a private company discount. The following subsections address each of these topics in turn.

[2610] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5, Decision on the Requests for Correction, Supplementary Decision and Interpretation (July 10, 2008), ¶ 21 (noting that Article 1117(3) of the NAFTA creates a presumption that the arbitrations should be consolidated if the investor claims damages for its own losses and the losses of the enterprise in separate arbitrations), **RL-081**.

[2611] *See* Counter-Memorial, ¶ 902 (acknowledging that "the Casinos belong to the Juegos Companies").

(a) Damages Period

1138. As explained in Claimants' Memorial, BRG valued the Casinos (and the Expansion Projects) through the expiration date of the E-Games Independent Permit assuming that they continued to operate through the expiration of the E-Games Independent Permit on November 16, 2037 (the "**First Damages Period**").[2612] Then, BRG considered a 15-year extension of the E-Games Independent Permit, as provided for in the Gaming Regulation, up to November 16, 2052 (the "**Renewal Period**").[2613]

1139. Here, Mexico and Rión do not contest that the E-Games Independent Permit, upon the expiration of its initial 25-year term, could—and in all likelihood would—have been further extended at least for an additional 15-year period. However, upon instruction from Mexico's counsel, Rión adjusts the First Damages Period to May 25, 2030 and sets the subsequent Renewal Period of 15 years to May 24, 2045.

1140. As demonstrated in Section II.E and II.F above, the E-Games Independent Permit was valid until November 2037 and would have been further extended at least until 2052.[2614] Mexico's arguments to the contrary—which incorrectly link the initial expiration date of the E-Games Independent Permit to that of E-Mex's permit—is contrary to its own law.[2615] Mexico seeks to deny this truth by emphasizing that Claimants themselves stated in their Request for Arbitration that the E-Games Independent Permit would have remained valid until 2030.[2616] In doing so, Mexico obviously ignores that Claimants' view at the time was based on limited evidence on this

[2612] Memorial, ¶ 824.

[2613] Memorial, ¶ 824.

[2614] *See also* Second Ezequiel González Matus Report, **CER-6**, Section VII.

[2615] Second Ezequiel González Matus Report, **CER-6**, ¶ 130-133.

[2616] Counter-Memorial, ¶¶ 981-982.

issue, and as explained in details at Section II.E above, SEGOB's own contemporaneous documents, including the very one that Mexico has submitted in this arbitration, firmly establish that the E-Games Independent Permit was valid until 2037 (again, with the possibility of subsequent 15-year renewals).[2617]

1141. Therefore, the damages period utilized by BRG is correct.

(b) Revenue Growth Forecast Between 2014-2019

1142. To forecast the Casinos' but-for revenue, BRG considered the historical net gaming revenue for each of the Juegos Companies as reported in E-Games' Audited Financial Statements from 2011 through 2013, with some minor adjustments based upon the Mexican government's interferences with the Casinos during this period.[2618] Given that Claimants' Casinos catered to local markets, BRG assumed that but for Mexico's unlawful closures, from 2014 through 2019, the revenues for each of the Casinos would have grown with the expected growth of Mexico's GDP in local currency. BRG then converted the forecasted revenue to USD using the IMF's forecasted exchange rates during that period.[2619] From 2020 through 2052 (*i.e.*, the end of the Renewal Period), BRG assumed that the Casinos would have continued to grow, in USD, with a long-term U.S. inflation rate of 2%.[2620]

1143. In response, Rión criticizes BRG's use of the expected growth rate of Mexico's GDP to forecast the but-for revenues of the Casinos from 2014 through 2019,[2621] claiming the lack of correlation between the growth in Mexico's gaming industry and the growth in Mexico's overall

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[2617] *See supra* Section II.E; *see also* Statement, **RWS-1**, Annex 1, "*Diagnóstico General de los Casinos*," p. 15; Information on Duration of Exciting Games, SEGOB Website (Dec. 3, 2012), **C-391**.

[2618] First Berkeley Research Group Report, **CER-4**, ¶ 91.

[2619] First Berkeley Research Group Report, **CER-4**, ¶¶ 92, 177.

[2620] First Berkeley Research Group Report, **CER-4**, ¶ 92.

[2621] Rión M&A Report, **RER-3**, ¶¶ 132, 135-136; *see also* Counter-Memorial, ¶¶ 988-989.

GDP over that period. Based on this unsupported observation, Rión argues that a more moderate rate should be used to forecast the but-for revenues of Claimants' Casinos and applies the long-term growth rate of 2.0% to its revenue projections for the entire damages period from 2014 onwards.

1144. Rión is wrong for a number of reasons.

1145. First, to support its argument that the growth of the Mexican gaming industry is not correlated with the growth of the Mexican economy, Rión arbitrarily selects the relevant years for comparison. It claims that the data from 2004 through 2007 should be excluded, because those years reflect the "exponential growth" of Mexican gaming industry following the publication of the Gaming Regulation in 2004.[2622] Rión, however, fails to provide no literature or evidence to support why that initial period from 2004 to 2007 should not be considered.[2623] As BRG explains, Rión's attempt to cherry-pick the relevant years for its analysis "places undue weight on exogenous events" that negatively affected the growth of Mexican gaming industry from 2008 to 2013, including the 2008 Financial Crisis and the regulatory measures implemented by Mexico during that period.[2624] In contrast, BRG examined the entire period (2004-2013) including both periods of expansion and contraction.[2625] This comprehensive and unbiased macroeconomics data again show the correlation between Mexico's overall GDP growth and the growth of Mexican gaming industry.[2626] Further, empirical studies show a link between regional GDP and casino revenue.[2627]

[2622] Rión M&A Report, **RER-3**, ¶¶ 128, 130-131, 133.

[2623] Second Berkeley Research Group Report, **CER-7**, ¶ 86.

[2624] Second Berkeley Research Group Report, **CER-7**, ¶ 86.

[2625] Second Berkeley Research Group Report, **CER-7**, ¶ 87.

[2626] Second Berkeley Research Group Report, **CER-7**, ¶ 87("[T]he difference the Mexican real Gaming growth and Mexican real GDP growth is 0.14 percentage points for the period of 2004 through 2013.").

[2627] Second Berkeley Research Group Report, **CER-7**, ¶ 17.

1146. Second, contrary to Rión's contentions, the available market information leading up to the Date of Valuation does not show "expectation of moderate or flat growth" of Mexican gaming industry. In support of its position, Rión oddly cites an outdated report from 2006.[2628] As BRG points out, "[t]he expectations expressed in the 2006 report should be disregarded, because the opinions in that report are too far removed from the Date of Valuation to be informative."[2629]

1147. Third, Rión also improperly seeks to fill this gap in information by misrepresenting the market commentary from a 2013 Forbes Mexico article.[2630] As noted by BRG, contrary to Rión's assertion, the Forbes article at issue expresses optimistic market expectations close to the Date of Valuation.[2631]

1148. Fourth, Rión ignores the ample information that BRG has presented with its First Report, which again show optimistic market expectations close to the Date of Valuation.[2632]

1149. Indeed, Rión's own revenue forecast only serves to reinforce Rión's overall lack of reliability. As noted, Rión purportedly "appl[ied] the long-term growth rate of 2.0%" to its projection. But for the period between 2014 and 2019, Rión forecasts the revenues in MXN, meaning that the proposed growth rate of "2% is lower than expected Mexican inflation over the same period, which is between 3% and 4%."[2633] Demonstrating a grave methodological inconsistency, for the period from 2019 onwards, Rión uses an annual growth rate of 2% for revenue forecast, projected in USD, thereby growing with inflation.[2634]

[2628] Rión M&A Report, **RER-3**, ¶¶ 128, 130-131, 133.

[2629] Second Berkeley Research Group Report, **CER-7**, ¶ 98.

[2630] Second Berkeley Research Group Report, **CER-7**, ¶ 97.

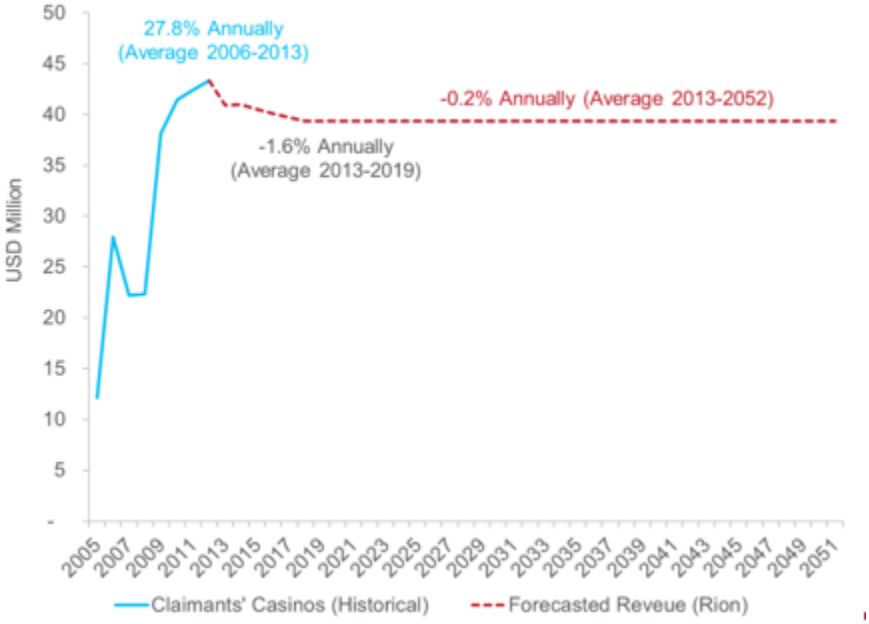
[2631] Second Berkeley Research Group Report, **CER-7**, ¶ 97.

[2632] Second Berkeley Research Group Report, **CER-7**, ¶ 99.

[2633] Second Berkeley Research Group Report, **CER-7**, ¶ 92.

[2634] Second Berkeley Research Group Report, **CER-7**, ¶ 92.

1150. In fact, Rión's growth rate of 2% leads to an unreasonable decline in the but-for revenues of Claimants' Casinos in real USD of *-1.6% per annum* for the period between 2014 through 2019, and *-0.2% per annum* in period from 2013 through 2052.[2635] This assessment stands in stark contrast with the average historical growth rate of Claimants' Casinos, which was 27.8% per annum, as indicated in the figure below.[2636] "Rión provides no explanation or evidence to support this decline," notwithstanding the historical operations of Claimants' Casinos which remained very profitable until they were illegally closed by Mexico.[2637]



1151. Additionally, the market data Rión itself relies upon underscores the unreasonable nature of Rión's forecasted decline in revenue. In its report, Rión presents historical data from 2008 through 2019 showing the SEGOB Contributions ("*Participaciones*") paid by gaming permit holders in Mexico.[2638] As BRG explains, the SEGOB *Participaciones* reflect historical visitor

[2635] Second Berkeley Research Group Report, **CER-7**, ¶ 93.

[2636] Second Berkeley Research Group Report, **CER-7**, Figure 3.

[2637] Second Berkeley Research Group Report, **CER-7**, ¶ 93.

[2638] Rión M&A Report, **RER-3**, Figure 2.

spend in casinos market wide, as the SEGOB *Participationes* are calculated at 2% on the amount bet by visitors to the casinos.[2639] Over the period from 2014 to 2019, the compound annual growth rate ("**CAGR**") in the SEGOB *Participaciones* was 8.0%, which is 2.6% higher than the real growth in BRG's but-for revenue forecast over the same period (*i.e.*, 5.4% CAGR from 2014 to 2019).[2640] As noted above, under Rión's assumption of 2% "growth" rate, the but-for revenues of Claimants' Casinos would actually decline by 1.6% during the same period.[2641]

1152. Therefore, Rión's criticism of BRG's revenue growth forecast for the period between 2014 and 2019 is inapposite, and its proposed alternative growth rate is incorrect and unreasonable.

(c) Adjustments to the Mexico City Casino's Revenue

1153. To forecast the but-for revenue of the Mexico City Casino, BRG made certain adjustments to the historical revenue for the Mexico City Casino, because certain acts taken by Mexico during the period of 2011 through 2013 had negatively impacted the historical revenue of that facility, which BRG utilizes as the basis for its revenue forecast.

1154. In their Memorial, Claimants described in detail how Mexico, acting through SEGOB, the SAT, and the municipal government of Mexico City, had interfered with the operations of the Mexico City Casino during this period between 2011 and 2013, culminating in the temporary closure of the Mexico City Casino in June 2013 for 34 days.[2642] BRG summarizes those interferences in the following figure[2643]:

[2639] Second Berkeley Research Group Report, **CER-7**, ¶ 94.

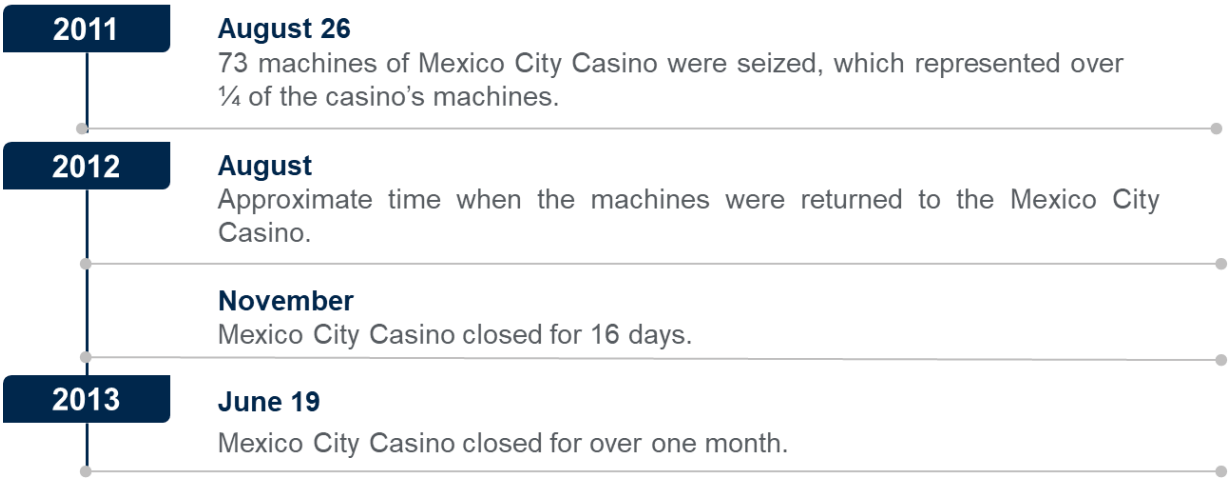
[2640] Second Berkeley Research Group Report, **CER-7**, ¶ 95 and Figure 4.

[2641] Second Berkeley Research Group Report, **CER-7**, ¶ 19.

[2642] Memorial, ¶¶ 188-196.

[2643] Second Berkeley Research Group Report, **CER-7**, Figure 5.

1155.



1156. As Claimants explained in their Memorial, and as Mexico acknowledges, Claimants are not seeking any damages for the historical losses they suffered as a result of Mexico's actions cited prior to June 2013 in the figure above.[2644] Instead, BRG adjusted the historical revenue for the Mexico City Casino to account for the fact that said location could not have a fully operational floor in 2011(due to seizure of 73 gaming machines), 2012 (due to continuing seizure of gaming machines and a temporary closure), and 2013 (due to a temporary closure for over a month).[2645]

1157. Mexico and Rión criticize BRG for making these adjustments, because, in their view, when "historical information" is available, such information must be used without adjustments when "using the DCF methodology."[2646] This is incorrect. As BRG explains, "[a]cademic literature advises that a cash flow assessment should account for the risks expected to be incurred through either the discount rate or a direct adjustment to cash flows."[2647] BRG in fact does rely on a discount rate that accounts for risks specific to the gaming industry, and BRG also includes

[2644] Memorial, ¶ 193 fn. 470; *see* Counter-Memorial, ¶ 986.

[2645] Second Berkeley Research Group Report, **CER-7**, ¶ 22, 24.

[2646] Counter-Memorial, ¶ 986.

[2647] Second Berkeley Research Group Report, **CER-7**, ¶ 106 (emphasis original).

Country Risk Premium ("**CRP**") specific for Mexico in its discount rate.[2648] As such, failing to make the adjustments that BRG made regarding historical revenues of the Mexico City Casino would result in the market and industry risks incorporated into BRG's but-for cash flow forecast, thereby double counting these risks already captured by BRG's discount rate.[2649]

1158. Thus, BRG's adjustments to the historical revenue of the Mexico City Casino were well-warranted and consistent with the DCF methodology.

(d) EBITDA Margin

1159. BRG calculated the EBITDA margins of Claimants' Casinos by deducting forecasted operating expenses ("**OPEX**") from the forecasted but-for revenues of Claimants' Casinos. To forecast the Casinos' OPEX, BRG considered the historical expense reports prepared by E-Games for 2012 through 2013 and applied minor adjustments for actual historical costs that were incurred during this period, including payroll expenses, security expenses, and payments to the B-Mex companies, which would have decreased after 2013.[2650] Based on this, BRG assesses that, from 2020 onwards, the stabilized EBITDA margins of Claimants' Casinos would have ranged between 31% and 40%.[2651]

1160. In response, Rión proposes the EBITDA margins of 24% for the entire damages period. As BRG and Claimants' gaming industry expert, Mr. Soll, explain, Rión's proposal is incorrect and unreasonable for several reasons.

[2648] Second Berkeley Research Group Report, **CER-7**, ¶ 106.

[2649] Second Berkeley Research Group Report, **CER-7**, ¶ 107.

[2650] First Berkeley Research Group Report, **CER-4**, ¶ 98.

[2651] Second Berkeley Research Group Report, **CER-7**, ¶ 111.

1161. First, in comparing the Casinos' historical EBITDA margins and BRG's forecasted margins,[2652] Rión fails to account for various external events that had a negative impact on the historical EBITDA margins of the Casinos but are not expected to impact the forecasted period, such as the relocation of the Puebla Casino in 2009 and the temporary closures of the Mexico City Casino in 2012 and 2013.[2653] Mr. Soll also explains that Rión's attempt to understate the historical margins of the Casinos by citing their relatively lower margins in their earlies days only demonstrates Rión's inadequate understanding of the gaming market.[2654] According to Mr. Soll, "it is evident that companies' margins will be lowest in the first 3-5 years of a casino's operation because casinos initially spend more to attract players and fortify the guest experience, which is paramount for driving loyalty in the earliest days of a casino's operation."[2655]

1162. Second, Rión incorrectly disputes BRG's classification of certain expenses as fixed expenses—that is, payroll, property lease, security, and electricity.[2656] In support, however, Rión unduly relies on the change of each of these costs from only one year to another (2012-2013), without corroboration or adjustment to what each of those costs would be in a steady state.[2657] Further, Rión itself admits that payroll expenses are unlikely to be variable because "it is likely that the increase in expenses is not directly proportional to the increase in sale,"[2658] thereby contradicting its own argument.[2659]

[2652] Rión M&A Report, **RER-3**, ¶ 139; *see also* Counter-Memorial, ¶ 992.

[2653] Second Berkeley Research Group Report, **CER-7**, ¶ 121.

[2654] First Michael Soll Report, **CER-8**, ¶ 61.

[2655] First Michael Soll Report, **CER-8**, ¶ 61.

[2656] Rión M&A Report, **RER-3**, ¶¶ 140-141; *see also* Counter-Memorial, ¶ 994.

[2657] Second Berkeley Research Group Report, **CER-7**, ¶ 122.

[2658] Rión M&A Report, **RER-3**, ¶¶ 140-141.

[2659] Second Berkeley Research Group Report, **CER-7**, ¶ 123.

1163. Third, Rión presents misleading market information to suggest BRG's forecasted EBITDA margins for the Casinos are above those seen in the international and local industry. However, as BRG explains, Rión's information should be disregarded for its lack of comparability.[2660] In particular, Rión fails to present any analysis that demonstrates sufficient comparability between the operations of its sample of Mexican operators and Claimants' Casinos, simply assuming, incorrectly, that because they operate in the same market, any profitability measure is comparable. For instance, Claimants' Casinos owned a vast majority of their gaming machines (near 75%)[2661] while local competitors tended to rent a larger portion of gaming machines for certain historical reasons as explained by Claimants' gaming industry expert, Mr. Soll.[2662] Rión's purported comparative analysis fails to account for the effect of machine ownership on EBITDA margin[2663] and other fundamental differences in the cost structure of Claimants' Casinos and other Mexico operators that could further impact EBITDA margins.[2664]

1164. BRG also explains that a different financial metric, such as EBIT, which includes the impact of depreciation and amortization, can better account for "important industry costs such as gaming machines regardless of the business model (rented versus owned)."[2665] Rión, however, does not present the EBIT margins of its sample of Mexican operators, even if it could have done so.

[2660] Second Berkeley Research Group Report, **CER-7**, ¶¶ 28, 114-123.

[2661] Fourth Erin Burr Statement, **CWS-60**, ¶ 5.

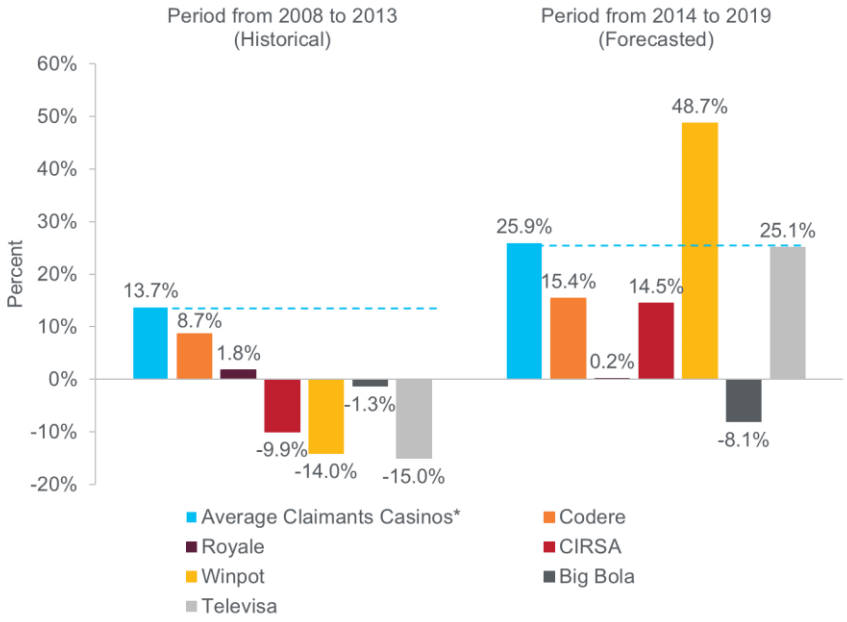
[2662] *See* First Michael Soll Report, **CER-8**, ¶¶ 65-67.

[2663] Second Berkeley Research Group Report, **CER-7**, ¶ 28; First Michael Soll Report, **CER-8**, ¶ 67.

[2664] Second Berkeley Research Group Report, **CER-7**, ¶¶ 114-123.

[2665] Second Berkeley Research Group Report, **CER-7**, ¶¶ 114-123.

1165. In this regard, BRG demonstrates that its forecasted EBIT margins for the Casinos is below or in line with Rión's sample of Mexican operators.[2666] Notably, during the historical period from 2008 through 2013, the EBIT margin for Claimants' Casinos exceeded Rión's sample of Mexican operators, as shown below[2667]:



1166.

1167. Likewise, the international set of companies put forth by Rión are largely diversified companies with business lines other than casinos, which impacts their EBITDA margins.[2668] Furthermore, these companies are from different countries from operation, which can impact how these companies account and report their EBITDA margins.[2669] Yet, Rión does not examine any such differences on business lines and countries of operation in its international sample, which renders Rión's purported comparison invalid.

[2666] Second Berkeley Research Group Report, **CER-7**, ¶ 118.

[2667] Second Berkeley Research Group Report, **CER-7**, Figure 7.

[2668] Second Berkeley Research Group Report, **CER-7**, ¶ 119.

[2669] Second Berkeley Research Group Report, **CER-7**, ¶ 120; First Michael Soll Report, **CER-8**, ¶ 53.

1168. Also, as further explained by Mr. Soll, at times, EBITDAR ('R' indicates Rent) can be a more appropriate measure of business performance than EBITDA when comparing against a company that owns its assets.[2670] As such, when comparing margins of different gaming companies, it would be inapposite to rely on a single financial metric as Rión does.[2671] In his report, Mr. Soll presents a representative sample of U.S-based operators, many of which have worldwide portfolios, exhibiting EBITDA *or* EBITDAR margins (where appropriate) in the range of the high 20% to low 30% in their stabilized years (on average, 29.6%).[2672] This clearly contrasts with Rión's claim that "an analysis of internationally traded casino companies [including those based in the U.S.] shows a historical average of 18.4% worldwide,"[2673] again highlighting a grave methodological error embedded in Rión's purported comparative analysis.

1169. In sum, Rión's comparison of Claimants' Casinos with its sample of international and local companies ignores important operational differences between these companies that could impact the EBITDA margins.[2674] This error invalidates any of the conclusions reached by Rión through its purported comparative analysis.

(e) CAPEX

1170. As explained in Claimants' Memorial and the First BRG Report, capital expenditures ("**CAPEX**") for Claimants' Casinos are comprised of two categories: periodic renovations and other capital expenditures required to maintain and improve gaming machines and other equipment.[2675] For forecasting the expenditures for period renovations, BRG used the renovation

[2670] First Michael Soll Report, **CER-8**, ¶¶ 53, 64.

[2671] First Michael Soll Report, **CER-8**, ¶ 53; *see also* Second Berkeley Research Group Report, **CER-7**, ¶ 120.

[2672] First Michael Soll Report, **CER-8**, ¶ 54 and Table 12.

[2673] Rión M&A Report, **RER-3**, ¶¶ 143.

[2674] Second Berkeley Research Group Report, **CER-7**, ¶¶ 114-119.

[2675] Memorial, ¶¶ 832-833; First Berkeley Research Group Report, **CER-4**, ¶¶ 106.

costs incurred in the Naucalpan Casino between 2010 and 2012 as a base line for the future renovations at all of the Casinos.[2676] For other CAPEX, BRG considered the Juegos Companies' Audited Financial Statements and adjusted the historical expenditures for inflation.[2677]

1171. While stating that it "agrees with the BRG analysis,"[2678] Rión nonetheless asserts that BRG has failed to "offer any statistics or analysis to support the assumption of a seven-year renewal cycle or that the amount proposed for each renovation is sufficient to maintain an attractive service offer."[2679] However, Rión itself fails to provide any alternative—much less a supported alternative—for what it considers reasonable.[2680] In contrast, BRG's assumptions regarding period renovations are well based on Claimants' experiences and expectations. Hence, Rión's hollow criticism is unwarranted and ultimately futile.[2681]

(f) Terminal Value

1172. BRG calculated the terminal value of Claimants' Casinos as of November 16, 2052, because Claimants' business is expected to have a positive enterprise value even at the end of the first Renewal Period.[2682]

1173. Rión disagrees with the inclusion of a terminal value in damages assessment for two reasons. *First*, Rión argues that the terminal value is not appropriate because of the alleged uncertainty regarding the renewal of the E-Games Independent Permit beyond the first Renewal

[2676] First Berkeley Research Group Report, **CER-4**, ¶¶ 106(a).

[2677] First Berkeley Research Group Report, **CER-4**, ¶¶ 106(b).

[2678] Rión M&A Report, **RER-3**, ¶¶ 143; Counter-Memorial, ¶ 998.

[2679] Rión M&A Report, **RER-3**, ¶¶ 153.

[2680] Second Berkeley Research Group Report, **CER-7**, ¶ 133.

[2681] Second Berkeley Research Group Report, **CER-7**, ¶ 133.

[2682] First Berkeley Research Group Report, **CER-4**, ¶¶ 108.

Period.[2683] As explained in Claimants' Memorial and again above, Rión's argument fails to recognize that there is evidence of the issuance of unlimited renewals in recent years.[2684] Moreover, by assuming no terminal value, Rión fails to consider that the terminal value captures more than just the assumption that the E-Games Independent Permit would be extended beyond November 16, 2052. This is because the terminal value reflects the alternative scenario where the E-Games Independent Permit will expire as of November 16, 2052 but Claimants could still sell their Casino business as a going concern to other gaming permit holders in the Mexican market, which will be able to operate under their then-existing permits.[2685] In this regard, Rión's assumption that as soon as the E-Games Independent Permit expires Claimants' investments in Mexico would no longer have any value is incorrect and unreasonable.

1174. *Second*, Rión claims that BRG's treatment of CAPEX in the terminal value calculation is "inconsistent" with BRG's perpetuity assumption, noting that the Casino assets "are fully depreciated as of 2052" under BRG's forecast.[2686] However, as BRG explains and as the industry literature supports, "Rión's critique would only be applicable in circumstances when *real* growth is forecasted in perpetuity, as growth require additional CAPEX."[2687] Here, BRG's 2% long-term growth rate "reflects long-term inflation expectations and therefore, does not reflect any growth."[2688] As such, Rión's critique is unfounded.

[2683] Rión M&A Report, **RER-3**, ¶ 113; Counter-Memorial, ¶ 1002.

[2684] Memorial, ¶ 155; *see also supra* Section II.E; Grupo Océano Haman, S. A. de C. V. Screenshot, **C-255**; Impulsora Géminis, S. A. de C. V. Screenshot, **C-256**; Espectáculos Deportivos de Cancun, S. A. de C. V. Screenshot, **C-257** available at http://www.juegosysorteos.gob.mx/es/Juegos_y_Sorteos/Salas_de_Sorteos_de_Numeros.

[2685] Second Berkeley Research Group Report, **CER-7**, ¶ 140.

[2686] Rión M&A Report, **RER-3**, ¶ 152; Counter-Memorial, ¶ 1002.

[2687] Second Berkeley Research Group Report, **CER-7**, ¶ 142.

[2688] Second Berkeley Research Group Report, **CER-7**, ¶ 142.

(g) Discount Rate

1175. In its First Report, BRG calculated an 8.12% discount rate (*i.e.*, the weighted average cost of capital, "**WACC**") for the Casinos (and the Expansion Projects) by averaging the BRG's own WACC, calculated based on the International Capital Asset Pricing Model ("**ICAPM**"), 7.80%, and the WACC published by Professor Damodaran for "Hotel/Gaming" companies operating in emerging market, 8.43%.

1176. In its Second Report, BRG updates its WACC calculation based on the ICAPM from 7.80%, presented in its Frist Report, to 7.90% ("**BRG's Updated ICAPM WACC**"), which reflects BRG's corrected calculation of the risk-free rate.[2689] By maintaining the same approach it took in its First Report, BRG averages its Updated ICAPM WACC with the WACC published by Professor Damodaran (*i.e.*, 8.43%), and obtains a WACC of 8.16%.[2690]

1177. In its report, Rión presents the WACC calculation based on the same methodology that BRG applied in estimating its own WACC (*i.e.*, ICAPM), as Rión "generally agrees with the methodology used by BRG to estimate the discount rate."[2691] However, Rión still proposes an alternative discount rate of 11.61% ("**Rión's Proposed WACC**"), which is 3.71 percentage points higher than the BRG's Updated ICAPM WACC of 7.90%.

1178. As BRG explains in further details in its Second Report, the Rión's Proposed WACC suffers from several fatal flaws. First, Rión uses inconsistent currencies in calculating the discount rate and cash flow, thus violating fundamental economic and financial principles.[2692] Rión raises certain issues using USD as the currency for calculating damages (which will be addressed below

[2689] Second Berkeley Research Group Report, **CER-7**, ¶ 208.

[2690] Second Berkeley Research Group Report, **CER-7**, ¶ 210.

[2691] Counter-Memorial, ¶ 1003.

[2692] Second Berkeley Research Group Report, **CER-7**, ¶ 217.

at Section V.C.3), but ultimately estimates cash flows of Claimants' Casinos in USD.[2693] Despite this, Rión relies on debt rates denominated in MXN for its calculation of the WACC.[2694] In contrast, and consistent with standard practices, BRG relies always on inputs in USD to maintain a consistent currency with its cash flow forecast.[2695]

1179. Additionally, as BRG further explains, in calculating the WACC, Rión overestimates market risk premium (without any explanation),[2696] incorrectly double-counts country-risk premium;[2697] uses an incorrect tax rate (which reflects the PTU payment that is inapplicable to Claimants' cash flows for reasons discussed in the following subsection);[2698] and makes several other errors that make Rión's WACC calculation incorrect and unreliable.[2699]

1180. When corrected for these fundamental flaws and errors, BRG demonstrates that Rión's WACC calculation results in the rate of 7.66% (the "**Rión's Corrected WACC**"), a rate lower than both BRG's Updated ICAPM WACC (*i.e.*, 7.90%) and the 8.12% discount rate that BRG relied upon in its First Report. In fact, applying Rión's Corrected WACC increases damages by 9.9%, that is, USD 44.0 million.[2700]

(h) PTU

1181. Rión's argument that PTU should be included in BRG's tax calculations is wrong. As Ms. Burr explains, Claimants' Mexican Enterprises were not obligated to pay PTU because the Juegos

[2693] Rión M&A Report, **RER-3**, ¶ 200.

[2694] Second Berkeley Research Group Report, **CER-7**, ¶ 214.

[2695] Second Berkeley Research Group Report, **CER-7**, ¶ 220.

[2696] Second Berkeley Research Group Report, **CER-7**, Section IV.1.2.

[2697] Second Berkeley Research Group Report, **CER-7**, ¶ Section I.V.3.

[2698] Second Berkeley Research Group Report, **CER-7**, ¶ 236.

[2699] Second Berkeley Research Group Report, **CER-7**, Section I.V.5.

[2700] Second Berkeley Research Group Report, **CER-7**, ¶ 247.

Companies did not have personnel directly hired as their employees, but subcontracted with a third-party company to provide them with these services. The few employees directly employed by E-Games, given their executive and management positions, were not entitled to the payment of PTU.[2701] This practice, which was common while Claimants operated their Casinos in Mexico, complied with Mexican law.[2702]

1182. The audited annual tax returns of the Juegos Companies and E-Games filed for fiscal years 2009 through 2013 also show that the Mexican Enterprises did not have to pay PTU.[2703] Claimants' expert on Mexican labor law also explains that under applicable law (*i.e.*, Mexican Federal Labor Law), Mexican companies without personnel hired directly and that subcontracting personnel services through third-parties are not required to pay PTU because the obligation to pay PTU is only with respect to employees hired directly by the company.[2704] Claimants' expert further elaborates that under applicable law, directors, administrators, and general managers of companies are exempt from the employee profit sharing plan.[2705]

1183. From the standpoint of damages assessment, as of the Date of Valuation, there was no news or information about any potential forthcoming changes in the fiscal regime that would impact the applicability of PTU to the Mexican Enterprises.[2706] Therefore, it was reasonable to assume that a willing buyer and willing seller would assume the same fiscal regime would continue applying to the Mexican Enterprises after the Date of Valuation.

[2701] Fourth Erin Burr Statement, **CWS-60**, ¶ 202.

[2702] Fourth Erin Burr Statement, **CWS-60**, ¶ 202.

[2703] Annual Tax Returns of the Juegos Companies and E-Games From 2009 Through 2013, **C-496**-**C-525** (showing that the PTU was not applicable to the Mexican Enterprises during this period).

[2704] First Expert Report of Claudio Jiménez de León ("First Claudio Jiménez de León Report"), **CER-9**, ¶ 18.

[2705] First Claudio Jiménez de León Report, **CER-9**, ¶ 15.

[2706] Second Berkeley Research Group Report, **CER-7**, ¶ 129.

1184. For these reasons, Rión's proposed inclusion of PTU in damages assessment is unwarranted.

(i) Private Company Discount

1185. In addition to overestimating the WACC and including PTU in his calculations, Rión also proposes the application of a private company discount rate of 20%.[2707] In support, Rión argues that there is a significant discount in the valuation of private companies over the estimated valuation with publicly traded companies, reflecting mainly an additional risk of illiquidity, among other purported risks of private investments, such as the lack of, or access to consistent financial information.[2708]

1186. However, as BRG explains, the inclusion of a private company discount, at any rate, is unwarranted here for at least four reasons.

1187. First, by applying a private company discount, Rión improperly assumes that Claimants would have sold their shares in the Casinos but for Mexico's expropriation. While Claimants, as explained above, did consider a clearer path to liquidity as one of the many advantages of the proposed transaction with BlueCrest/Advent, turning their shares into cash was not the economic purpose of Claimants' long-term business (including the Expansion Projects) in the Mexican gaming industry.[2709] BRG further notes that in the context of determining the FMV of Claimants' investments, which were illegally expropriated by Mexcio, it is further unwarranted to reduce the net present value ("**NPV**") of the Casino's future cash flows by simply assuming that Claimants would sell their shares.[2710]

[2707] Rión M&A Report, **RER-3**, ¶ 114.

[2708] Rión M&A Report, **RER-3**, ¶ 114, 252.

[2709] Second Berkeley Research Group Report, **CER-7**, ¶ 258.

[2710] Second Berkeley Research Group Report, **CER-7**, ¶ 258.

1188. Second, Rión's suggestion that a willing buyer in a hypothetical transaction of a private company will have a lower degree of assurance regarding the seller's financial information than in the case of a publicly traded company, is incorrect and contradicts the well-accepted FMV standard, which assumes no information asymmetries between the willing buyer and the willing seller.[2711]

1189. Third, Rión's arguments regarding other purported risks of private investments, such as alleged concentration of shareholder control and decision-making, are left entirely unsubstantiated by any analysis or documents.[2712] Rión also fails to explain why the potential sale of Claimants' shares in the Mexican Enterprises would subject to any restrictions. [2713]

1190. Lastly, Rión's reliance on the U.S. stock market studies is misplaced. As the academic literature shows, the purported relationship between illiquity and returns does not hold in markets *other than* the U.S.[2714] Claimants' Casinos (and Expansion Projects) are all located in Mexico.[2715]

1191. Based on the foregoing, BRG concludes that the inclusion of any private company discount fails to result in the FMV assessment of Claimants' Casinos.[2716]

2. Claimants' DCF Methodology Fully Compensates the Damages That Mexico Caused to the Expansion Projects

1192. Relying on a relatively small sample of ultimately inapposite investment treaty case law, Mexico argues that a DCF method cannot be used for investment projects like the Expansion

[2711] Second Berkeley Research Group Report, **CER-7**, ¶ 259.

[2712] Second Berkeley Research Group Report, **CER-7**, ¶ 260.

[2713] Second Berkeley Research Group Report, **CER-7**, ¶ 260.

[2714] Second Berkeley Research Group Report, **CER-7**, ¶ 261.

[2715] Second Berkeley Research Group Report, **CER-7**, ¶ 261.

[2716] Second Berkeley Research Group Report, **CER-7**, ¶ 262.

Projects that are not yet in operation. According to Mexico, "the existence of a proven track record of profitable operations (at least three years) [is] a condition for using the DCF method."[2717]

1193. Instead, Mexico argues that the value of the Expansion Projects should be equal to their "liquidation value"—namely, "historic value" of Claimants' investment costs in the Expansion Projects that "were duly proven by the Claimants."[2718] Notably, Rión's report at least acknowledges that gaming licenses under the E-Games Independent Permit comprise Claimants' investments in the Cabo and Cancun Projects, while it incorrectly assigns USD 1.425 million as the purported liquidation value of those license.[2719]

1194. Departing even from its own quantum expert, however, Mexico asserts—simply repeating its Pre-Investment Objection to the Tribunal's jurisdiction—that Claimants made no investments in the Cabo and Cancun Projects and that they should be valued at "zero."[2720] With respect to Claimants' Online Gaming Project, Mexico and Rión both assign a "value of zero"[2721] based on the purported lack of investment made in relation to the Online Gaming Project.

1195. Again, in Section III.A above, Claimants demonstrated why Mexico's Pre-Investment Objection (which is untimely in the first place) must fail both as a matter of law and fact, as Claimants have made several protected investments in the Expansion Projects. This fact alone is sufficient to dispose of Mexico's Pre-Investment Objection under well-established arbitral jurisprudence.

[2717] Counter-Memorial, ¶ 950.

[2718] Counter-Memorial, ¶ 1011.

[2719] Rión M&A Report, **RER-3**, ¶ 187.

[2720] Counter-Memorial, ¶ 1013.

[2721] Rión M&A Report, **RER-3**, ¶ 200; Counter-Memorial, ¶ 1015.

1196. More importantly, and much relevant to the discussion here regarding the quantification of damages, Mexico grossly overreaches with its quantum arguments in this regard.

1197. To begin with, the relevant standard under international law is "fair market value." If a hypothetical purchaser would have used a DCF to value Claimants' Expansion Projects on the Date of Valuation—irrespective of their stages of development or histories of profitability—then there is no basis for this Tribunal not to use such a valuation here. And, indeed, BRG explains that real market participants do use DCF to value the expansion projects like the ones that Claimants were pursing in Cabo, Cancun, and online gaming.[2722]

1198. In this context, and as previously explained at Sections II.A.3-5 above, it is important to note that Claimants' Expansion Projects did not exist in a vacuum. Rather, Claimants already held legally secured rights under the E-Games' Independent Permit to operate two additional gaming facilities as well as online gaming. Further, Claimants' Casino business in Mexico was a going concern until Mexico unlawfully shuttered it on April 24, 2014, and the Expansion Projects were integral parts of Claimants' Casino business which continued to expand since Claimants opened their first Casino in Naucalpan in December 2005 and until Mexico shut down their business in April 2014.

1199. BRG considered these facts to arrive at the appropriate methodology for valuing the Expansion Projects. As BRG explains, the DCF approach is a forward-looking method that assesses the NPV of the future cash flows Claimants reasonably expected to receive from their business as of the Date of Valuation.[2723]

[2722] *See* Second Berkeley Research Group Report, **CER-7**, ¶¶ 41, 43, 152,

[2723] Second Berkeley Research Group Report, **CER-7**, ¶ 41.

1200. In other words, the DCF approach accounts for a business' ability to generate free cash flows "in a way that captures the operational structure and growth prospects otherwise understood as intangible or brand value—that is, 'the value that is attributable to the way a business is organized and managed.'"[2724] As such, industry literature supports using the DCF approach to value the expansion of an existing business, because "the company's future cash flows stems from investments already made and investments yet to be made."[2725] Here, determining the value of Claimants' Casino venture requires evaluating the profitability of existing business, as well as expected expansion of such business.[2726]

1201. Consistent with the valuation literature, BRG also observes that the following factors related to Claimants' Casino business support its use of the DCF methodology for valuing the Expansion Projects (as well as the Casinos):[2727]

- "Claimants' business model involved expanding their business over time by opening casinos in new markets, which had a demonstrated track record of new growth."[2728] As an illustration, between its opening in 2005 and its last full year of operation (*i.e.*, 2013), Claimants' business experienced a 20% CAGR in net gaming revenue.[2729]

- "Claimants' business had a track record of profitability," as demonstrated by the fact that all of the existing five Casinos yielded positive EBITDA margins within two full years of operation.[2730]

[2724] Second Berkeley Research Group Report, **CER-7**, ¶ 152(b) (quoting R. Parrino, Choosing the Right Valuation Approach, paper presented at the CFA Institute Conference Proceedings, 2005, p. 17 (**Ex. BRG-054**)).

[2725] Second Berkeley Research Group Report, **CER-7**, ¶ 152(a).

[2726] Second Berkeley Research Group Report, **CER-7**, ¶¶ 152, 153.

[2727] Second Berkeley Research Group Report, **CER-7**, ¶ 149.

[2728] Second Berkeley Research Group Report, **CER-7**, ¶ 149 (b).

[2729] Second Berkeley Research Group Report, **CER-7**, ¶ 149 (b).

[2730] Second Berkeley Research Group Report, **CER-7**, ¶ 149 (c).

- "Claimants had a track record of reorganizing the casinos to improve performance," as shown by the margin expansion following the relocation of the Puebla Casino.[2731]

- Claimants demonstrated experience and knowledge of the Mexican gaming industry by renovating and expanding their existing Casinos and successfully implementing marketing, promotion, investment initiatives that had positive effects on the overall success of the Casinos.[2732]

- Claimants had an organization structure in place with suppliers and partners to support the development and operation of the Expansion Projects.[2733] As previously explained, Claimants had the management team with expertise in the Mexican gaming industry, as well as stable suppliers of personnel services and gaming machines (such as IGT, Bally, WMS, and Aristocrat who are the top machine manufacturers in the word).[2734] Further, in pursuit of the Expansion Projects, Claimants were partnering with prominent hotel developers (*i.e.*, the Marcos family for the Cancun Project and the Medano Beach Group for the Cabo Project) and strongest players in the global online gaming market (*i.e.*, Bally and PokerStars).

1202. All of BRG's stated assumptions are amply borne out by the facts developed and explained by Claimants in Section III.

1203. Thus, the DCF method is best suited for valuating Claimants' business (including the Expansion Projects), because the FMV of Claimants' successful and growing Casino venture necessarily includes the future growth of Claimants' business (including from the Expansion Projects), which was reasonably expected from Claimants' track record of profitability and proven

[2731] Second Berkeley Research Group Report, **CER-7**, ¶ 149 (d).

[2732] Second Berkeley Research Group Report, **CER-7**, ¶ 149 (e).

[2733] Second Berkeley Research Group Report, **CER-7**, ¶ 149 (f).

[2734] Third Erin Burr Statement, **CWS-51**, ¶ 26; Fourth Erin Burr Statement, **CWS-60**, ¶ 5.

ability to successfully scale their business model to enter new markets in Mexico.[2735] Rión's use of the liquidation method (*i.e.*, a cost approach) to value the Expansion Projects fails to account for these important features of Claimants' business.[2736]

1204. BRG further explains that liquidation in general means "selling the assets for the parts."[2737] And, as explained, in its report, Rión does recognize that gaming licenses are intangible assets of the Cancun and Cabo Projects (which, again, was unlawfully expropriated by Mexico when it invalided the E-Games Independent Permit). However, in applying the liquidation method to value the gaming licenses, Rión again ignores "valuation literature that recommends the use of an income approach as the most common method for valuing intangible assets, namely gaming licenses."[2738]

1205. In addition to finding little support in the valuation literature, Rión's implementation of the liquidation method is fundamentally flawed. Rión relies on only one data point to value a gaming license—namely, the contemplated transaction by Claimants to acquire Eventos Festivos in 2008.[2739] In particular, Rión posits that because Claimants were prepared to pay USD 28.5 million for Eventos Festivos whose permit allowed the operation of 20 gaming facilities, "the amount offered would provide a valuation of USD 1.425 mm for the intangible asset of the permit for each authorized venue."[2740]

1206. As explained above at Section II.B.1, the contemplated acquisition of Eventos Festivos did not materialize, meaning that, as BRG notes, the offer price "does not reflect a market transaction

[2735] Second Berkeley Research Group Report, **CER-7**, ¶ 187.

[2736] Second Berkeley Research Group Report, **CER-7**, ¶ 187.

[2737] Second Berkeley Research Group Report, **CER-7**, ¶ 154.

[2738] Second Berkeley Research Group Report, **CER-7**, ¶ 158.

[2739] Rión M&A Report, **RER-3**, ¶ 187.

[2740] Rión M&A Report, **RER-3**, ¶ 187.

as no money was exchanged nor any agreements signed."[2741] Additionally, "the offer was six years prior to the Date of Valuation and therefore fails to reflect expectations for Claimants' business, the gaming industry, or macroeconomic environment as of the Date of Valuation."[2742] Rión, however, does not offer any explanation on how this outdated transaction, which even did not take place, reflect the value of a license as of the Date of Valuation.[2743]

1207. In any event, as BRG explains, Rión's use of the cost approach to value the gaming licenses fails to capture the intrinsic value (or in other words, the FMV) of the gaming licenses held "in the hands of Claimants,"[2744] which derive from the *use* of such licenses.[2745] For example, when averaging the value of Claimants' Casinos from the start of their operations and multiplying this average by two (2) to reflects the intrinsic value of the two licenses for the Cabo and Cancun Projects, it equals to USD 58.7 million.[2746] This again shows that Rión's valuation of the Expansion Projects under the purported liquidation method falls grossly short of the full reparation standard under international law, which requires the compensation equivalent to the FMV of the expropriated investments.

1208. In support of Rión, Mexico also resorts dogmatically to citing select cases where tribunals have declined to use the DCF methodology, claiming that "the existence of a proven track record of profitable operations (at least three years) [is] a condition for using the DCF method."[2747] In

[2741] Second Berkeley Research Group Report, **CER-7**, ¶ 155.

[2742] Second Berkeley Research Group Report, **CER-7**, ¶ 155.

[2743] Second Berkeley Research Group Report, **CER-7**, ¶ 155.

[2744] Second Berkeley Research Group Report, **CER-7**, ¶ 154.

[2745] Second Berkeley Research Group Report, **CER-7**, ¶ 154.

[2746] Second Berkeley Research Group Report, **CER-7**, ¶ 154 and fn. 324.

[2747] Counter-Memorial, ¶ 950.

essence, Mexico's contentions echoes Rión's view that the DCF method "does not apply to business lacking a proven history of profitable investments." [2748]

1209. Yet, as noted above, these contentions are—in addition to misstating the law—based on a glaring omission of the fact that Claimants indeed had a very successfully business with "a proven history of profitable investments." Again, in these circumstances, expert economics analysis endorses the use of DCF method, *i.e.*, to value the expansion projects of an existing business like the Cabo, Cancun, and Online Gaming Projects.

1210. In fact, none of the cases cited by Mexico addresses the situation where, as here, the investor's business has operated for nearly 10 years with an established track record of profitability. For instance, as explained in Mexico's own words, in *Metaclad*, "the case involved hazardous waste containment that *never* became operational due to lack of a local permit."[2749]

1211. That is not the case here. Claimants held a legally obtained, valid gaming permit and developed one of the most profitable Casino operations in Mexico when Mexico unlawfully shuttered their business. In *Metalclad*, the tribunal approvingly quotes the decision from the Iran-U.S. Claims Tribunal, noting "the importance in relation to a company's value of 'its business reputation and the relationship it has established with its suppliers and customers.'"[2750]

1212. Mexico also relies on *Siag v. Egypt* to argue that tribunals are reluctant to award lost profits for "young businesses lacking a long track record of established trading."[2751] Again, Claimants' Casino business in Mexico was hardly a "young" business. In any event, Mexico omits to mention

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[2748] Counter-Memorial, ¶ 1007.

[2749] Counter-Memorial, ¶ 951 (emphasis added).

[2750] *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2020), ¶ 120 (quoting *Sola Tiles, Inc. v. Iran* (1987),14 Iran-U.S.C.T.R. 224, 240-42; 83 I.L.R. 460, 480-81), **CL-79**.

[2751] Counter-Memorial, ¶ 955 (quoting *Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (June 1, 2009), ¶ 570, **RL-065**).

that the tribunal in *Siag* ultimately adopted a market-based valuation method which assessed lost profits—namely, comparable sales valuation.[2752] The tribunal thus ultimately awarded claimant USD 150 million, well over the USD 30 million that the claimant had invested into the "young business."[2753] *Siag v. Egypt* does not preclude, and in fact supports, an award of full lost profits here.[2754]

1213. Likewise, Mexico cannot rely on *Gemplus v. Mexico* in support of its position. There, "as a business, the Concessionaire had barely progressed beyond start-up operations."[2755] Moreover although the tribunal rejected the use of the DCF model, the tribunal also rejected the "Asset Approach" proposed by the respondent's expert (similar to Rión's liquidation approach here) because the concession "was to be a lucrative investment for the Claimants, albeit subject to high risks."[2756]

1214. Again, despite Mexico's bid to mislead the Tribunal, Claimants' Casino business was not a new start-up company with an unproven business model. This fact is critical. Although it ultimately rejected the claimant's DCF model, the tribunal in *Vivendi v. Argentina* explained how such a model could be accepted in circumstances akin to Claimants:

> The Tribunal also recognises that in an appropriate case, a claimant might be able to establish the likelihood of lost profits with sufficient certainty even in the absence of a genuine going concern. For example, a claimant might be able to establish clearly that an investment, such as a concession, would have been profitable by presenting sufficient

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[2752] *Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (June 1, 2009), ¶¶ 572-574, **RL-065**

[2753] *Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (June 1, 2009), ¶¶ 574, 631, **RL-065**

[2754] As BRG noted in its First Report, the market-based approach is rather inapposite to value Claimants' business in this case, because "there were no sales of either the entire portion or substantial portion of a casino business in Mexico around the time of the Date of Valuation." *See* First Berkeley Research Group Report, **CER-4**, ¶ 80.

[2755] *Gemplus S.A. and others v. United Mexican States* and *Talsud S.A. v. United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 and ARB(AF)/04/4, Award (Jun. 16, 2010), ¶ 13-70, **CL-232**.

[2756] *Gemplus S.A. and others v. United Mexican States* and *Talsud S.A. v. United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 and ARB(AF)/04/4, Award (Jun. 16, 2010), ¶¶ 13-72, 13-73, **CL-232**.

evidence of its expertise and proven record of profitability of concessions it (or indeed others) had operated in similar circumstances.[2757]

1215. Similarly, in *Lemire v. Ukraine*, as explained above, the tribunal found that the claimant would have been able to grow his business into what he had planned for, if Ukraine had not arbitrarily assigned the radio frequencies the claimant pursed.[2758] In assessing the damages, the parties did not even controver the use of the DCF method, and the tribunal did not hesitate to accept the DCF approach to assess the difference in value between the worth of the claimants' radio company in its "but for" condition (*i.e.*, expanded business with additional radio frequencies) and the actual value of the radio company in its "as is" condition.[2759]

1216. Mexico conveniently fails to mention these cases and more. For instance, in *Gold Reserve v. Venezuela*, the tribunal applied a DCF valuation to award USD 713 million for two mining concessions that had never entered production at the time of their wrongful revocation.[2760] Notably, in that case, the respondent's expert presented "negative valuation, resulting in no compensation."[2761] The tribunal did not find this convincing, because "[t]his would essentially mean that the mine was completely uneconomic to operate—a highly unlikely proposition given the effort and expense to which Gold Reserve had committed to get the mine operational."[2762] Likewise, here, Mexico's proposed valuation of the Expansion Projects—that is, zero—belies

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[2757] Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic, ICSID Case No ARB/97/3, Award (Aug. 20 2007), ¶ 8.3.4 (empahasis added), **CL-92**.

[2758] *Lemire*, Award, ¶¶ 205, 207, 208, 254 **CL-233**.

[2759] *Lemire*, Award, ¶ 224, **CL-233**.

[2760] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (Sept. 22, 2014), ¶ 863(ii), **CL-137**.

[2761] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (Sept. 22, 2014), ¶ 833, **CL-137**.

[2762] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (Sept. 22, 2014), ¶ 833, **CL-137**.

ample evidence on record which demonstrates tireless efforts and resources to which Claimants have dedicated to open the Cabo and Cancun Projects and to launch their online business.

1217. *Tethyan Copper v. Pakistan* is another example of a claimant obtaining compensation based the DCF method for a pre-operational project. There, the tribunal first observed that "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."[2763] However, the tribunal saw no such uncertainties in the claimant's mining project, given "the Feasibility Study" demonstrating the claimant's plans for the project and "the commitment shown by claimant as well as its two owners."[2764]

1218. In that case, the respondent claimed that the claimant's plan was in fact infeasible, pointing out certain risks and uncertainties, such as licensing risks and uncertainties regarding the prospect of entering a mining agreement with the government.[2765] The tribunal concluded that "neither of these risks or uncertainties constitute a '*fundamental uncertainty*" that would have stopped the project or rendered it unprofitable."[2766] Instead, the tribunal took note of the facts that owners of the claimant were global mining companies and that they "had been sponsoring and overseeing the project during its exploration stage[] and were willing to contribute large further amounts of

[2763] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award (Jul. 12, 2019, ¶ 330, **RL-092**.

[2764] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award (Jul. 12, 2019, ¶ 331, **RL-092**.

[2765] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award (Jul. 12, 2019, ¶ 333, **RL-092**.

[2766] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award (Jul. 12, 2019, ¶ 332 (emphasis original), **RL-092**.

equity into the project."[2767] According to the tribunal, these "are very strong indications that they believed that this project would become operational and profitable," which warrants the use of the DCF method.[2768]

1219. Here, because of the very fact that Mexico, through its unlawful measures, irretrievably hindered the Expansion Projects, those Projects could never come to fruition. Exploiting this situation, Mexico and Rión unduly seeks to emphasize the risks and uncertainty allegedly associated with the success of Expansion Projects.[2769] But as noted above, Claimants' business model involved expanding their business over time by opening casinos in new markets and therefore, Claimants faced and overcome the types of risks and uncertainties listed by Rión (*i.e.*, local permission to operate in a specific location, attractiveness of the location, and the level of local competition, sources of funding),[2770] with each expansion of their business.[2771]

1220. Further, in addition to erroneously asserting that Claimants had made no protected investments in the Expansion Projects (which is not true), Mexico has failed to present any evidence to cast doubt on Claimants' legitimate expectations and proven ability to continue to leverage their past performance and experience in the Mexican gaming market to develop the Expansion Projects into profitable operations. Moreover, the evidence before the Tribunal convincingly shows that Claimants were at very advanced stages of negotiations and planning to

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[2767] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award (Jul. 12, 2019, ¶ 332, **RL-092**.

[2768] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award (Jul. 12, 2019, ¶ 332, **RL-092**.

[2769] *See* First Rión Report, **RER-3**, ¶ 177(a), 181.

[2770] Rión M&A Report, **RER-3**, ¶¶ 78, 169, 181.

[2771] *See* Second Berkeley Research Group Report, **CER-7**, ¶ 189.

execute and implement their expansion plans in Cabo, Cancun, and online gaming when Mexico unlawfully shuttered the Casinos in April 2014.

1221. Additionally, based on their experience and knowledge in the Mexican gaming industry, as well as their extensive due diligence and market research, Claimants fully and legitimately expected that the Cabo and Cancun Projects would be lucrative early on.[2772] None of Claimants' competitors had developed similar casinos within resorts like Claimants planned to do in Cabo and Cancun.[2773] Both of these proposed locations would have attracted very high-end tourists, willing to spend significant sums of money.[2774]

1222. Claimants' Online Gaming Project was very promising as well.[2775] As Mr. and Ms. Burr explain, Claimants would have enjoyed the so-called "first-mover advantage."[2776] Now, many of Claimants' competitors with brick-and-mortar casino operations (such as the Caliente group and Producciones Móviles) are operating online gaming sites, but in 2014, Claimants would have been one of the first few permit holders to enter Mexico's promising online gaming market.[2777] That E-Games pursued the Online Gaming Project in partnerships with internationally renowned gaming companies (such as Bally and PokerStars) with very successful experience in the global online gaming market made the prospect of success more promising.

[2772] Fourth Gordon Burr Statement, **CWS-59**, ¶ 30; Fourth Erin Burr Statement, **CWS-60**, ¶ 43; Third Gordon Burr Statement, **CWS-50**, ¶ 87; Third Erin Burr Statement, **CWS-51**, ¶ 80.

[2773] Fourth Erin Burr Statement, **CWS-60**, ¶ 43; Third Gordon Burr Statement, **CWS-50**, ¶¶ 77, 87; Third Erin Burr Statement, **CWS-51**, ¶ 80.

[2774] Fourth Erin Burr Statement, **CWS-60**, ¶ 54, 66, 72; Third Gordon Burr Statement, **CWS-50**, ¶ 87; Third Erin Burr Statement, **CWS-51**, ¶ 80.

[2775] Fourth Gordon Burr Statement, **CWS-59**, ¶ 45, 47; Fourth Erin Burr Statement, **CWS-60**, ¶ 76; Third Gordon Burr Statement, **CWS-50**, ¶ 91; Third Erin Burr Statement, **CWS-51**, ¶ 83; Second José Ramón Moreno Statement, **CWS-53**, ¶ 32.

[2776] Fourth Gordon Burr Statement, **CWS-59**, ¶ 47; Fourth Erin Burr Statement, **CWS-60**, ¶ 76.

[2777] Third Gordon Burr Statement, **CWS-50**, ¶ 91; Third Erin Burr Statement, **CWS-51**, ¶ 83; Second José Ramón Moreno Statement, **CWS-53**, ¶¶ 34-35; Fourth Gordon Burr Statement, **CWS-59**, ¶¶ 45,47; Fourth Erin Burr Statement, **CWS-60**, ¶ 76.

1223. Given these facts, as well as the well-established arbitral jurisprudence and valuation principles discussed above, the Tribunal should disregard Rión's cost-based methodology in favor of BRG's DCF to value the Expansion Projects.

1224. Lastly, one of the key investments comprising Claimants' Expansion Projects was the gaming licenses under the E-Games Independent Permit to open two additional two dual-function casinos and an online gaming site. As confirmed both by BRG and Claimants' gaming industry expert, Mr. Soll, these gaming licenses were intrinsically valuable, with a proven potential to generate income.[2778] This provides an additional reason for the Tribunal to adopt BRG's DCF valuation of the Expansion Projects.

1225. In *Rumeli v. Kazakhastan*, the tribunal found that the respondent unlawfully expropriated the claimants' shares in the local company that had been awarded a license to operate a mobile telephone network in Kazakhastan.[2779] There, the respondent argued that the liquidation approach should be used to assess the value of the expropriated shareholding, relying on the World Bank Guidelines (which Rión, in the instant case, cites as the sole source for dismissing the income approach). [2780] The *Rumeli* tribunal held that, even though the local company lacked the track record that might normally required for it to be treated as a going concern for purposes of applying the DCF method, value had to be ascribed to its major asset—namely, the license for the mobile telephone network.[2781] According to the tribunal, the license was plainly worth far in excess of its book value, and this asset of the local company would undoubtedly have been taken into account

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[2778] Second Berkeley Research Group Report, **CER-7**, ¶ 189.

[2779] Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award (Jul. 29, 2008), ¶¶ 707, 715, **CL-113**.

[2780] Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award (Jul. 29, 2008), ¶¶ 729-730, **CL-113**. See also First Rión Report, **RER-3**, ¶ 7.

[2781] Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award (Jul. 29, 2008), ¶ 811, **CL-113**.

by a willing buyer who would purchase the shares of the local company. The tribunal thus concluded that there was "no realistic alternative" to using the DCF method, because "the value of that asset was directly linked to its potential to produce future income."[2782]

3. The Tribunal Should Adopt Claimants's Valuation of the Expansion Projects

1226. As discussed above, Rión incorrectly views that the DCF method is inapposite to value the Expansion Projects. As such, Rión does not perform a DCF valuation of the Expansion Projects, instead presenting their purported liquidation value, which grossly underestimates Claimants' losses and does not provide them with full reparation.

1227. Rión does not stop there, however, as it also criticizes BRG's DCF valuation of the Expansion Projects as "speculative" on several equally meritless grounds.

1228. First, Rión's critique of BRG's use of the same discount rate for the Expansion Projects as Claimants' Casinos is misplaced. Rión claims that it could not find convincing evidence that the Expansion Projects were close to being launched, and therefore, that the application of the same discount rate for the Expansion Projects fails to account for what it refers to as "completion risk."[2783]

1229. As an initial matter, Rión's critique is based on a false factual premise, because the Expansion Projects were reasonably expected to open in the short term, as Claimants explained in Section III.A above. Additionally, Rión fails to present any literature to support its position that the discount rate should include a premium for this alleged completion risk.[2784] Lastly, BRG's discount rate already reflects the risks involved in investing in a company in the casino and gaming

[2782] Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award (Jul. 29, 2008), ¶ 811, **CL-113**.

[2783] Rión M&A Report, **RER-3**, ¶ 177 (a); Counter-Memorial, ¶ 1007.

[2784] Second Berkeley Research Group Report, **CER-7**, ¶¶ 250, 252.

industry in Mexico, which in turn captures the risks of a business that *is expanding* in that industry in Mexico.[2785] As explained above, the Expansion Projects reflect the growth investments of Claimants' business; thus, BRG's application of the same discount rate is appropriate for the Expansion Projects.[2786]

1230. Second, Rión's critique of BRG's revenue forecast is also unfounded, as it ignores available market information and the facts of this case and is also based on a flawed sensitivity analysis. As explained in the First BRG Report, to forecast revenues of the Cabo and Cancun Projects, BRG uses the Cuernavaca Casino as a baseline, given their similarity in casino floor size and their locations in resort communities.[2787] In particular, to estimate the daily revenue per active player for the Cabo and Cancun Projects, BRG used the projected performance of the Cuernavaca Casino as a baseline with certain adjustments reflecting tourism metrics. In Rión's view, BRG's reliance on tourism metrics to forecast the spending differences between players at the Cabo and Cancun Projects with the Cuernavaca Casino is not well-supported, because the Mexican gaming market is for local players.[2788]

1231. However, as BRG explains, (i) tourist expenditure, and, in particular, that of international tourists, is a significant portion of Cabo and Cancun's economy, (ii) market expectations around the Date of Valuation anticipated growth from tourist clientele in the Cabo and Cancun gaming markets, and (iii) the evidence on record shows that Claimants reasonably expected that their Cabo and Cancun Projects would capture these tourist markets. [2789]

[2785] Second Berkeley Research Group Report, **CER-7**, ¶ 251.

[2786] Second Berkeley Research Group Report, **CER-7**, ¶ 254.

[2787] First Berkeley Research Group Report, **CER-4**, ¶ 115.

[2788] Rión M&A Report, **RER-3**, ¶¶ 177, 179.

[2789] Second Berkeley Research Group Report, **CER-7**, ¶¶ 172-174, 175-176, 177, 178.

1232. Rión also performs a sensitivity analysis to allegedly test whether BRG's approach for forecasting the net gaming revenues for the Cabo and Cancun Projects can reliably predict the net gaming revenue for Claimants' Casinos.[2790] However, Rión's sensitivities are fatally flawed, as they fail to utilize the same methodology that BRG used to forecast revenue, incorrectly assuming (i) that all five of the Casinos would have the same size and, thus, the same number of active players per day; and (ii) that all five of the Casinos catered to a tourist customer base.[2791] Further, Rión improperly seeks to recreate (rather than project) the historical revenues of the Casinos without accounting for factors (such as, relocation, renovations, and government interferences) that impacted the historical revenues of different Casinos.[2792]

1233. BRG thus maintain its revenue forecast for the Cabo and Cancun Projects. Mr. Soll also agrees that based on his experience, BRG's reliance on macroeconomic statics, tourist arrivals, and visitor and trip characteristics to forecast the revenues for the Cabo and Cancun Projects is appropriate and consistent with industry practice.[2793]

1234. Mr. Soll further tests the reasonableness of BRG's revenue forecast for the Cabo and Cancun Projects, by comparing it to the actual performance of comparable casino resort projects in the Latin American and Caribbean region. For this purpose, Mr. Soll identifies nine (9) comparable properties in the region that closely resemble the Cabo and Cancun Projects in terms of their development scales and local market demographics.[2794] He then compares BRG's forecasts with actual performance of the comparable properties, using three key performance

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[2790] Rión M&A Report, **RER-3**, ¶¶ 179-181.

[2791] Second Berkeley Research Group Report, **CER-7**, ¶¶ 182-183, 185.

[2792] Second Berkeley Research Group Report, **CER-7**, ¶ 184.

[2793] First Michael Soll Report, **CER-8**, ¶ 26.

[2794] First Michael Soll Report, **CER-8**, ¶ 39.

indicators ("**KPI**") widely utilized within the casino industry: Gross Gaming Revenue ("**GGR**"); Win per Position per Day; and GGR per Hotel Room Night Available.[2795]

1235. GGR refers to the annual topline revenue to the casino after paying prizes to customers.[2796] Win per Position per Day refers to the daily topline gaming revenue per individual gaming seat available.[2797] GGR per Hotel Room Night Available refers to the annual topline gaming revenue divided by the number of available hotel rooms on property and further by 365 days in a year.[2798] As further detailed in Mr. Soll's expert report, and as summarized below, BRG's forecasts for the Cabo and Cancun Projects are well within the range of actual performance of the comparable properties, across all three KPIs.[2799]

Comparison of Actual Operating KPIs to BRG Forecasts*

	Min	Max	Median	Average	BRG Stabilized Forecast - Cancun	BRG Stabilized Forecast - Cabo
Gross Gaming Revenue (US$ Millions)	$11.3	$173.1	$23.7	$40.6	$17.5	$27.5
Win per Position per Day	$53	$481	$140	$181	$117	$196
GGR per Hotel Room Night Available	$130	$1,613	$331	$545	$192	$308

1236. Based on this comparative analysis, Mr. Soll concludes that BRG's revenue forecasts are reasonable and appropriate.

1237. Third, Rión's critique of BRG's operating expenses ("**OPEX**") forecast for the Cabo and Cancun Projects is factually incorrect, because contrary to Rión's assertion,[2800] BRG did not forecast that the OPEX of the Cabo and Cancun Projects would be similar to those of the Cuernavaca Casino.[2801] Indeed, even though BRG used the Cuernavaca Casino's ration of OPEX

[2795] First Michael Soll Report, **CER-8**, ¶¶ 42-44.

[2796] First Michael Soll Report, **CER-8**, ¶ 9.

[2797] First Michael Soll Report, **CER-8**, ¶ 9.

[2798] First Michael Soll Report, **CER-8**, ¶ 9.

[2799] First Michael Soll Report, **CER-8**, ¶¶ 9-10 and Table 9.

[2800] Rión M&A Report, **RER-3**, ¶ 177(d).

[2801] Second Berkeley Research Group Report, **CER-7**, ¶ 193.

to revenue as a benchmark for the Cabo and Cancun Projects, under BRG's forecast, the OPEX of the Cabo and Cancun Project would be higher than the OPEX of the Cuernavaca Casino. [2802]

1238. Again, BRG's forecast of the Cabo and Cancun Projects' OPEX demonstrates BRG's consistent reliance on the Claimants' business model and track record of profitability, which in turn justifies BRG's DCF valuation of the Cabo and Cancun Projects.

1239. Mr. Soll also observes that BRG's OPEX and margin assumptions for the Cabo and Cancun Projects are reasonable and appropriate given, among others, (i) historical performance and trends at Claimants' Casinos; (ii) EBITDA(R) margins observed at publicly traded companies; and (iii) specific examples of EBITDA performance at comparable properties within the Latin America and Caribbean region.[2803]

1240. Lastly, Rión's contention that Claimants' Online Gaming Project "was at least one year from becoming operational" [2804] has already been disproven by contemporaneous documentary evidence now before the Tribunal.[2805] Notably, except for questioning the project timeline, Rión does not raise any critiques related to BRG's implementation of the DCF methodology to assess the FMV of the Online Gaming Project.

1241. Thus, none of Rión's or Mexico's critiques undermines BRG's assessment of the FMV of the Expansion Projects. As the tribunal in *Tethyan v. Paksistan* observed, where "Tribunal is convinced that in can, with reasonable confidence, determine the amount of [future] profits based

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[2802] Second Berkeley Research Group Report, **CER-7**, ¶ 193.

[2803] First Michael Soll Report, **CER-8**, ¶ 68.

[2804] Counter-Memorial, ¶ 1014; Rión M&A Report, **RER-3**, ¶¶ 194-196.

[2805] Exciting Games Project Plan with Bally (Mar. 10, 2014), **C-479**; *see also* First Miguel Romero Statement, **CWS-68**, ¶ 19-21; Third José Ramón Moreno Statement, **CWS-63**, ¶ 4; Fourth Gordon Burr Statement, **CWS-59**, ¶ 50.

on the inputs provided by the Parties' experts for this calculation," the application of the DCF method is all the more warranted.[2806]

1242. As demonstrated above, BRG's DCF valuation of the Expansion Projects was based on reasonable inputs and assumptions, which in turn are well-grounded in valuation principles and literature, market information and expectations as of the Date of Valuations, as well as on Claimants' business plans and history of successful Casino operations. This provides sufficient confidence for the Tribunal to rely on BRG's assessment to compensate Claimants' losses of the Expansion Projects.

D. The Tribunal Should Award Damages Denominated in U.S. Dollars and Should Award Claimants Pre- and Post-Award Interest at a Rate that Ensures "Full Reparation"

1243. In their Memorial, Claimants explained that in order to return Claimants to the economic position they would have been in but for Mexico's unlawful expropriation, damages must include a measure of pre- and post-award interest.[2807] Further, consistent with the full reparation principle, Claimants have shown that interest awarded should be subject to reasonable compounding,[2808] and specifically requested that the Tribunal to declare that any award of damages be net of all applicable tax.[2809]

1244. Mexico does not dispute any of these points and accepts that an interest rate should be a "commercially reasonable rate."[2810] Mexico, however, appears to question the Claimants' basis for seeking an award of damages denominated in U.S. dollars (USD), claiming that because

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[2806] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award (Jul. 12, 2019, ¶ 330, **RL-092**.

[2807] Memorial, ¶ 855.

[2808] Memorial, ¶ 859.

[2809] Memorial, ¶¶ 860-861.

[2810] Counter-Memorial, ¶ 1016.

"Claimants business was located in Mexico, they consider that reparation should be determined in Mexican pesos (MXN)."[2811] Surprisingly, Mexico does not cite any authority for this position, but it merely notes that this is Rión's view. In fact, it is entirely commonplace for damages to be awarded in the currency of the claimant's nationality,[2812] which is necessary to prevent the claimant from being exposed to currency risk during the period following the Treaty breach until damages are paid. [2813] The Tribunal, therefore, should award Claimants the damages they seek in USD.

1245. Rión then claims that if the payment is to be made in USD, the reasonable commercial rate would be the "United States Prime Rate."[2814] However, as BRG explains, the United States Prime Rate reflects a risk-free rate, which fails to sufficiently compensate Claimants because "risk-free rates do not compensate Claimants for the opportunity cost or the actual cost of funding they face during the default period"[2815] and because they "encourage the defaulting party (*i.e.*, Respondent, if found in breach) to avoid payment of the award in favor of their other, more expensive debts (*i.e.*, promote a form of unjust enrichment)."[2816]

1246. Thus, BRG maintains its approach to interest. As set out in Claimants' Memorial, BRG relies on Mexico's interest rate on its funding[2817] to determine the appropriate pre-award interest

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[2811] Counter-Memorial, ¶ 1017.

[2812] S. Ripinsky and K. Williams, *Damages in International Investment Law* (2008), p. 394 ("Tribunals have mostly frequently opted for the currency of the claimant's nationality."), **CL-331**.

[2813] *See, e.g., Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (Feb. 6, 2007), ¶ 361, **CL-91**; Compañía *de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,* ICSID Case No. ARB/97/3, Award (Aug. 20, 2007), ¶ 8.4.5, **CL-92**.

[2814] Rión M&A Report, **RER-3**, ¶¶ 119-120.

[2815] Second Berkeley Research Group Report, **CER-7**, ¶ 265(a).

[2816] Second Berkeley Research Group Report, **CER-7**, ¶ 265(b).

[2817] Memorial, ¶ 855.

rate. It also proposes as an alternative rate an interest rate corresponding to the pre-tax cost of debt that Claimants would have faced operating their business but for Mexico's unlawful measures.[2818]

1247. Mexico's interest rate on its funding is calculated as the sum of the average of the twelve months ending on the Date of Valuation of (i) the 10-year U.S. Treasury constant maturity rate (risk free rate), and (ii) the JP Morgan's EMBI spread for Mexico.[2819] As noted above, along with its Second Report, BRG has updated its risk-free rate from 2.50% to 2.61%, and reflecting this change, BRG updates Mexico's interest rate on its funding to 4.46% to 4.57%.

1248. The alternative interest rate is calculated as (i) the interest rate above (4.57%) plus (ii) the industry risk premium for the Hotel/Gaming companies in the U.S. (3%) as reported by Professor Damodaran as of January 2014.[2820]

E. Summary of Damages

1249. As established above and in the First and Second BRG Reports, Claimants are entitled to full compensation for Mexico's breaches of the NAFTA, including for the Casinos, the Cabo, Cancun Projects, and for the Online Gaming Project. Such compensation amounts to a total figure of at least USD 446.1 million as of December 6, 2021.

1250. A commercially reasonable interest rate (that is, 4.57%, or, in the alternative, 7.57%) should accrue on this amount both before and after the Award is issued and until payment in full by Mexico. The compensation should bear interest at a compound rate sufficient to fully compensate Claimants. The award of damages and interest should be made net of all taxes; Mexico should not tax, or attempt to tax, the payment of the Award.

[2818] Memorial, ¶ 855 fn. 1975.

[2819] Second Berkeley Research Group Report, **CER-7**, ¶ 263; First Berkeley Research Group Report, **CER-4**, ¶ 158.

[2820] Second Berkeley Research Group Report, **CER-7**, ¶ 264; First Berkeley Research Group Report, **CER-4**, ¶ 158.

VI. REQUEST FOR RELIEF

1251. On the basis of the foregoing, without limitation and reserving Claimants' right to supplement these prayers for relief, including without limitation in the light of further action which may be taken by Mexico, Claimants respectfully request that the Tribunal:

(i) DECLARE that Mexico has breached Article 1110 (Expropriation), Article 1105 (Fair and Equitable Treatment, Full Protection and Security, and Denial of Justice), Article 1102 (National Treatment), and Article 1103 (Most-Favored Nation Treatment) of the NAFTA;

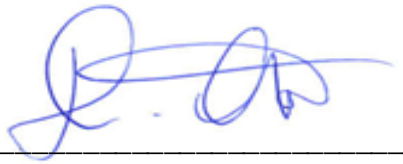
(ii) ORDER Mexico to compensate Claimants for their losses resulting from Mexico's breaches of the NAFTA and international law for an amount of at least USD $ 446.1 million as of December 6, 2021 (inclusive of pre-Award interest), plus post-Award interest until payment at a commercially reasonable rate, compounded annually;

(iii) DECLARE that: (a) the award of damages and interest be made net of all taxes; and (b) Mexico may not deduct taxes in respect of the payment of the award of damages and interest;

(iv) AWARD such other relief as the Tribunal considers appropriate; and

(v) ORDER Mexico to pay all of the costs and expenses of these arbitration proceedings, including, but not limited to, any expenses arising from the discovery phase of these proceedings.

Respectfully submitted,



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