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BEFORE THE HONORABLE TRIBUNAL ESTABLISHED PURSUANT TO THE CHAPTER ELEVEN OF THE NORTH AMERICA TRADE AGREEMENT (NAFTA)

B-MEX AND OTHERS (CLAIMANTS)

V.

THE UNITED MEXICAN STATES (RESPONDENT)

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

REJOINDER

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GLOSSARY

Abbreviation	Definition
Verification Acts	Records drafted during the verification visits carried out to E-Games Casinos on April 24, 2014.
Advent	Advent International
Amparo 1151/2012	Writ of Amparo filed by E-Mex against the permits granted to E-Games (permit DGAJS/SCEVF/P-06/2005-BIS) and Producciones Móviles (permit DGAJS/SCEVF/P-06/2005-TER)
Amparo 1668/2011	Writ of Amparo filed by E-Mex against the verifications and suspension of operations by SEGOB of some establishments and the revocation of its permit
BlueCrest	BlueCrest Capital
CAM	Centro de Arbitraje de México [*Mexican Center of Arbitration*]
Casinos	Draw rooms and remote gambling centers operated by E-Games in Naucalpan, Mexico City, Cuernavaca, Puebla, and Villahermosa.
CJEF	Federal Executive Legal Counseling
FTC	Free Trade Commission of the North American Free Trade Agreement
CNPP	National Code of Criminal Proceedings
Juegos Companies	Juegos de Video y de Entretenimiento de México, S. de R.L. de C.V.; Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V.; Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V.; Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V., and Juegos y Video de México S. de R.L. de C.V.
Operator Certificate	Oficio DGAJS/SCEV/0194/2009 dated May 8, 2009 by SEGOB issued a certificate that E-Games is the operator of E-Mex
Operating Agreement	Agreement dated November 1, 2008, executed by E-Games and E-Mex
Transaction Agreement	Agreement dated April 1, 2008, executed by E-Mex, the Juegos Companies, and JEV Monterrey.
CPEUM	Constitución Política de los Estados Unidos Mexicanos [*Political Constitution of the United Mexican States*]

VCLT	Vienna Convention on the Law of Treaties, drafted in Vienna on May 23, 1969.
Respondent or Mexico	United Mexican States
Claimants	Gordon G. Burr; Erin J. Burr; John Conley; Neil Ayervais; Deana Anthone; Douglas Black; Howard Burns; Mark Burr; David Figueiredo; Louis Fohn; Deborah Lombardi; P. Scott Lowery; Thomas Malley; Ralph Pittman; Daniel Rudden; Marjorie "Peg" Rudden; Robert E. Sawdon; Randall Taylor; James H. Watson, Jr.; B-Mex, LLC; B-Mex II, LLC; Oaxaca Investments, LLC; Palmas South, LLC; B-Cabo, LLC; Colorado Cancun, LLC; Santa Fe Mexico Investments, LLC; Caddis Capital, LLC; Diamond Financial Group, Inc.; Family Vacation Spending, LLC; Financial Visions, Inc.; J. Johnson Consulting, LLC; J. Paul Consulting; Las KDL, LLC; Mathis Family Partners, Ltd.; Palmas Holdings, Inc.; Trude Fund II, LLC; Trude Fund III, LLC; Victory Fund, LLC
DGJS	Dirección General de Juegos y Sorteos [*General Directorate of Games and Sweepstakes*]
DOF	Diario Oficial de la Federación [*Federal Daily Gazzette*]
EDN	Espectáculos y Deportes del Norte S.A. de C.V.
E-Games	Exciting Games, S. de R.L. de C.V.
E-Mex	Entretenimientos de México, S.A. de C.V.
Establishments	Remote gambling centers or lottery hallds operated by E-Games in Naucalpan, Mexico City, Cuernavaca, Puebla and Villahermosa.
Eventos Festivos	Eventos Festivos de México, S.A de C.V.
Non-Compliance Complaint	Non-Compliance Complaint 82/2013 against the Second compliance decided by the Seventh Collegiate Court.
JA	Juicio de Amparo [*Amparo proceeding*]
JCA	Juicio contencioso administrativo [*Administrative Proceeding*]
JEV Monterrey	Juegos de Entretenimiento y Video de Monterrey, S.A. de C.V.
Sixteenth Court	Sixteenth District Administrative Court in the Federal District (now Mexico City), which decided *Amparo* 1668/2011.

Third Court	Third District Administrative Court in the Federal District (now Mexico City), which decided Amparo 356/2012, in which E-Games filed an action against the inspection of the Casino in Puebla.
JVE Centro	Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V. which operated the Casino in Puebla.
JVE DF	Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V. which operated the Casino in Mexico City.
JVE Mexico	Juegos de Video y de Entretenimiento de México, S. de R.L. de C.V. which operated the Casino in Naucalpan.
JVE Sureste	Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. which operated the Casino in Villahermosa.
JyV México	Juegos y Video de México S. de R.L. de C.V. which operated the Casino in Cuernavaca.
***Amparo* Law**	Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos [*Amparo Law, which Regulates Articles 103 and 107 of the Political Constitution of the United Mexican States*]
LFJS	Ley Federal de Juegos y Sorteos [*Federal Games and Sweepstakes Law*]
LFPA	Ley Federal del Procedimiento Administrativo [*Federal Law of Administrative Procedure*]
MP	Ministerio Público [*Public Prosecutor*]
MFN	Most-Favored Nation
MST	Minimum Standard of Treatment
RFA	Request for Arbitration
NOI	Notice of Intent to Submit a Claim to Arbitration
2009-BIS Oficio	DGAJS/SCEV/0260/2009-BIS Oficio, dated May 27, 2009
Operator Oficio	DGAJS/SCEV/00619/2008 Oficio dated December 9, 2008 which authorizes E-Mex to have E-Games as its operator.

Permitholder Oficio	DGAJS/SCEV/0827/2012 Oficio dated August 15, 2012, whereby SEGOB changed the status of E-Games from operator to permitholder of seven casinos under the same terms and conditions as the E-Mex Permit.
Permitholder-BIS Oficio	DGJS/SCEV/1426/2012 Oficio, dated November 16, 2012 whereby the General Director of the DGJS clarifies that the Oficio of Permitholder is valid and issues permit number DGAJS/SCEVF/P-06/2005-BIS to E-Games.
Verification Orders	Verification orders dated April 23, 2014
PAN	Partido Acción Nacional [*National Action Party*]
Permit	Administrative act issued by SEGOB, that allows a natural person or a legal entity carry out sweepstakes and games with gambling, during a specific period of time and limited in its scope to the terms and conditions determined by the Secretariat
E-Mex Permit	Permit number DGAJS/SCEVF/P-06/2005 issued to E-Mex to operate 40 draw rooms and remote gambling centers.
Permitholder	Natural person or legal entity to which SEGOB grants a permit to carry out any activity on games with gambling and sweepstakes legally allowed by the Law and its Regulations.
Petolof	Petolof S.A. de C.V.
Prescience, LLC	Prescience
PRI	Partido Revolucionario Institucional [*Institutional Revolutionary Party*]
First Compliance	Ruling issued by SEGOB dated July 19, 2013, which voided the 2009-BIS Oficio and rejected E-Games' petition to operate the E-Mex Permit independently.
First Collegiate Court	First Collegiate Administrative Court of the Fourth Circuit, Nuevo Leon.
Disciplinary Proceeding	Administrative proceeding that decides penalties in accordance with the LFJS and its Regulations, which may decide to remove a permit or close down an establishment.

Producciones Móviles	Producciones Móviles, S.A. de C.V.
Projects	The Claimants' alleged projects relating to online casinos and those located in Cabo San Lucas, Baja California, and Cancun, Quintana Roo.
PSA	Proveedor de Servicio Autorizado [*Authorized Service Provider*]
PTU	Participación de los Trabajadores en las Utilidades de la empresa [*Workers' profit sharing*]
Motion for Reconsideration	Motion for Reconsideration filed by E-Games against the Non-Compliance Claim and the ruling dated March 10, 2014, in which the Sixteenth Court ruled that the judgment from *Amparo* 1668/2011 had been enforced. The Supreme Court assigned it case number 406/2014, which was forwarded to the Seventh Collegiate Court and assigned Reconsideration file number 5/2014 connected with Reconsideration 9/2014.
Administrative Review	Motion for Administrative Review filed by E-Games against the inspection orders and verification reports.
QE Reply	Reply of the Claimants represented by Quinn Emanuel Urquhart & Sullivan LLP.
Petolof Decision	Decision issued on October 28, 2008, in administrative proceeding UG-010/2008, enforcing the *Amparo* judgment in favor of Petolof as a member of EDN.
Review 107/2013	Motion for Review filed by E-Mex, E-Games, Producciones Moviles, and SEGOB against the judgment from *Amparo* 1668/2011, dated January 31, 2013.
RLFJS or Regulations	Reglamento de la Ley Federal de Juegos y Sorteos [*Regulations to the Federal Games and Sweepstakes Law*]
SAT	Servicio de Administración Tributaria [*Tax Administration Service*]
SE	Ministry of Economy
SEGOB	Ministry of the Interior

Second Regional Chamber	Hidalgo-Mexico Second Regional Chamber of the Federal Tax and Administrative Court
Second Compliance	Ruling issued by SEGOB dated August 26, 2013, which voided all official notices issued based on the 2009-BIS Oficio, including the Permitholder-BIS Oficio.
Seventh Collegiate Court	Seventh Collegiate Administrative Court of the First Circuit, which decided Review 107/2013, the Non-Compliance Claim, and the Motion for Reconsideration.
SPA	Share purchase agreement with Eventos Festivos.
Supreme Court	The Federal Supreme Court
BIT	Bilateral Investment Treatry
FET	Fair and Equitable Treatment
NT	National Treatment
MFNT	Most-Favored Nation Treatment
TFJFA	Tribunal Federal de Justicia Fiscal y Administrativa [*Federal Tax and Administrative Tribunal*] (now the Tribunal Federal de Justicia Administrativa) [*Federal Administrative Tribunal*]
NAFTA	North American Free Trade Agreement
Verification Visits	Visits carried out to E-Games Casinos on April 24, 2014.
FMV	Fair Market Value

I. INTRODUCTION

1. The case presented by the Claimants is one of the typical cases where investors seek to force the use of investment arbitration provided in the North American Free Trade Agreement (NAFTA), to resolve a complex dispute between private parties that emanates from a risky investment made by the Claimants with Mexican investors. Claimants cannot disagree with the tense relationship they had with E-Mex and the series of lawsuits related to the permits to operate casinos and gambling games. The State was oblivious to the investment decisions adopted by the Claimants and their litigation strategy before national courts. As the Tribunal will be able to observe, the litigation before national courts gave rise to the Respondent acting, under the applicable legal framework, and complying with decisions issued by national courts, where the Claimants participated and presented their arguments. Neither can the Claimants expect the authority to fail to comply with its mandate and illegally allow the operation of casinos that do not have a permit under the applicable legal framework. Finally, this dispute is not politically motivated as the Claimants allege. On the contrary, those arguments or defense strategies reflect the fragility and lack of merit of your claim.

2. In response, the Claimants submitted a 709-page Reply, that is, 266 pages more than their Memorial on the Merits. This does not surprise the Respondent and is part of the litigation strategy that they have decided to deploy for this arbitration. It should also be remembered that the Claimants had 12 months from the presentation of the Respondent's Counter-Memorial on the Merits to the presentation of their Reply. During this time, the Claimants had plenty of opportunity to stretch themselves unnecessarily and desperately try to gather evidence that might give some support to their arguments. Unfortunately, as will be seen in this Rejoinder, the Claimants have failed in their objective.

3. This Rejoinder contains the factual, legal and *quantum response* to the claims filed against the Mexican State. As can be seen, throughout this Rejoinder, the Respondent has avoided unnecessary repetition and provides a timely response to the Claimants' arguments, providing the necessary evidence to show that the case presented by the Claimants lacks merit and should be dismissed outright. its entirety.

4. The Claimants reiterate that they started their operations under the Monterrey Resolution, however, once again they overlook that according to the RLFJS, it was necessary to have a permit

to be able to operate casinos. Knowing this, they decided to establish their operations under the Monterrey Resolution which, as explained in the Counter-Memorial, is not a permit to operate casinos, but rather a resolution stating that the operation of certain machines does not fall within the scope of application of the LFJS. Claimants either did not operate casinos before 2008 or did so illegally. In any case, they were aware that they required a permit to operate a casino and did nothing to get it until 2008 when they decided to become E-Mex operators.

5. Claimants' factual narrative is replete with conspiracy, political intrigue, and corruption. However, this narrative is not consistent with reality. What is certain is that the Respondent's entities acted in compliance with the Mexican legal framework.

6. Since their Memorial, the Claimants have maintained that Mexico declared its permit non-subsistent for political reasons. They alleged that the permit that protected their operations was granted by the PAN administration that ended on November 30, 2012, and that, upon the arrival of the PRI administration on December 1, 2012, an attack began against E- Games to remove their permission.

7. The Respondent has demonstrated since the Counter-Memorial, and reinforces it in this Rejoinder, that the alleged political motivations did not exist and are more than a plot designed by the Claimants to justify bad decisions such as the selection of their business partners, the conduct of their business and the strategy followed in the trials that were brought before Mexican courts. The Respondent has argued, through evidence and witness statements (*e.g.*, Ms. Marcela González Salas) that the political motivations referred to by the Claimants never existed. A conspiracy, such as the one Claimants describe, would have required the coordinated intervention of many individuals and government entities. In this Rejoinder, in addition to a Second Witness Statement of Ms. González Salas, which reinforces and reiterates that there were no such political motivations, the Witness Statement of Mr. Carlos Véjar Borrego has been included, who declares that when the Claimants made the knowledge of Mexico its claim to present a dispute through a letter sent by the firm White & Case (which in 2013 represented the Claimants), the Respondent did nothing more than try to resolve the dispute without the need to resort to arbitration. Had there been political motivations against Claimants, Mr. Véjar's meetings with Claimants' representatives in 2013 would not have taken place, and Respondent would not have tried to bring Claimants closer to SEGOB to avoid having this arbitration.

8. The Claimants have also argued that public servants of the Federal Judiciary of Mexico, including members of the Supreme Court of Justice of the Nation, were also involved in the alleged political campaign against the Claimants. The Claimants have not presented evidence to support these assertions and base their arguments on the testimony of Mr. Julio Gutiérrez who is the legal representative of the Claimants in this proceeding and partner of the Juegos Companies. His testimony is limited to stating that saw the then Legal Counselor of the Federal Executive, Mr. Humberto Castillejos Cervantes, leave the office of Minister Alberto Pérez Dayán. That's how flimsy Claimants' evidence is. The Respondent submits with this pleading a Second Witness Statement from Mr. José Raúl Landgrave, who affirms that the Legal Department of the Federal Executive never requested information about the lawsuits that E-Games was conducting, although he was the one who handled the case as a lawyer. of the SEGOB.

9. The Claimants refuse to acknowledge that the amparo proceeding 1668/2011 that led to the declaration of non-subsistence of the E-Games permit was the result of a conflict between private parties, that is, a conflict between E-Games and E -Mex. SEGOB did not promote this protection, much less did it seek to benefit or harm any permit holder by declaring invalid or revoking the E-Games permit. SEGOB simply limited himself to comply with a judicial sentence that it was not in a position to breach. It is probable that, if E-Mex had not promoted Judgment 1668/2011, E-Games would have its permission today. It was the Claimants themselves who decided to do business with Mr. Rojas Cardona and E-Mex with full knowledge of his questionable background and the problems and risks generated by his enormous debt with Bluecrest.

10. As the Respondent explained in its Counter-Memorial, SEGOB initially left only the Official Letter 2009 BIS unsubstantiated, but E-Mex complained that SEGOB did not properly comply with the ruling. The Sixteenth Court agreed with E-Mex and ordered SEGOB to leave all the acts derived from Official Letter 2009 BIS unsubstantiated. It was then that SEGOB declared the entire series of official documents unsubstantiated, including the official document of August 2012 that granted E-Games its permit (Oficio de Permisionario) and the one of November of that same year that confirmed its status as a permit holder and assigned a new number to the permit (BIS Permit Holder Official Letter). There was no conspiracy or political motivations behind the non-subsistence of the permit and E-Games participated as a party in the internal procedures and trials substantiated in national courts. E-Games always had the opportunity to defend himself and

present evidence in his favor. If the Claimants were wrong or presented a poor defense that caused their arguments to fail, this is not attributable to the Respondent.

11. The Claimants allege irregularities in the amparo proceeding and the different legal remedies. However, after reviewing and analyzing the files of the national trials, the Respondent's independent expert has concluded that the different bodies of the Federal Judicial Power did not commit irregularities and that the judicial procedures were substantiated under the Amparo Law and applicable regulations. The Claimants refuse to accept and acknowledge that they lost these lawsuits and intend to use this procedure to litigate again issues that have already been decided by the Mexican courts under the applicable regulations. This Arbitral Tribunal is urged to disregard these arguments of the Claimants and not turn the NAFTA arbitration into a court of appeal to the decisions of Mexican national courts.

12. On the other hand, the Claimants have included the two casino projects in Cabo and Cancun, as well as an online casino (the Expansion Projects) as covered investments under NAFTA. The Respondent maintains that the Tribunal does not have jurisdiction to consider claims related to alleged violations of NAFTA Articles 1102, 1105, or 1110 concerning activities that do not fall under the definition of "investment" established in Article 1139, such as the Projects of Expansion. In other words, it is a prerequisite for filing a claim under these articles that the investor demonstrates that it has a covered investment under the definition of NAFTA Article 1139 in these projects. The Claimants have not shown that the casino projects in Cabo, Cancun, and the online casino constitute an "investment" as that term is defined in Article 1139. The investments they identify in connection with these Expansion Projects, in any case, would not justify a claim for the expropriation of these casinos or damages equivalent to fair market value if they were going concerned. It is reiterated that these casinos not only never materialized, but had not even begun to be built. The analysis that the Tribunal has to make is not whether the Claimants were exploring the possibility of opening casinos in Cabo, Cancun, and the online casino (they were), but whether those plans materialized in a covered investment. From this analysis, the Tribunal will realize that the Expansion Projects cannot be considered as such an investment covered by NAFTA.

13. As regards the claim related to the existing Casinos, the Respondent maintains that there was no expropriation of the Claimants' investment, since the non-subsistence of the E-Games permit was the result of compliance with a court order issued in an amparo lawsuit initiated by E-

Mex. SEGOB had no alternative but to comply with the order of the Sixteenth Court that resolved Amparo 1668/2011. It should not go unnoticed that SEGOB's compliance with this ruling has been ratified by national courts, and it is not up to this Court to challenge those decisions or impose its criteria in the absence of a denial of justice.

14. Under NAFTA, the fair and equitable treatment (FET) standard is a sub-element of the MST under customary international law. The FET standard cannot be interpreted as a stand-alone FET standard or a standard with a lower threshold than that established by the MST under customary international law. For the Claimants to establish an MST violation under NAFTA Article 1105(1), they must be able to show that a denial of justice has occurred. However, the Claimants have not been able to show that there was. His evidence, which consists primarily of innuendo, is markedly insufficient to meet the high threshold for demonstrating a denial of justice. To date, the Claimants remain unable to prove this alleged violation.

15. Concerning the alleged violation of NAFTA Articles 1102 and 1103, the Claimants have also not offered conclusive evidence. They have not been able to demonstrate that the Respondent accorded less favorable treatment to its investments than the treatment accorded to national investments or investors of other trading partners of Mexico, in similar circumstances. The Claimants have not provided evidence of competitors who are in "like circumstances" in accordance with the multidimensional examination referred to in investment arbitration precedents. The Claimants have attempted to argue that the Mexican company Producciones Móviles continues to operate its Permit, however, as has been shown, this company continues to operate its Permit because the litigation in amparo 1668/2011 was limited to the E-Games BIS Permit and their related trades, that is, it was never decided in that trial about the permission of Producciones Móviles. Neither SEGOB nor the Claimants could have requested the waiver of this Permit because they have no legal interest under Mexican law. The one who could have made this request before the Mexican courts was E-Mex, and it did not.

16. The Respondent's position regarding the claim for damages can be summarized in the following points:

- The Claimants seek damages of USD $317.3 million (before interest) based on the fair market value of five existing casinos and three more that were never built and therefore never entered into operation. Because the Claimants do not own the

Casinos, such a claim can only be brought under section 1117 and must be paid directly to the Mexican Companies according to section 1135(2)(a). As shareholders of the Mexican Companies, the Claimants can only claim the loss of the value of their shares under article 1116.

- The damage claim related to the so-called Expansion Projects, amounting to USD $154.9 million (before interest) and representing close to 50% of the damages, must be dismissed because there is evidence that: (i) the projects failed due to reasons not attributable to the Respondent and therefore, there is no causality, and; (ii) the damage estimate is highly speculative and does not comply with the principle of reasonable certainty because they were projects in the planning stage (not even pre-operational) that cannot be evaluated using an income methodology such as the DCF. About this last point, the Claimants' previous experience with other casinos does not apply to the Expansion Projects because the Los Cabos, Cancun, and online markets are completely different, as the Claimants themselves acknowledged at the time.

- The existing Casino-related damage estimate is grossly exaggerated and some of the information is unreliable. The main problems are: (i) the projection of future income and, in particular, the growth rate used by the Claimants' expert (BRG); (ii) a deficient calculation of the shares that the Claimants were obliged to pay to SEGOB; (iii) the calculation of operating expenses, and; (iv) the use of the financial statements of E-Games that include the results of the Huixquilucan casino (which is not part of this claim) and presents important differences in items such as the rental of machines and depreciation. Other differences do not affect the result so significantly, but they must be taken into account.

- By all of the foregoing, the Respondent's expert has carried out an alternative valuation of the Claimants' Casinos and has concluded that the damages should be, at most, USD $11.86 million plus pre-award interest.

- The Claimant considers that, in case of granting a favorable award to the Claimants, the Tribunal must reduce the damages by at least 50% due to the contributory fault of the Claimants. In particular, the Respondent maintains that the Claimants, and in particular those who ran the business, negligently and deliberately decided to

associate with Mr. Rojas despite having obtained a report from an investigative company reporting all kinds of irregularities and "red flags", and recommended not doing business with him. They also negligently and deliberately partnered with Mr. Rojas knowing that E-Mex's permit was in serious jeopardy because of E-Mex's debt to Bluecrest. Finally, the Respondent maintains that the cancellation of the permit was the direct consequence of a lawsuit between E-Games and E-Mex that arose due to a breach by E-Games of the agreements it had with E-Mex, as the award demonstrates. in CAM arbitration.

- In relation to the previous point (*i.e.*, contributory fault), Mr. Taylor has also presented evidence of all kinds of irregularities in the administration of the Casinos, ranging from the theft of cash from the vault, the theft and destruction of records accountants, non-compliance with tax obligations and payment of bribes, among others. The Respondent maintains that these irregularities break the causal link between the measures claimed and the damage because they would have eventually given rise to investigations by the Mexican authorities and the cancellation or non-renewal of its permit.

- Finally, regarding the applicable interest rate, the Respondent maintains that it must apply the US Prime Rate which, contrary to what the Claimants and their expert affirm, is not a risk-free rate, but rather a reasonable commercial rate for an award. denominated in US dollars, as provided in section 1110(4).

17. Next, the facts will be presented, immediately afterward the legal argument is presented and it concludes with the presentation of the Respondent's position on the damages.

II. FACTS

A. Establishment and start of operations

18. In their Reply, the Claimants argue that the start of their operations under the Monterrey Resolution was legal, successful, and approved by SEGOB. However, they have not been able to resolve a series of contradictions that affect the credibility of Mr. Burr and Ms. Burr and reveal the illegality of the Claimants' operations.

1. Legal framework

19. First, it is noted that the Claimants do not dispute anything said about the legal framework that existed when they decided to start their operations in Mexico in 2005. In particular, they do not dispute that: on September 17, 2004, the Federal Executive issued the Regulation of the Federal Law of Games and Raffles (RLFJS or Regulation) that, among other things, requires processing and obtaining a permit to be able to legally operate a casino in Mexico (article 20); that article 31 of the Regulation prohibits the transfer, assignment, alienation or commercialization of permits and; that article 30, which establishes the figure of an operator, requires that there be some type of joint venture, provision of services or an agreement of some other nature so that a permit holder can exploit his permit in conjunction with an operator.

20. Nor do Claimants dispute that the Regulation remained in force during the constitutional controversy presented by the House of Representatives in November 2004 and that was finally resolved by the Supreme Court of Justice of the Nation (SCJN) in January 2007. Therefore, it is an undisputed fact that when Mr. Burr and his partners decided to invest in casinos in Mexico in 2004 or 2005 they knew that a permit was needed to operate them. That, without permission under the applicable legislation, their operations would be illegal. However, there is no evidence that they even tried to get one back then. This notwithstanding that "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"[1].

21. What the evidence demonstrates is that, instead of obtaining the permission required by the Regulation, the Claimants sought to turn the LFJS and its Regulation around by joint venture with

[1] Reply, ¶ 36.

Mr. Lee Young to operate their casinos under the called the Monterrey Resolution. Contradictorily, the Claimants also allege that they "relied on the guarantees provided by the newly enacted 2004 Gaming Regulation in making their investment in Mexico".[2]

22. The Respondent maintains that any prudent and serious foreign investor would have tried to obtain the permission required by the laws of the host country before making his investment and committing his capital and that of his partners.

2. First contacts

23. In his third witness statement, Mr. Burr stated that he met Mr. Young in August 2004. Mr. Burr described Mr. Young as "an American citizen who was operating a profitable video entertainment facility" in the city of Monterrey, through a company called JEV Monterrey. According to Mr. Burr, this company had obtained an "authorization" from SEGOB to operate its entertainment centers (the Monterrey Resolution).[3]

24. Mr. Burr then stated that after he met with Mr. Young in August 2004 he made several exploratory and due diligence visits to various gaming facilities around Mexico. He claims to have met with key players – whom he does not identify – and, through those meetings, "quickly realized that what Mr. Young had told [him] was true—gaming operators were making substantial profits in Mexico and it was legal to operate such businesses there."[4] He also claimed to have carried out extensive due diligence and obtained opinions from two Mexican law firms to ensure that his planned operations in Mexico were legal.[5]

25. In the Counter-Memorial, the Claimants were made to see that what Mr. Burr stated could not be true because the Monterrey Resolution was not issued until March 5, 2005, and, therefore, it was not possible that would have discussed it with Mr. Young in August 2004, let alone analyzed it as part of his *due diligence*. Faced with this contradiction, the Claimants now change their position and state that Mr. Burr's exploratory trips began in late 2004 and that Mr. Young began

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2 *Id.*, ¶ 19.

3 Counter-Memorial on the Merits, ¶ 62.

4 CWS-50, Third Witness Statement of Mr. Burr 3, ¶¶ 3 and 4.

5 Reply, ¶ 22; Exhibit CWS-59, Fourth Witness Statement of Mr. Gordon Burr, ¶ 5.

operating his “machines in 2004, with the understanding that JEV Monterrey did not need a permit."[6]

26. Regardless of the fact that the Claimants do not speak for Mr. Young and have not presented him as a witness in these proceedings, the Respondent notes that there is a contradiction in this new approach. If what Mr. Young communicated to Mr. Burr in August or late 2004 was that a permit was not required to operate the type of establishments he operated at the time, Mr. Burr surely should have confirmed it with his legal advisers and, if successful, would surely have sought to open their establishments without a permit. That obviously was not what happened.

27. The Claimants reiterate a little later that “Mexico ignores the important fact, however, that according to SEGOB, Mr. Young and JEV Monterrey did not need a permit from SEGOB to operate the type of machines owned or run by JEV Monterrey.”[7] But this would only force one to ask: if the machines operated by JEV Monterrey (and by extension those operated by the Claimants) did not require a permit from SEGOB, why would it have been necessary to start operations under the Monterrey Resolution? What law or regulation establishes the requirement to have a SEGOB resolution to operate "skill and skill machines" that do not fall within the scope of application of the LFJS or its Regulations? Even if the requirement (*quod non*) existed, why did not the Claimants process their own Monterrey Resolution instead of associating with JEV Monterrey and committing to pay it 15% of the fiscal profit of each establishment they opened? This makes no sense.

28. The Claimants surprisingly also allege that “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."[8] In doing so, the Claimants seem to forget that from 2005 to 2008 the 5 casinos they opened in Mexico operated under the Monterrey Resolution, in a joint venture with JEV Monterey, owned by Mr. Young. Therefore, the legality of Mr. Young's operations and, by extension, those of the Claimants in the period 2005-2008, is decidedly relevant to this case.

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6 Reply, ¶ 16

7 *Id.*, ¶ 31.

8 Reply, ¶ 20.

3. The Monterrey Resolution

29. The Respondent explained in its Counter-Memorial that the Monterrey Resolution was not a permit or authorization – as Mr. Burr falsely described[9] it – but rather an official letter issued by SEGOB stating that the machines operated by JEV Monterrey were not in the scope of application of the LFJS because: (i) the result depended on the skill of the player and, therefore, they could not be considered games of chance prohibited by the LFJS, and; (ii) were not gambling games.[10]

30. The origin of this official letter is a letter dated September 8, 2004, in which JEV Monterrey alleged that its commercial activity consisted of the "use, exploitation, import, distribution, sale, lease, installation, transmission or assignment of skill machines and skill [...] [which] do not involve chance or gambling in any form".[11] This being the case, it is clear that the Claimants could not operate "casinos" or machines involving chance or betting under the Monterrey Resolution.

31. This is where we find another inconsistency in the Claimants' statement of facts because, to justify their decision in 2008 to operate under the E-Mex permit instead of proceeding to purchase Festive Events, the Claimants allege that the E-Mex permit E-Mex was more attractive, among other things, because it allowed the operation of Class III machines, like the ones they had.[12]

32. However, it should be noted that Mexico does not have a classification for gaming machines, and the permits do not specify the "class" of machines that a casino can operate. Although the Claimants do not specify what they mean by "Class II" or "Class III" machines, the

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9 Claimants angrily complain that "Mexico asserts that Mr. Burr suggests that the Monterrey Resolution was a permit." They also state that Mr. Burr "has never said, nor even hinted, that the Monterrey Resolution was a permit [...]". Mexico never asserted that Mr. Burr suggested that the Monterrey Resolution was a permit. What he claimed is that Mr. Burr had described it as an "authorization". CWS-50, ¶ 3 where it states: Mr. Young had obtained an authorization to operate these types of facilities throughout Mexico pursuant to a validly-issued Resolution issued by the Mexican Secretary of the Interior [...]"

10 Counter-Memorial on the Merits, ¶ 68.

11 Exhibit C-94, Monterrey Resolution, p. 1.

12 Reply, ¶ 40. In this regard, Ms. Burr testifies: "When we were operating under Monterrey's Resolution, we equipped our existing five Casinos with certain Class III machines that were specifically approved as gaming machines of skill under Monterrey's Resolution." CWS-60, ¶ 18. Mr. Burr, for his part, also testifies that "Monterrey's Resolution allowed us to operate certain machines that Mexico had classified as Class III machines which, in the industry, are deemed superior to Class II machines." CWS-59, ¶ 13

reference appears to be to the classification of games under the US *Indian Gaming Regulatory Act*[13]. Class III includes all kinds of games that fall neither in Class I nor in Class II and refers to games that are traditionally played in casinos, such as slot machines, blackjack, craps, roulette, as well as gambling games and their electronic facsimiles and any game of chance.[14] In this regard, Mr. Pérez Lizaur points out that:

- In Mexico, there is no official classification of machines and the distinction between Class II and Class III machines is a classification that exists and is used in the United States.[15]
- Class II machines are known as "Bingo" machines and Class III is "Reel" machines; both are considered "gambling gambling" machines.[16]
- The permits issued by SEGOB do not specify the type of machines authorized to operate; the permit holders make a query to the SEGOB with the description of the machines and, later, the SEGOB issues the corresponding authorization.[17]

33. If the hypothesis is correct, it is clear that the Claimants could not have operated Class III (or Class II) machines under the Monterrey Resolution because they are games of chance with a bet and, as explained a moment ago, the Monterrey Resolution was obtained under the representation of JEV Monterrey that the machines it operated were of "skill and dexterity" in which neither chance nor betting intervened.

34. JEV Monterrey's representation that the machines it operated (and by extension those of the Claimants) operated neither gambling nor gambling is also contrary to Mr. Burr's testimony. As explained in the Counter-Memorial, Mr. Burr stated that he could "set the payback rate [*i.e.*, *payback rate*] at a high level" so that "customers to win and enjoy their time in the Casinos"[18]. It

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13 Exhibit R-126, Indian Gaming Regulatory Act, p. 2

14 *See* Exhibit R-126, Indian Gaming Regulatory Act.

15 RWS- 8, Witness Statement of Mr. Alfonso Pérez Lizaur, p. 4.

16 *Id.*

17 *Id.*

18 CWS-50, Third Witness Statement of Mr. Gordon Burr, ¶ 27.

is evident that the ability to adjust the payback rate of a machine is incompatible with the idea that the outcome of the game depends on the skill of the player.

35. The Claimants allege that SEGOB inspected the machines and found that their operation adhered to the description provided by JEV Monterrey at the time. However, considering that "Mexico unfortunately is a country where corruption is endemic in the culture, increases yearly and remains rampant "[19], it would not be difficult to think that JEV Monterrey, and later the Naucalpan casino, managed to pass the inspection by corrupting the inspectors. of the SEGOB. After all, there is evidence on the record indicating that the Claimants paid bribes and/or knew about the payment of bribes, in Mr. Burr's words:

> RANDALL TAYLOR: How good are bribes down there?
> GORDON BURR: How good are they?
> RANDALL TAYLOR: Well, I'm just saying –
> GORDON BURR: They're [UNINTEL].
> RANDALL TAYLOR: – They pissed backwards on you a couple of times, didn't they?
> GORDON BURR: The bribes are good. They're only good for a certain amount of time.
> RANDALL TAYLOR: What a country.[20]

36. The only other alternative would be to conclude that the SEBOG inspectors made a mistake in approving the machines operated by the Claimants because, as just explained, Class III machines and those in which "the payback rate" can be adjusted are games of chance and gambling.

37. The Claimants justify the decision to start operations under the Monterrey Resolution by arguing that it was the most solid, prudent, and conservative decision in the circumstances since the Regulation had been challenged and there was no certainty about its future. It is a somewhat peculiar argument for at least two reasons. In the first place, because, as explained above, the application of the Regulation was not suspended while the constitutional controversy was resolved. In other words, it was still a legal requirement to have a permit to operate a casino in Mexico. Second, because the LFJS prohibits games of chance and betting in all its forms, as explained in

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[19] Reply, ¶ 1.

[20] Transcribed by Respondent from Exhibit CRT-04, p. 26 (p. 100 of the transcript contained in the annex).

the Statement of Defense, so that, if the Regulation had been declared unconstitutional, the Claimants would never have been able to operate a casino. in Mexico.

38. Finally, it is necessary to clarify that contrary to what the Claimants point out, Mexico does not intend to present the Claimants' initial operations as illegal because the Monterrey Resolution was not issued until March 2005.[21]The legality of the Monterrey Resolution *per se*. Mexico questions the legality of the Claimants' initial operations because the description of the machines that they have offered does not conform to the provisions of the Monterrey Resolution, that is, they are not machines in which neither chance nor the bets. In short, Class III machines cannot be considered "Video Games" as indicated in section "C" of the *joint venture agreement* cited by the Claimants in paragraph 31 of the Reply.

B. The decisión to operate under the E-Mex Permit

39. In the Counter-Memorial, the Respondent referred to the fact that the Claimants decided to withdraw from the transaction with Festive Events, lose their deposit of one million dollars and operate their casinos under the license of E-Mex. This despite knowing that E-Mex was owned by a person who, by his own admission, had a questionable background and had driven his original partner, Mr. Young, out of business.[22]

40. To justify their decision, the Claimants repeat the same arguments in the Memorial. According to the Claimants, the E-Mex permit was more attractive because it covered a greater number of casinos, had no restrictions regarding the location of the establishments, and allowed the operation of Class III machines like the ones they had. [23]They also reiterate that, with the proposed transaction by Advent and Bluecrest, the Claimants would have been able to use E-Mex's license to operate casinos without any involvement by Mr. Rojas Cardona.[24] Additionally, they argue for the first time that an additional drawback of the Eventos Festivos transaction was that

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21 Reply, ¶ 31.

22 Counter-Memorial on the Merits, ¶ 82.

23 Reply, ¶¶ 39-40.

24 *Id.*, ¶ 44.

they needed to raise external capital to acquire the company.[25] Again, these arguments are not supported by the facts.

41. The Claimants have never explained the basis for saying that the E-Mex permit admitted Class III machines while the Eventos Festivos permit did not. The permits do not refer to this classification or describe what type of machines could be used.[26] Nor have they explained the alleged restriction on the geographic location of the casinos of the Eventos Festivos permit. In fact, the available evidence shows that, during the negotiations with said company, the change of location of 5 of the establishments was requested to accommodate the Claimants' casinos, and Eventos Festivos was able to achieve it without any problem.[27] The issue of the number of casinos that could be operated under one permit or another is another that lacks substance because the Claimants have not presented further details of the intended operation between E-Mex, Bluecrest, and Advent and, in accordance with the agreement reached with E-Mex, Bluecrest, and Advent, E-Mex, only the 5 existing casinos could operate plus another two that had not yet been defined.[28]

42. It should also be noted that the Claimants contradict themselves and change their narrative depending on the forum in which they find themselves. In particular, the change of position of the Claimants with respect to what they indicated in the Notice of Arbitration, the Jurisdiction phase, and what they stated before the tribunal in the arbitration between E-Mex and B-Mex Group in the Mexican Arbitration Center (CAM).

43. In the following sections, the Respondent will refer to the contemporaneous evidence on the record, and to the different versions of the facts that the Claimants have offered in relation to the decision to operate under the E-Mex permit.

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25 *Id.*, ¶ 40.

26 RWS-8, Witness Statement of Mr. Alfonso Pérez Lizaur, p. 4.

27 Counter-Memorial on the Merits, ¶ 80.

28 This was also noted in the Counter-Memorial on the Merits, ¶ 83.

1. The Claimants were unable to obtain the resources for the acquisition and therefore the transaction with Eventos Festivos did not materialize

44. The Tribunal will recall that the Claimants entered into a share purchase agreement (SPA) with Eventos Festivos and paid a non-refundable deposit of one million dollars.[29] The SPA was signed on February 21, 2008, and the closing date was scheduled for no later than April 2, 2008.[30] The final purchase price was set at $28.5 million dollars.[31]

45. According to the SPA, the Claimants had the right to extend the payment date of the remaining balance for periods of fifteen days by paying USD $300,000.00 for each extension.[32] These payments were non-refundable and could not be credited against the purchase price or any other payment obligation.[33]

46. The evidence presented with the Reply shows that they exercised their right of extension on 3 occasions: on April 2, 2008, on April 17, 2008, and on May 2, 2008.[34] On May 20, 2008, Eventos Festivos notified the Claimants that the last extension had expired on May 19 and granted a period of 10 days to pay the final purchase price equivalent to 27.5 million dollars.[35] On June 5, 2008, Eventos Festivos notified the Claimants that the 10-day period had elapsed without the final payment having been made, thus an event of default had been updated. Festive Events terminated the SPA and kept the payments made by the Claimants for a total of US$1,900,000 – *i.e.*, the initial deposit of one million dollars plus US$900,000 corresponding to the three requested extensions.[36]

47. Documents filed with the Reply show that the Claimants retained Crowell, Weedon & Co. (Crowell) to advise them on the financing of the Eventos Festivos acquisition.[37] Exhibit C-383, an engagement letter dated February 20, 2008, from Crowell's director to Mr. Burr shows that

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29 Memorial, ¶ 78; Counter-Memorial on the Merits, ¶ 79. Exhibit C-250, Stock Purchase Agreement (SPA) with Holiday Events.

30 Exhibit C-250, Stock Purchase Agreement (SPA) with Holiday Events, pgs. 18 and 24.

31 *Id*., p. 4.

32 *Id.*

33 *Id.*

34 Exhibit C-380, Communication of Holiday Events regarding the breach dated June 5, 2008, p. 1.

35 Exhibit C-379, Communication of Holiday Events dated May 20, 2008, pgs. 1-2.

36 Exhibit C-380, Communication of Holiday Events regarding the breach dated June 5, 2008, p. 2.

37 Reply, ¶ 44 and Exhibit C-383, "Engagement Letter" with Crowell Weedon, p. 1.

BlueCrest and Tangent Capital were also involved in the Eventos Festivos transaction.[38] However, the Claimant's narrative suggests that BlueCrest was only involved in the potential transaction with E-Mex.

48. It is now clear to the Respondent that the explanation behind the abandonment of the Eventos Festivos opportunity is that Mr. Burr and his partners failed to raise the necessary capital to close the transaction. Later it will be seen that the first formal documents on the possible transaction with BlueCrest, Advent, and E-Mex are after the termination of the SPA with Eventos Festivos. In sum, the Claimants did not "prefer" the deal with E-Mex; they were forced to accept it because they had no other alternative to keep their Casinos in operation. However, instead of waiting for the transaction between Bluecrest, Advent, and E-Mex to materialize, they unwisely decided to tie their operations to those of Mr. Rojas, knowing the risks that this implied.[39] That decision was the Claimants' own, and the results of their business decisions cannot now be attributed to Respondent.

2. The reason behind the decision to operate under gaming and sweepstakes permit and deviate from the Monterrey Resolution

49. Claimants' explanation of the decision to stop operating under the Monterrey Resolution and instead operate under E-Mex's license is riddled with contradictions. In the Counter-Memorial, the Respondent mentioned that, according to the Claimants, obtaining a permit would have allowed them to continue operating their five existing Casinos plus the casinos in Cabo and Cancún, but that the Claimants had not explained why this would not have been possible under the "Monterrey Resolution" or what were the advantages of becoming a permit holder versus continuing to operate as they had been doing.[40]

50. The Claimants have offered various explanations for changing the way their casinos had been operating since 2005. The evolution of the Claimants' position ranges from Mr. Burr's alleged "vision" of becoming a permit holder from the start to the final resolution of the SCJN on the constitutionality of the Regulation at the beginning of 2007:

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38 Exhibit C-383, "Engagement Letter" with Crowell Weedon, p. 1.

39 *See* Counter-Memorial on the Merits, ¶ 107.

40 Counter-Memorial on the Merits, ¶ 78.

> As of 2008, once the Mexican Supreme Court upheld the constitutionality of the new gaming legislation from 2004, it became clear that companies would need to purchase their own permit under the new gaming law to remain in business. We decided to look for a new validly issued gaming permit that we could acquire and through which we could operate. [41]

51. In contrast to these reasons, in the counter-memorial in the arbitration CAM 58/2010 between E-Mex and E-Games dated May 9, 2011, which was signed by Mr. Julio Gutiérrez, the Claimants stated that "it was not logical to think" that the business model in which E-Games decided to invest should change in such a short time – *i.e.* in less than two years – when the A&P contracts had a minimum term of 10 years:

> 15.- It is not logical to think that Grupo B-Mex would enter into various A&P Contracts to operate the Entertainment Centers (for a minimum term of 10 years as established in the second clause of the A&P Contracts), and then, without further ado, change the way they operate in a period of less than two years , especially considering that simply the construction and installation of the Entertainment Centers, in some cases, took from six to eight months.[42]
>
> 90.- The business model in which Egames decided to invest did not have to change in such a short time (less than two years)[43]
>
> [Emphasis added]

52. As can be seen, this differs materially from the explanations Claimants have offered in these proceedings.

3. The Claimants assumed the risk of doing business with E-Mex and Mr. Rojas Cardona knowing the risks that this implied

53. In the Counter-Memorial, the Respondent underlined that the Claimants ignored all the red flags regarding Mr. Rojas Cardona. Both Ms. Burr, Mr. Burr, and their attorney Julio Gutierrez testified that they had reservations about the possibility of doing business with Mr. Rojas Cardona because they knew that: Mr. Rojas Cardona had a criminal record, he had expelled Mr. Young

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41 CWS-1, Primera declaración testimonial del Sr. Gordon Burr ¶ 21.

42 Exhibit R-035, Counter-Memorial in Arbitration 58/2010 between E-Mex and E-Games, dated May 9, 2011, p. 18.

43 Exhibit R-035, Counter-Memorial in Arbitration 58/2010 between E-Mex and E-Games, dated May 9, 2011, p. 59.

from the Monterrey casinos, E-Mex had a huge debt with Bluecrest and, therefore, there was a risk that E-Mex would be declared bankrupt (as it was) and lose its license.[44]

54. In their Reply, the Claimants explain that in late 2007 Mr. and Mrs. Burr decided that they should conduct due diligence on Mr. Rojas Cardona and that, because they had heard some rumors about Mr. Rojas Cardona, they hired the company Prescience to investigate his background.[45] The Claimants note that "[w]hile Prescience's initial recommendation was that the Claimants separate from Mr. Rojas Cardona in a businesslike manner, Prescience did not advise against the transaction with BlueCrest and Advent"[46]. They also point out 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".[47] The Claimants again defend the decision to withdraw from the acquisition of Eventos Festivos and continue doing business with Messrs. Rojas Cardona and E-Mex, alleging that they could rely on the Petolof case to separate their operations from E-Mex if the agreement proposed by Advent and BlueCrest will not materialize.[48]

55. In the following sections, the Respondent will first address the contemporary evidence on Mr. Rojas Cardona; subsequently, it will expose the different versions of the Claimants on the reasons why they decided to sign the Settlement Agreement in April 2008 with E-Mex and, finally; will explain why the Petolof case could not have influenced the Claimants' decision to opt-out of the Eventos Festivos acquisition.

a. Evidence on the background of Mr. Rojas Cardona

56. In the Prescience memorandum, dated November 29, 2007, it is mentioned that Mr. Rojas Cardona was involved in various criminal proceedings; that he was charged with possession and intent to distribute marijuana; that he was charged with forgery and theft, and that he fled the

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44 Counter-Memorial on the Merits, ¶¶ 94-100.

45 Reply, ¶ 53.

46 *Id.*

47 *Id.*

48 *Id.*, ¶ 54.

jurisdiction while appealing his conviction.[49] The memorandum also mentions that he studied at the University of Iowa (from which he did not graduate) and that as president of the student assembly he was accused of embezzlement of student funds for luxurious personal expenses and that in 1992 he initiated proceedings under the Chapter of Insolvency and Bankruptcy in the United States.[50] In short, the evidence on the record demonstrates that in late 2007 and early 2008, the Claimants were fully aware that doing business with Mr. Rojas Cardona involved a high risk.

57. Exhibit C-389 consists of an email dated May 2008 from Mr. Bob Rice of Tangent Capital to Erin Burr and Gordon Burr showing that Mr. Burr and his daughter had serious concerns that Mr. Rojas Cardona will change his mind, and the deal will not materialize as planned: "[*t]he curten structure has been adopted to meet everyone's primary concern, most particularly yours: that Rojas Will change his mind*"[51]. Another document included in this exhibit illustrates the risk Claimants assumed by continuing their association with Mr. Rojas Cardona. The document mentions that, according to DEA, FBI, and ICE sources, the Claimants should not do business with Mr. Rojas Cardona:

> • Pepe is Watchlisted by U.S. authorities... however, there are no active warrants for him...
>
> • Subject is described as a "person of interest" to authorities...
>
> • Pepe is known in an "adverse context" to DEA, FBI and ICE authorities...
>
> • U.S. law enforcement is "monitoring" subject's activities in Monterrey, Mexico". According to contacts, they and the local authorities are "aware" of his current activities in Monterrey.
>
> • According to contacts, authorities believe that Pepe is involved in the financing of drug smuggling, primarily marijuana, between Mexico and the U.S.
>
> • If Pepe were to enter the United States, he would be flagged through the El Paso Information Center (as the central repository)... DEA, FBI and ICE databases would be alerted and personnel notified. These agencies would then take action "short of being stopped/detained"... this means that Subject would be placed under surveillance and monitored...

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[49] Exhibit C-389, mail of Mr. M. Baker to Mr. Gordon Burr enclosing the Prescience Report, dated July 11, 2008, p. 3.

[50] *Id.*, p. 4.

[51] Exhibit C-385, mail of Mr. M. Baker to Mr. Gordon Burr enclosing the Prescience Report, dated July 11, 2008, p. 1.

> • All contacts were unanimous in stating the opinion that "you should not do business with this individual [52]
>
> [Emphasis added]

58. The Claimants also had reservations about their previous dealings with Mr. Rojas Cardona. In the counter-memorial in the CAM arbitration, B-Mex Group refers to the bad faith with which the officials of JEV Monterrey (E-Mex Group) behaved during the negotiations of the *joint ventures* in 2006:

> It should be added that during the negotiation of the A&P Contracts, JEV Monterrey officials refrained from informing Grupo B-Mex that the company E-Mex had obtained the Permit on May 25, 2005, shortly before the conclusion of the first A&P Contract, nor that there was an opportunity to expand the business not only for the provision of services with certain skill and dexterity machines but also for the inclusion of games and raffles. The foregoing denotes the bad faith with which E-Mex officials have been conducting themselves, who did not reveal this business opportunity to the B-Mex Group Companies until the change of control in JEVMonterrey took place.[53]
>
> [Emphasis added]

59. Despite the fact that Mr. Rojas Cardona had apparently concealed from B-Mex Group that he had had a permit from SEGOB since 2005, in April 2008 the Claimants signed a Settlement Agreement with E-Mex, through which they continued their commercial operations indefinitely at the hands of Mr. Rojas Cardona. This agreement was signed exclusively by the Grupo Rojas and Grupo E-Games. BlueCrest and Advent were totally oblivious to this new business relationship between E-Mex and E-Games. Claimants' assertions that they "later also provided guidance on the proposed transaction with BlueCrest and Advent"[54]. If that were true, logic and prudence indicated that they should have waited for the operation to be finalized before continuing their association with Mr. Rojas.

60. In this context, the testimony of Mr. Julio Gutiérrez, attorney for the Claimants, stands out, who points out that it was not foreseeable that Mr. Rojas Cardona would not agree to sign the

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[52] Exhibit C-389, mail of Mr. M. Baker to Mr. Gordon Burr enclosing the Prescience Report, dated July 11, 2008, p. 2.

[53] Exhibit R-035, Counter-Memorial in Arbitration 58/2010 between E-Mex and E-Games, dated May 9, 2011, p. 16.

[54] Reply, ¶ 44.

transaction with Advent and that said the irrational decision by Mr. Rojas Cardona was the which caused the Claimants to remain commercially tied with E-Mex:

> It was certainly not foreseeable that Mr. Juan José Rojas Cardona ("Mr. Rojas Cardona") would not agree to sign the transaction with Advent, and that he would prefer to put E-Mex's permit at risk by being declared in bankruptcy due to the debts he owed to BlueCrest. Mr. Rojas Cardona's irrational decision not to accept the transaction with Advent caused the Claimants to be locked into an uncomfortable business relationship with E-Mex. [55]
>
> [Emphasis added]

61. The aforementioned Exhibit C-389, which contains Mr. Rice's email to Messrs. Burr, directly contradicts what Mr. Gutiérrez said. Mr. Burr strongly anticipated that Mr. Rojas might not agree to the Advent transaction.

b. The circumstances surrounding the signing of the Transaction Agreement between E-Games and E-Mex in April 2008

62. Claimants' position on the circumstances in which E-Games entered into the Settlement Agreement with E-Mex has also evolved throughout this proceeding. In the Memorial, the Claimants stated that "[a]s a condition of the proposed transaction with BlueCrest and Advent, Claimants completed the process to function as an operator under EMex's"[56]." However, in the Counter-Memorial at the Jurisdiction phase, the Claimants stated that they "were persuaded by the private equity companies to move their Casino operations under the E-Mex permit".[57]

63. For its part, in the Reply[58] and the fifth witness statement of Mr. Julio Gutiérrez, it is stated that they decided to renounce the acquisition of the Holiday Events permit at the *request* of BlueCrest and Advent:

> In addition, and importantly, at the time the Claimants made the decision to waive the possibility of acquiring the Eventos Festivos permit and staying with Advent and BlueCrest and the E-Mex permit, they did so at the request of these investment funds, and it was thought that the agreement and project with Advent and BlueCrest was going to materialize. This would result in the latter being the owners of the E-Mex permit and

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55 CWS-62, Fifth Witness Statement of Mr. Gutierrez, ¶ 18.

56 Memorial, ¶ 85.

57 Counter-Memorial on Objections to Jurisdiction, ¶ 46.

58 Reply, ¶ 45.

> Mr. Rojas Cardona would no longer play a role in the business as his interest would be acquired by Advent and BlueCrest. [59]
>
> [Emphasis added]

64. There is no contemporaneous document on the record (*i.e.*, April 2008) showing that Advent and BlueCrest requested or convinced Claimants to transition to the E-Mex permit. There is also no evidence that Advent and/or BlueCrest conditioned the alleged transaction for the acquisition of the E-Mex permit on the Claimants operating under the E-Mex permit.

65. What is in the file are documents prepared by the Claimants themselves that contradict their position in this proceeding. For example, in the counter-memorial in the CAM arbitration, B-Mex Group stated before that arbitral tribunal that, in 2008, it was E-Mex that proposed to B-Mex Group the installation and operation of machines that required a permit from the SEGOB and that will operate under the permission of E-Mex.

> Response to Fact 3.- It is true that in 2008 E-Mex proposed to the Companies of the B-Mex Group the installation and operation of machines that do require permission from SEGOB and it is also true that E-Mex offered Grupo B-Mex that the Entertainment Centers were operated under the Permit in exchange for economic consideration, however, such events happened promptly after JEVMonterrey had corporate problems that caused a change of control in said company, which forced my client to accept a sudden change in operations.[60]
>
> 12.- From the date of execution of the A&P Contracts (2006), the Entertainment Centers with skill and dexterity machines were built, installed, and operated by the BMex Group companies, under the technical advice, installation of machines, guidance, and administration of JEV Monterrey, until at the end of March 2008 we were informed by the representatives of JEV Monterrey that they were having a corporate problem, that it was probable that they would lose control of JEV Monterrey [...], but that they proposed to do a change of the Entertainment Centers to be operated under the protection of the Permit of a company of the same group […] (EMex), otherwise, that is, if the change is not made, they would be forced to terminate commercial relations sustained between both groups, since they could not continue controlling the company JEV Monterrey, and therefore could not continue assisting Grupo B-Mex in the administration of the associations in which it participation and in the operation of the type of machines covered by the SEGOB Resolution [Monterrey Resolution][61]
>
> [Emphasis added]

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59 CWS-62, Fifth Witness Statement of Mr. Julio Gutiérrez, ¶ 26

60 Exhibit R-035, Counter Memorial in Arbitration 58/2010 between E-Mex and E-Games, dated May 9, 2011, p. 16.

61 *Id.*, pp. 16-17.

66. Claimants have never offered this explanation in these proceedings. They have never referred to a "corporate problem" with JEV Monterrey, nor have they identified this as one of the causes that caused the termination of the *joint ventures* with said company. It should be noted that the Claimants argued before the CAM arbitration tribunal that, on April 1, 2008, they entered into the Transaction Agreement with E-Mex, among other reasons, because they did not have the time or the knowledge to contract with a permit holder that had permission to operate in the same places as the installed entertainment centers:[62]

> 16. Response to Fact 4.- It is true that on April 1, 2008, the Transaction agreement was entered into […] since, due to the imminent change of control of JEV Monterrey, B-Mex Group could only opt for the following options:
>
> i) accept the conditions imposed by E-Mex officials to continue operating its recently installed Entertainment Centers;
>
> ii) get to know the new controllers of JEV Monterrey to see if they could continue performing the management functions of the Entertainment Centers, with the risk of losing the operations and the investments made,
>
> iii) continue operating under a permit or resolution similar to that of JEV Monterrey, for which there was no experience in the operation, nor the time to obtain such administrative resolutions, with the risk of losing operations and the investments made; either
>
> iv) contract with another permit holder, for which neither the time nor the knowledge of any permit holder who had permission to operate in the same places as the installed Entertainment Centers was available (last two options with the risk of having to litigate the return of the payment of rights made for each of the A&P Contracts);
>
> Evidently, the only reasonable option was chosen (to accept from the beginning the conditions imposed by E-Mex officials in the Transaction Agreement, preparatory agreement) to continue operating the Entertainment Centers, at least while both the obligations of the parties were negotiated as definitive compensation.
>
> [Emphasis added]

67. It is evident that nothing was said there about the possible transaction with Bluecrest and Advent, nor about the possible transaction with Eventos Festivos. On the contrary, it was argued that the transaction with E-Mex was the "only reasonable option" while the obligations of the parties and the final considerations were negotiated.

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62 *Id.*, pp. 19-20.

4. The Petolof Resolution could not have served as the basis for E-Games' decision to transfer its operations to the E-Mex Permit

68. In their Memorial, the Claimants noted that they would not have agreed to move their operations under the permission of E-Mex, had it not been for the Petolof precedent that allowed them to completely disassociate themselves from E-Mex.[63] In the Counter-Memorial, the Respondent questioned whether the Petolof case could have served as a basis for the decision to become an operator of E-Mex, since in April 2008, when the Claimants made that decision, there was no such precedent.[64] Indeed, the SEGOB resolution in favor of Petolof was issued on October 28, 2008, that is, at least six months after the Claimants decided to transfer their operations to the E-Mex permit under the figure of "operator".[65]

69. In their Reply, the Claimants again defend the decision to continue doing business with Messrs. Rojas Cardona and E-Mex, alleging that they could rely on the Petolof case to separate their operations from E-Mex if the agreement proposed by Advent and BlueCrest will not materialize:

> 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.[66]

70. Based on the testimonies of Ms. Erin Burr, Mr. Gordon Burr, and Mr. Julio Gutiérrez, the Claimants seek to explain this notable discrepancy as follows:

> 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. 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"). Mr. Gutiérrez understood and explained the relevance of this precedent to the Claimants, and also explained that E-

63 Memorial, ¶¶ 84-85. Exhibit CWS-50, Third Witness Statement of Mr. Burr, ¶¶ 42-49.

64 Counter-Memorial on the Merits, ¶¶ 103-106, 141, 437-442.

65 *Id.*, ¶ 106.

66 Reply, ¶ 54.

> Games should benefit from the precedent, and the court's likely ruling in favor of Petolof.[67]
>
> 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. Mr. Gutiérrez was closely following the development of the Petolof case and reported to the Claimants regarding these relevant case updates.[68]
>
> [Emphasis added]

71. Therefore, it is appropriate to describe the judicial proceeding that culminated in the issuance of the Petolof Resolution, to verify that the publicly available information on this case, for a person such as Mr. Julio Gutiérrez, who was not involved in that proceeding, would have been insufficient and irrelevant to the Claimants' decision to operate under the E-Mex Permit.

a. Amparo trial number 176/2005-3 and amparo under review 53/2006

72. Claimants and Respondent agree that the Petolof Resolution originates from amparo suit number 176/2005-3, filed by Petolof before the Eighth District Court of Tamaulipas. [69]The Tribunal will recall that the amparo proceeding is a means of constitutional defense that is always followed at the request of the aggrieved party against laws or acts of authority that it considers to be in violation of their individual guarantees.

73. In this particular case, Petolof and the permit company Espectáculos y Deportes del Norte, SA de CV (EDN) had signed a joint venture agreement[70] (*i.e., joint venture*) to exploit the permit that SEGOB had granted to EDN.[71] On May 28, 2004, SEGOB revoked EDN's permit as a result

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67 *Id.*

68 *Id.*, ¶ 55.

69 Memorial, ¶ 119. Reply, ¶¶ 54 and 380. Counter-Memorial on the merits, ¶¶ 440 and 445.

70 The full name of the contract is: "Contract for the Provision of Services, of Participation Association for the exploitation of the federal permit dated July 14, 1978, granted by the SEGOB, and its subsequent modifications, with the effect of dation of payment up to a total of 49% and forty-nine percent of the shares and all assets and rights acquired by the company Espectaculos y Deportes del Norte SA de CV, and loan of personal property".

71 Exhibit R-109, Judgment issued in the amparo proceeding number 176/2005-3, pgs. 10 and 11.

of an administrative proceeding initiated against it on March 20, 2002, by issuing summons number DGG/211-1182/2002[72].

74. In a letter dated April 5, 2005, Petolof's legal representative filed an amparo suit against SEGOB, arguing that SEGOB had violated, to his detriment, the guarantee of a hearing contemplated in article 14 of the CPEUM, because was not called to the administrative procedure that culminated in the revocation of the permit granted to EDN.[73] It also argued that SEGOB had violated its guarantee of a hearing due to the closing processes of the establishments where it operated.[74] The judgment issued on November 7, 2005 granted the protection to Petolof for the following purposes:

> [I]t is appropriate to grant the Amparo and Protection of the Federal Justice requested, so that those responsible render null and void everything that has been done in the administrative proceeding formed and initiated on the occasion of official letter-subpoena number DGG/211-1182/2002, of March 20, 2002, against the injured third party, Espectaculos y Deportes del Norte, a variable capital corporation, including the definitive resolution and the aforementioned procedure is initiated again, respecting the guarantee of a hearing for the benefit of the complainant, that is, that she be heard and defeated in said administrative procedure.[75]
>
> [Emphasis added]

75. When resolving the amparo trial, the District Judge considered that Petolof had legitimacy to appeal the administrative procedure that ended with the revocation of EDN's permit because it had signed a *joint venture* to exploit the permit that SEGOB had granted to EDN[76]. In addition, among the rights and obligations that EDN and Petolof assumed under the contract, the use, exploitation, and exploitation of EDN's permit stand out, in association with Petolof under Clause three, subsection A.[77]

76. The amparo was confirmed by the First Collegiate Court of the Nineteenth Circuit, through a ruling dated August 29, 2006 issued in the amparo under review number 53/2006. In turn, the

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72 *Id.*, p. 2.

73 *Id.*

74 *Id.*

75 *Id.* , p. 20.

76 *Id.*, pp. 10 and 11.

77 Exhibit R-089, Contract between EDN and Petolof dated November 23, 1999.

order that had consented to compliance with the amparo sentence was issued by the District Judge on January 19, 2007 [78].

77. After the confirmation of the amparo ruling, the publicly available electronic file only reports the following acts, without offering details:[79]

- On June 1, 2007, the District Judge admitted for processing a brief presented by Petolof, filing an appeal for excess or defect in compliance with the amparo ruling [80].
- As part of compliance with the amparo ruling, on December 13, 2007, the SEGOB ordered the lifting of the closure and seal status of seven establishments [81].
- On February 27, 2008, the District Judge proceeded to study whether SEGOB had fully complied with the amparo sentence. The District Judge concluded that the SEGOB had not complied with the sentence because it did not leave the original procedure unsubstantiated nor did it grant Petolof the guarantee of a hearing when starting a new procedure in replacement [82].
- As a consequence of the foregoing, on March 7, 2008, the SEGOB ordered that the administrative procedure that gave rise to the cancellation of EDN's permit be rendered null and void and a new administrative procedure be initiated, respecting Petolof's guarantee of a hearing [83].
- On July 18, 2008, the District Judge admitted an official letter from the SEGOB in which he stated that he had complied with the amparo sentence and ordered Petolof

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78 Exhibit R-121, Council of the Federal Judiciary. Consultation of judgments of jurisdictional bodies (Consultation of judgments (cjf.gob.mx)). Amparo in review number 53/2006.

79 What is narrated in this paragraph is the information publicly available to a person outside the trial in the electronic portals managed by the Federal Judiciary Council.

80 Exhibit R-125, Council of the Federal Judiciary. Consultation of judgments of jurisdictional bodies (Consultation of judgments (cjf.gob.mx)). Amparo trial number 176/2005-3.

81 Exhibit C-253. Current permit UG-010/2008 (Resolution Petolof), resulting in 2.

82 Exhibit R-124, Council of the Federal Judiciary. Consultation of judgments of jurisdictional bodies (Consultation of judgments (cjf.gob.mx)). Amparo trial number 176/2005-3.

83 Exhibit C-253. Current permit UG-010/2008 (Resolution Petolof), resulting in 2.

to be seen so that he could state whether he agreed with the compliance given by the SEGOB. [84].

- Finally, on January 26, 2009, the District Judge declared that the procedure for executing the amparo judgment had expired and ordered the definitive filing of the amparo proceeding number 176/2005-3 [85].

b. The Petolof Resolution could not have been the basis for the decision to continue doing business with Messrs. Rojas Cardona

78. As can be seen from the previous section, in the amparo trial number 176/2005-3 and the amparo under review 53/2006, the judicial authorities did not rule on the figure of "rights created or acquired" in favor of Petolof, nor about its alleged "independent operator" status of the EDN permit.

79. In the ruling issued in the amparo trial 176/2005-3, the District Judge limited himself to resolve that Petolof had the right to respect the guarantee of a hearing, contemplated in article 14 of the CPEUM:

> [E]ven though it is true that the complaining company is not a permit holder before the Ministry of the Interior, nor is it the holder of a right against it, and it does not have, nor did it have, nor does it have, a permit issued by it in matters of gaming and raffles, it is also true that, despite this, the acts claimed to affect the legal sphere of rights of said company and the responsible authorities should, consequently, grant it the guarantee of a hearing, taking into account that it (the legal sphere of rights) and the respect for this (the guarantee of a hearing) derives from the rights that the aforementioned contract generated for the repeatedly complaining company over the permit in question.[86]
>
> [Emphasis added]

80. In any case, in April 2008, the only legal certainty that the Claimants could have derived from the judicial proceeding initiated by Petolof is that SEGOB could not revoke a permit exploited by a permit holder in association (*i.e.*, "*joint-venture*") with a third party, without

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84 Exhibit R-123, Council of the Federal Judiciary. Consultation of judgments of jurisdictional bodies (Consultation of judgments (cjf.gob.mx)). Amparo trial number 176/2005-3.

85 Exhibit R-122, Council of the Federal Judiciary. Consultation of judgments of jurisdictional bodies (Consultation of judgments (cjf.gob.mx)). Amparo trial number 176/2005-3.

86 Exhibit R-109, Judgment issued in the amparo proceeding number 176/2005-3, pgs. 13 and 14.

respecting the third party's right to be heard. This situation is not comparable to that of E-Mex because E-Mex did not exploit its license through a *joint-venture agreement* with E-Games. As explained before, E-Games was not a partner of E-Mex, but its operator under article 30 of the Regulations.

81. The Claimants themselves acknowledge the foregoing in their Reply in the section entitled: "SEGOB independently recognized Petolof's acquired rights, and not because of a court order" [87]:

> 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. At no point did the Mexican court rule that SEGOB had to issue a permit based on the principle of acquired rights. 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. And based on this independent analysis, SEGOB granted Petolof independent operator status over seven of EDN's properties in Mexico.
>
> 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.[88]
>
> [Emphasis added]

82. This demonstrates that the Claimants could not have relied on the amparo suit filed by Petolof at the time of deciding to move to the E-Mex permit, since the Petolof Resolution was based "on SEGOB's discretionary analysis within the proceedings administrative" and the result of the said analysis was not disclosed until October 28, 2008. During the processing of the amparo trial number 176/2005-3 and the amparo under review 53/2006, no jurisdictional authority determined that the SEGOB was to issue a permit to Petolof based on the doctrine of acquired rights.

C. The dispute between E-Mex and E-Games

83. Contrary to what the Claimants allege, this case is not about arbitrary actions by SEGOB or the national courts. It has to do with a legal dispute between E-Mex and E-Games over the

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87 Reply, ¶¶ 380-382.

88 *Id.*, ¶¶ 381-382.

permit that E-Mex originally had and was operated by E-Games with respect to five establishments.

84. As explained in detail in the Memorial and Counter-Memorial, E-Mex owed Bluecrest/Advent approximately USD $75 million. The Claimants were fully aware of the risk involved in this debt. In particular, they were aware that, if Bluecrest demanded payment of the debt, E-Mex would surely not be able to cover it and would be declared bankrupt, which would update one of the grounds for revocation of its permit. [89]This risk eventually materialized.

85. The actions that E-Games subsequently took to preserve the operation of its casinos sparked a legal dispute between E-Mex and E-Games that led to the CAM arbitration and amparo 1668/2012, among other procedures. And it was precisely compliance with the ruling in amparo 1668/2012 that led to the cancellation of the E-Games permit.

86. It is reiterated that the Mexican State had nothing to do with the decision of E-Games to associate with Mr. Rojas Cardona or E-Mex; it also had nothing to do with the loan that Bluecrest granted to E-Mex for $75 million dollars; nor was it involved in the alleged transaction between Bluecrest/Advent and E-Mex that allegedly gave Claimants control of the E-Mex permit; even less with the bankruptcy that E-Mex faced when the alleged transaction failed and Bluecrest demanded repayment of the debt.

87. SEGOB limited itself to issuing an official letter confirming E-Games' status as operator of E-Mex (Official 2009-Bis); issuing a permit to E-Games in August 2012, after E-Mex was declared bankrupt, and; assigning its nomenclature to the permit in November 2012, when E-Games requested that the General Director of Games and Raffles endorse the official letter through which the permit was issued to E-Games in August 2008.

88. Subsequently, when the Sixteenth Court resolved amparo 1668/2012, the SEGOB left unsubstantiated, by instruction of the Judge, Official Letter 2009-Bis and, after finding that SEGOB's compliance was deficient, SEGOB proceeded to leave all the official letters unsubstantiated and resolutions derived from said Official Letter 2009-Bis, also by instructions of the Sixteenth Court. The entire sequence of trades and domestic procedures will be explained in detail in the following sections.

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[89] Counter-Memorial on the Merits, ¶¶ 97-98, 128-129.

D. E-Games requested SEGOB to confirm its status as operator of the E-Mex Permit in the context of the dispute with E-Mex

89. On December 28, 2009, E-Mex notified E-Games of its intention to terminate the operating contract between both companies due to its disagreement with the payment of royalties and the payment of participations before SEGOB.[90] That same day, E-Games filed a document with SEGOB requesting that the official documents through which its status as operator under the permission of E-Mex be not revoked.[91]

90. On July 21, 2010, through official letter number DGAJS/SCEV/0321/2010, SEGOB confirmed the nature of the operator of E-Games and asked it to present the documents that demonstrate compliance with the provisions of the RLFJS and other applicable regulations:

> Based on the provisions of articles 8, 14 and 16 of the Political Constitution of the United Mexican States; 27, section XXII of the Organic Law of the Federal Public Administration; 1, 3, 4 and 7 of the Federal Law on Games and Raffles; 1, 2, 3 and 5 of the Regulations of the Federal Law on Games and Raffles, as well as the provisions of the official letters DGAJS/SCEV/00619/2008, DGAJS/SCEV/0059/2009, DGAJS/SCEV/00194/2009, DGAJS /SCEV/00260/2009 and DGAJS/SCEV/00260/2009-BIS, dated December 9, 2008, February 13, 2009, May 8, 2009, and last of May 27, 2009, respectively; I inform you that the legal entity that you represent, under the character of operator of the permit DGAJS/SCEVF/P-06/2005, dated May 25, 2005, granted in favor of the permit holder Entertainment de México, SA de CV, has with authorization from this Federal Agency to operate 7 seven Remote Betting Center establishments with Number Draw Rooms, under the terms stipulated in each of the aforementioned official documents.
>
> In the same way and to provide for the SECOND and FOURTH points, you are required to, as soon as possible, submit to this authority the documentation that proves compliance with the regulations on the matter.[92]
>
> [Emphasis added]

91. Three months later, on October 26, 2010, E-Games complied with SEGOB's requirement and once again requested confirmation from the DGJS regarding the legal operation and exploitation of E-Mex's permit. In addition, it asked SEGOB to "agree that regardless of the consequences and effects that the insolvency proceeding against [E-Mex, E-Games] could have, it

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

91 Exhibit C-012, Official Letter No. DGAJS/SCEV/0321/2010 of July 21, 2010, pgs. 1-2.

92 *Id.*

could] operate the establishments in terms of Official Letters DGAJS/SCEV/0260/2009 and DGAJS/SCEV/0260/2009-BIS".[93]

92. On December 8, 2010, through official letter No. DGAJS/SCEV/0550/2010, SEGOB informed E-Games that it had fulfilled the obligations outlined in the Regulations and once again confirmed its operator status.[94] It is important to note that SEGOB at no time recognized the character of "independent operator of E-Mex" as argued by the Claimants [95]. The character of "independent operator" is not provided for by the LFJS or the RLFJS. In this regard, the Respondent's expert, Mr. Alfredo Lazcano, stated in his first expert report[96] and reiterates in his second report that: the figures of "Permit holder and Operator are the only figures that as subjects of rights and obligations are regulated in the Games Regulations." [97].

93. Additionally, official letter number DGAJS/SCEV/0550/2010 of December 8, 2010, also stated that, under the Regulation itself, E-Games had the right to request a permit to continue operating its establishments if the permit of E-Mex was revoked when it declared bankruptcy:

> [You] are hereby informed that your principal has an expedited right to request and process the corresponding permit to carry out the activities that it currently operates in the seven aforementioned establishments, to the extent that the hypothesis of revocation of the DGAJS/SCEVF/P permit -06/2006 dated May 25, 2005 granted to the permit holder Entertainment de México, SA de CV occurs or could potentially occur as established in article 34 section IV of the Regulations of the Federal Law of Games and Raffles.
>
> Given the case, this is not a pre-authorization and this authority will resolve what is appropriate according to law.[98]
>
> [Emphasis added]

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93 Exhibit C-013, Official Letter DGAJS/SCEV/0550/2010 of December 8, 2010, p. 2.

94 *Id.* , pp. 1-2: *"[…this authority considers that its represented Exciting Games, S. de RL de CV, has the recognized character as operator of the company Entertainment de México, SA de CV, with respect to 7 seven of the establishments related to the permission DGAJS/SCEVF/P-06/2005…]"*

95 Reply, ¶ 70.

96 RER-2, First Expert Report of Mr. Alfredo Lazcano Sámano, ¶¶ 43-47.

97 RER-5, Second Expert Report of Mr. Alfredo Lazcano Sámano, ¶ 48.

98 Exhibit C-013, Official Letter DGAJS/SCEV/0550/2010 of December 8, 2010.

94. As indicated in the Counter-Memorial [99], contrary to Claimants' arguments, the aforementioned memorandum was in no way a “formal” invitation for E-Games to become a permit holder. It was an affirmation made by SEGOB within the scope of its attributions and with respect to the rights established in the RLFJS, [100]which anyone has to initiate the process of an application for a permit to operate a casino. Said request, if any, would be subject to the assessment and analysis carried out by the authority at the time and the official letter cannot be considered as a "pre-authorization" or "invitation" to request an "independent permit", as can be seen from the text. of official letter number DGAJS/SCEV/0550/2010.

E. The link between the various trades issued by SEGOB and the E-Games Permit

95. In the Reply, the Claimants insist on the lack of procedural correlation between the various official letters issued by SEGOB during the years in which E-Games operated under the permission of E-Mex and the issuance of the permit obtained through the official letter dated November 16, 2012.[101] In particular, they point out that “the permit granted to E-Games through the Notice of November 16, 2012, the E-Games Independent Permit, was completely autonomous and independent”[102] since “E-Games Games had complied with all the procedural steps and legal requirements to obtain a stand-alone permit, and the E-Games Stand-alone Permit had its own permit number and was separate and distinct from the E-Mex permit.”[103] In addition, they point out that “the Official Letter of November 16, 2012 is not based on the Official Letter of May 27, 2009 [Oficio 2009-BIS], and does not even mention it ” (Original emphasis).[104]

96. The Respondent considers that the Claimants' position should be rejected. The link between Official Letter 2009-BIS, the Official Letter dated August 15, 2012, and the Official Letter dated November 16, 2012 can be observed from the Claimants' requests to SEGOB and the official letters issued as a result of those requests. requests:

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99 Counter-Memorial on the Merits, ¶ 156.

100 Exhibit R-032, articles 20 and 21 of the RLFJS.

101 Reply, ¶ 76, citing the Statement of Claim, Section IV. O.

102 *Id.*, ¶ 76.

103 *Id.*

104 *Id.*, ¶ 92.

E-Games Permit Application February 25, 2011 [C-014]	That through this document and based on Articles […] as well as official letter […] number **DGAJS/SCEV/0260/2009-BIS, dated May 27, 2009** […] I request […] a) To grant in favor of my principal, permission for the operation and installation of the Remote Betting Centers and Number Draw Rooms that it currently operates as an operator, granting it the status of Permit Holder.
Letter DGAJS/SCEV/0827/2012 15 August 2012 [C-254]	The ownership of the rights acquired, on the use and exploitation of the permit Number DGAJS/SCEVF/P-06/2005, dated May 25, 2005, and its modifications, in favor of "Exciting Games S. de RL de CV" in terms of the official letters […] **DGAJS/SCEV/0260/2009-BIS, dated May 27, 2009** […] which specifically refer to (7) seven Remote Betting Centers and (7) Rooms of Draws of Numbers […]
E-Game Request November 5, 2012 [R-047]	REQUEST: SINGLE. In this order of ideas, my client **in this act submits in a plain and simple manner,** as regards **the general content of Official Letter DGAJS/SCEV /0827/2012, dated August 15, 2012**. However, and with regard to the due justification of the competence of the Deputy Director of Authorization of Permits, in this act I request from you, with **the sole purpose of granting legal certainty to the act of reference and in terms of article […] endorse the content of Official Letter DGAJS/SCEV/0827/2012**, dated August 15, 2012, and makes it the property of the General Director of Games and Raffles […]. **The foregoing in the understanding that the rest of the content of the reference Official Letter prevails**.
Letter DGJS/SCEV/1426/2012 16 November 2012 [C-16]	I refer to the letter received in this General Director of Games and Raffles […] through which it requests that this Administrative Unit correct and make its own the official letter number DGAJS/SCEV/0827/2012 dated August 15, 2012. […] […] I allow myself to inform you that what is contained in official letter DGAJS/SCEV/0827/2012, dated August 15, 2012, meets the substantive requirements and is part of a valid administrative act, in terms of article 3 of the Federal Law of Administrative Procedure, supported by the exercise of specific functions, and consequently, effective and enforceable as of the date on which the notification thereof took effect, and valid, unassailable due to the conformity expressed in its content, by the petitioner; Therefore, there is no deficiency to remedy. […] FIRST. The ownership of an independent permit is determined and recognized, granting the rights and obligations in the same terms as the permit Number DGAJS/SCEVF/P-006/2005, dated May 25, 2005, and its modifications, under the numbering DGAJS/SCEVF/P-06/2005-Bis, regarding (7) Seven Remote Betting Centers and (7) Seven Number Draw Rooms […]

97. The Claimants accuse the Respondent of arguing the existence of a link between the Official Letter 2009-Bis and the Official Letter of November 16, 2012 "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."[105] However, as mentioned in paragraphs,

105 *Id.*, ¶ 91.

supra, it is the Claimants who contradict themselves and change their narrative depending on the forum in which they find themselves. In this proceeding, they insist that "the SEGOB Resolution of August 15, 2012 did not grant E-Games its own independent permit"[106] and that "E-Games insisted on its request and obtained its own independent permit through the Resolution of the SEGOB of November 16, 2012" [107].

98. In stark contrast to the position they take before this Tribunal, in the TFJFA in Mexico, the Claimants argued that they acquired permit holder status with the Official Letter of August 15, 2012, and that the official letter of November 22, 2012 confirmed the content of the Official Letter of August 15 and granted an alphanumeric code:

> 7.- On August 15, 2012, the General Directorate for Games and Raffles issued the letter DGAJS/SCEV70827, through which it decided to change the status of my client: from operator to permit holder.
>
> 8.- On November twenty-second (sic) of two thousand and twelve, the today called General Directorate of Games and Raffles issued an official letter through which it confirmed the determination immersed in the content of the official letter referred to in the immediately preceding point, determining to give to the permit that my client would operate, the alphanumeric code DGAJS/SCEVF/P-06/2005/BIS.[108]
>
> [Emphasis added]

99. It should be mentioned that the RLFJS does not establish different permits categories. Particularly, it does not establish "independent" permits. This term has been created by Claimants in their strategy of defense in this arbitration. All permits are within the same category and they had to be independent, they are in this manner because the exercise of the permit's rights does not depend on the will of third parties. Claimants' attempt to differentiate August 2012 E-Games permit from the one of November is part of their strategy to try to separate them. As it has been shown by the document previously cited, E-Games has recognized its status as permit holder on Ausgust 2018, and it also recognized that on November 22 the determination of the official communication from August was "confirmed".

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106 Memorial, ¶ 139.

107 *Id.*

108 Exhibit R-050, Annulment claim - E-Games brief dated February 18, 2013 Exp. 1080-13-11-03-1., pp. 23.

100. In the following section the link between the different official communications issued by SEGOB will be explained (in particular, the 2009-BIS Oficio) and the official communication from 16 November 2012.

1. E-Games request for permit

101. On February 22, 2011, in accordance with the applicable legislation and SEGOB's official communications issued to E-Games since 2008, E-Games requested SEGOB a permit to operate its casinos in the same conditions that it had under E-Mex Permit. As it can be read, E-Games cited as basis for acquiring its permit the official communication DGAJS/SCEV/0260/2009-BIS, for May 27, 2009:

> That by means of this instrument and pursuant to articles… ; as well as official communications number DGAJS/SCEV/00619/2008, dated December 9, 2008; number DGAJS/SCEV/0059/2009, dated February 13, 2009; number DGAJS/SCEV/0194/2009, dated May 8, 2009; number DGAJS/SCEV/0260/2009, dated May 27, 2009; number DGAJS/SCEV/0260/2009-BIS, dated May 27, 2009; number DGAJS/SCEV/0321/2010, dated July 21, 2010, and number DGAJ/SCEV/550/2010, dated December 10, 2010, each and every one of them issued by this General Deputy Directorate of Gambling and Lottery of the Ministry of the Interior (SEGOB), before you with all due respect I hereby appear to request in accordance with the aforementioned legal principles, the PERMIT described herein.[109]
>
> [Emphasis added]

102. Respondent indicated in the Counter-Memorial that on May 12, 2011, SEGOB required E-Games to present additional documents and information, and SEGOB also informed that it had identified 28 deficiencies to E-Games request for permit.[110] Respondent also indicated in the Counter-Memorial that, on November 18, 2011, SEGOB issued official notice DGAJS/SCEV/546/2011 in which it determined that E-Games complied with the requirements to continue operating its casinos under E-Mex Permit; however, SEGOB also determined to suspend E-Games request for permit until E-Mex was declared bankrupt:

> Regarding the request of the petitioner to continue operating the establishments that it currently has authorized under the capacity of operator of the permit DGAJS/SCEVF/P-06/2005 issued in favor of the company Entretenimiento de México S.A. de C.V., it should be noted that since the permit holder has not set up the declaration of bankruptcy, and therefore the ground for revocation provided for Article 151, Section V is not updated; this Authority is not able to issue a final decision regarding the process of changing the status from operator to permit holder that concerns us. The above in view

109 Exhibit C-014, E-Games written submission of February 22, 2011.

110 Counter Memorial on the Merits, ¶ 158.

> of the fact that such establishments are part of the Remote Betting Centers and Number Sweepstakes Rooms for which the aforementioned permit holder has a permit, so it is not appropriate for this Deputy Directorate General to decide at this time on the reasons given, since the number of establishments would be increased, which is contrary to the policy of not encouraging the increase in the number of authorized establishments at present. Therefore, the change of status requested should result in equal or lesser number of those existing to date within the universe of said permit, and this can only happen until the update of the revocation of permit DGAJS/SCEVF/P-06/2005 issued in favor of the company Entretenimiento de México S.A. de C.V.[111]
>
> [Emphasis added]

103. Respondent asserts that Claimants always knew that the official communications issued by SEGOB only recognized E-Games capacity as operator under E-Mex Permit. There was not an authority's declaration in the sense that E-Games was an "independent operator", that is so, because the RLFJS does not establish such figure.[112] E-Games' permit request was conditioned under E-Mex declaration of insolvency; what is more, the terms and conditions of E-Games permit that would be given would be the same as E-Mex Permit, because the basis for E-Games' permit issuance would be the various official communications issued by SEGOB and the DGAJS/SCEVF/P-06/2005 permit itself.

104. Claimants arguments in the sense that their permit was independent and autonomous[113] are incorrect, and, in fact, their position is contrary to past E-Games requests, also to the content of SEGOB's replies to such requests. As explained by Mr. Lazcano in his second report:

> E-Games feared that when E-Mex was declared insolvent, its Permit would be revoked and, therefore, the same would occur with any authorization to operate Establishments under said Permit. Consequently, E-Games requests SEGOB, based on the theory of acquired rights, to recognize the status of Permit Holder with respect to the seven Establishments that it had authorized at that time. If the condition for requesting and granting a new Permit depended on E-Mex's declaration of insolvency, by definition, it is not possible to speak of an independent Permit.[114]

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111 Exhibit C-352, Official notice DGAJS/SCEV/546/2011, p. 4.

112 RER-2, *See* First Expert Report from Mr. Alfredo Lazcano Sámano, ¶54.

113 Reply, ¶ 76.

114 RER-5, Segundo informe pericial del Sr. Alfredo Lazcano Sámano, ¶ 66.

2. The link between 2009-BIS Oficio and the permit issued on August 2012

105. Once E-Mex was declared under insolvency proceedings, SEGOB issued a permit to E-Games through the Oficio DGJS/SCEV/0827/2012, dated August 15, 2012 (Permitholder oficio). In the officio SEGOB expressly resolved:

- To recognize E-Games' entitlement to the acquired rights related to the use and exercise of the DGAJS/SCEVF/P-06/2005, E-Mex Permit, under the terms of the various official notices in favor of E-Games, including the 2009-BIS Oficio.
- That E-Games' acquired rights were naturally limited to the terms and conditions of permit DGAJS/SCEVF/P-06/2005.
- The legal change of condition of E-Games to be entitled of the rights of exploitation and operation of the permit DGAJS/SCEVF/P-06/2005Reconocer a E-Games la titularidad de los derechos adquiridos, sobre el uso y explotación del permiso DGAJS/SCEVF/P-06/2005 de E-Mex en términos de los diversos oficios emitidos a favor de E-Games, incluido el oficio 2009-BIS.[115]

106. In the Reply Claimants allege that the links between the various official notices issued by SEGOB in favor of E-Games are irrelevant for getting their independent permit.[116] Nonetheless, in their Memorial, Claimants themselves recognize that 2009-BIS Oficio and the Permitholder Oficio were related. Paragraph 166 of their Memorial explains that the Permitholder Oficio specially cites the 2009-BIS Oficio and "that was a motivating factor for the issuance of the August resolution [*i.e.*, the Permitholder Oficio] ":

> In the light of the above, Mr. González concludes that the rights E-Games acquired to become and independent operator served as a justification or cause die E-Games´s change of status to a holder of the right to use and operate E-Mex's permit, as recognized in the August 15, 2012.[117]

107. Mr. Lazcano confirms that the 2009-BIS Oficio is one the administrative acts that generate E-Games recognition of entitlement to the rights of use and exploitation of E-Mex Permit:

> Official Letter DGAJS/SCEV/0260/2009-BIS, which, in my opinion, does nothing more than corroborate the status of E-Games Operator, is one of the administrative acts

115 Anexo C-254, Oficio DGJS/SCEV/0827/2012 del 15 de agosto de 2012, pp. 6-7.

116 Reply, ¶ 66.

117 Memorial, ¶ 166.

> that form part of the basis that determines the scope of the recognition of the ownership of the rights on the use and exploitation of the E-Mex Permit.[118]

108. Thus, there is no doubt about the link between the 2009-BIS Oficio and the Permitholder officio.

3. The link between the Permitholder Oficio from august 2012 and the November 16 Oficio of the same year (Permit-BIS Oficio)

109. Respondent reiterates that a clear and direct link exists between the Permitholder Oficio, from August 2012, and the November 16 oficio of the same year (Permit-BIS Oficio), which is confirmed with E-Games written submission that originated the second official communication.

110. On November 7, 2012, E-Games submitted a written communication requiring SEGOB to amend the permitholder oficio that SEGOB issued in August of the same year, because the deputy director had signed it and E-Games sought to ensure that the competent public servant issued the permit. In that sense, E-Games alleged that it needed further legal certainty; hence, E-Games required that the Permitholder Oficio had to be signed by the General Director of the DGJS:

> [A]long these lines, my principal hereby fully submits to the general contents of the [Permitholder Oficio]. However, and concerning the proper grounds of competency of the Deputy Director of Permit Authorizations, I hereby request that You, for the sole purpose of providing legal certainty to referenced action, and pursuant to Article 6 of the Federal Law of Administrative Procedure currently in effect, adopt the contents of the [Permitholder] Oficio, and pursuant to the referenced law, cure it and have the Directorate of Games and Sweepstakes follow suit with regard to the proper grounds of the issuing official's competency, in the understanding that the remaining content of the foregoing Oficio would prevail.[119]
>
> [Emphasis added]

111. E-Games did not ask for a new permit, in fact, E-Games required the General Director of the DGJS "adopt the contents of the [Permitholder] Oficio, cure it and make it as its own". Besides, E-Games required that the rest of the Permitholder Oficio prevailed.

112. SEGOB replied to such request on November 16, 2012, via a new official notice in which SEGOB confirmed the content and terms of the Permitholder Oficio, that is, SEGOB expressly referred that the Permitholder Oficio had the required elements and it was a valid administrative

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118 RER-5, Segundo informe pericial del Sr. Alfredo Lazcano Sámano, ¶ 69.

119 Exhibit R-047, E-Games petition dated November 7, 2012.

act and "there [was not] any deficiencies to cure" because the deputy director had the authority to sign it. Nonetheless, SEGOB confirmed the following:

> I allow myself to inform you that content of the [Permitholder Oficio] satisfies the formal and substantive requirements of a valid government act…; accordingly, there is no deficiency that requires curing. However, and to provide legal certainty to your principal, "Exciting Games, S. de R.L. de C.V.," this Directorate of Games and Sweepstakes again and directly acknowledges the legal effects of the [Permitholder Oficio] as issued for all applicable legal purposes, pursuant to the authority granted to the Directorate of Games and Sweepstakes set forth in Article 2(B)(XII) in relation to Article 15 Ter of the Internal Regulations of the Secretariat of the Interior, and article 2, third paragraph of the [RLFJS], the validity of the content of the [Permitholder Oficio] remains, with the terms that it was issued, for the necessary legal effects.[120]

113. Mr. Lazcano also confirms that E-Games acquired it permitholder status in August 2012 with the issuance of the Permitholder Oficio:

> [O]fficial Letter DGAJS/SCEV/0827/2012 did generate changes in the status of E-Games since it recognized it as the owner "of the rights acquired over the use and exploitation of permit Number DGAJS/SCEVF/P-06/ 2005, dated May 25, 2005, and its modifications, in favor of Exciting Games, S. de R.L. de C.V. (…) specifically referring to (7) seven Remote Betting Centers and (7) Number Drawing Rooms" 49. For all practical purposes, E-Games acquired the legal status of Permit Holder in relation to seven Establishments.[121]

114. Only differences of format, not of substantive content, exist between the August and November 2012 official communications, the change of legal status of operator to permit holder occurred on August 15, 2012 with the Permitholder Oficio which was later confirmed by SEGOB when it issued the Permit-BIS Oficio on November 16, 2012.

115. Claimants argue in their Reply that E-Games request from November 7, 2012 was made for a permit under the terms of articles 20, 21 and 22 of the RLFJS, because the Permitholder Oficio did not mention the requirements from the RLFJS to obtain a permit; in contrast the Permit-BIS Oficio from November, that confirmed August 15, 2012 oficio, clearly states those articles.[122]

116. This argument is clearly designed by Claimants for this arbitration, as previously mentioned, E-Games recognized before national courts that Permit-BIS Oficio was a confirmation

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120 Exhibit C-16, DGJS/SCEV/1426/2012 Oficio, dated November 16, 2012, p. 1.

121 RER-5, Segundo informe pericial del Sr. Alfredo Lazcano Sámano, ¶ 60.

122 Réplica, ¶¶ 97 y 99.

of the Permitholder Oficio.[123] For example, in the administrative claims that E-Games presented in December 2012 and February 2013. In the first one, E-Games requested to open another casino in Veracurz, and in the second one, E-Games considered illegal that it slot machines were not able to accept coins and bills.[124] Albeit that in a clear manner, E-Games based its allegations from E-Mex Permit, because with that permit it had acquired rights (to open another casino and to allow its slot machines to receive coins and bills), now, Claimants pretend to deny E-Games' recognition.[125]

117. Claimants allege that E-Games distinguished between E-Mex and E-Games permit by simply using the word "distinct". This is incorrect: "the distinct" is a synonym of "the other", which is very common in the legal briefs and official communication in Mexico. This does not imply all the legal effects that Claimants allege in this arbitration.[126] The use of this word does not eliminate the facts that E-Games itself explained in its complaints.

118. Claimants even allege that E-Games' recognition does not transcend legally; the aforementioned because Mr. González Matus says that what E-Games stated in its complaints allegedly does not affect his conclusions: E-Games permit was no related to E-Mex permit.[127] However, this assertion does not respond to Respondent point. E-Games knew that its permits originated from E-Mex Permit. Beyond the conclusions that Claimants' expert states, which Respondent rejects entirely, Claimants cannot deny that E-Games itself exercised its rights before national courts using E-Mex Permit. Even, taking Claimants' argument to the extreme and considering that E-Games legal representative did not know the legal consequences of his actions complaints,[128] it is clear that the rights that E-Games considered violated by SEGOV were based

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123 Exhibit R-050, Action for Annulment - E-Games Brief 18 Feb 2013 Exp. 1080-13-11-03-1, pp. 2-3.

124 Counter-Memorial on the Merits, ¶¶ 188-189; *See* Exhibit R-049, Action for Annulment - E-Games Brief 14 Dec 2012 Exp. 9606-12-11-02-3, pp. 2-3; Also *see* Exhibit R-050, Action for Annulment - E-Games Brief 18 Feb 2013 Exp. 1080-13-11-03-1, pp. 2-3, 10-11.

125 Réplica, ¶¶ 102-104.

126 *Id.*, ¶ 105.

127 Reply, ¶ 105. CER-6, Second Expert Report from Mr. Ezequiel González Matus, ¶¶ 150-151.

128 Besides, Respondent emphasizes that the person that presented the administrative claims in the annulment proceedings, 9606-12-11-02-3 and 1080-13-11-03-1, was the same that acted repetitively before SEGOB. The same legal representative requested the issuance of the Permitholder-BIS Oficio. Exhibit R-047, E-Games petition dated November 7, 2012, p. 3 ("for the sole purpose of providing legal certainty …

on the E-Mex Permit—as well as its modifications. Why E-Games made references to E-Mex? The answer is simple, E-Games did it because the rights of the permit holder were E-Mex's, and –Games wanted to benefit from them.

4. Namimg E-Games permit

119. Claimants argue in their Reply that the Permit-BIS Oficio of November 2012 complied with all the elements and requirements established under the LFJS and the RLFJS for the expedition of a permit; besides it also had its own number and it was distinct to E-Mex permit. In the same way, they state that the similar numbering between E-Mex and E-Games permit does not indicate in any manner that E-Games permit depended on E-Mex permit. They also say that in their expert opinion, Mr. Ezequiel Gonzalez, it is common that permits use a similar naming with suffixes as BIS, TER, QUATER; they also cite as an example the RLFJS itself (article 3.- 1. BIS Gambling concept); thus, they considered that the permit number given by SEGOB to E-Games confirms its independent and autonomous nature.[129]

120. Claimants' sayings are pointless efforts to separate two official communications that are clearly related. Albeit the numbering of the both official communications, it is clear that the alleged "independent permit", from November 2012, was issued in the same terms and conditions of the August 2012, and in the same terms under E-Mex; thus, it should be concluded that it was an extension of the same permit. This is logical, besides the principle used to issue E–Games permit was under acquired rights and E-Games, as E-Mex's operator, could not have "acquired" other rights than those originally provided to E-Mex. The Permit-BIS Oficio does not give space for interpretation:

> [a] permit to be granted the same rights and obligations under identical conditions in which it had been operating along with modifications made thereto, i.e., authorizing it **to continue** performing their activity in the same terms, conditions, legal scope and materials of permit number DGAJS/SCEVFIP-06/2005 and the modifications it holds.[130]
>
> [Emphasis added]

adopt the contents of the DGAJS/SCEV/0827/2012 Oficio, dated August 15, 2012, … and make it as own of the Directorate of Games and Sweepstakes).

129 Reply, ¶ 76-83.

130 Exhibit C-16, DGJS/SCEV/1426/2012 Oficio, dated November 16, 2012, p. 6.

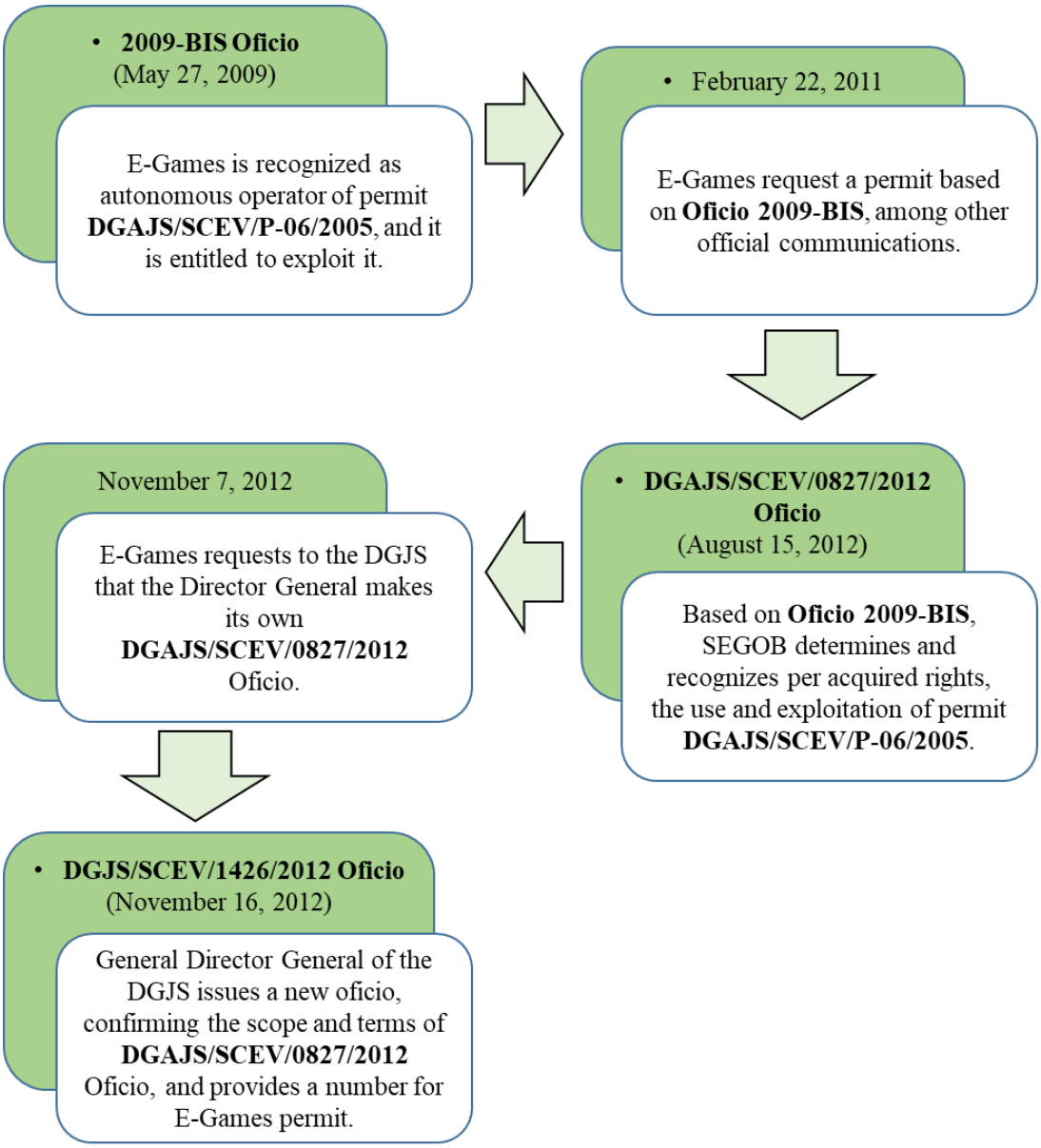
121. Mexico's expert, Mr. Alfredo Lazcano, explains it this way in his second expert report:

[it] was precisely E-Games who requested that it be granted the status of Permit Holder "under the same conditions as the Permit of which it is currently the Operator, which is identified by Number DGAJS/SCEVF/ P-06/2005.[131]

122. E-Games did not ask SEGOB for an "independent permit" to operate its casinos. E-Games requested to operate its establishments under the same terms and conditions that the E-Mex Permit, that is the permit under which E-Games operated its establishments.[132]

[131] RER-5, Scond Expert Report from Mr. Alfredo Lazcano Sámano, ¶ 71.

[132] Exhibit C-16, DGJS/SCEV/1426/2012, dated on November 15, 2012 *"in the same terms of the Permit number DGAJS/SCEVF/P-6/2005.*



123. In conclusion, Claimants admit the link between 2009-BIS Oficio and the Permitholder oficio, and Respondent sustains that the link between the Permitholder Oficio and the Permit-BIS Oficio is evident from E-Games request and SEGOB's response. Per transitivity, if 2009-BIS Oficio is linked to the Permitholder Oficio and at the Permitholder Oficio is linked to the Permit-BIS Oficio, it is logical to conclude the 2009-BIS Oficio and the Permit-BIS Oficio are liked.

124. In consequence, it was reasonable to conclude that, when the Sixteenth Court ordered SEGOB to declare null and void ("insubsistente") the effects of 2009-BIS Oficio, it included the Permit-BIS Oficio. The cancellation of E-Games permit was not part of any authority's ill will

against E-Games. It was a reasonable interpretation of SEGOB and the Court's instructions which was confirmed by Mexican tribunals.

5. E-Games permit's validity and renewal

125. Claimants insist that E-Games permit was valid until, at least, 2037, that is, a 25-year period of validity, counting from the date that it was issued; also that it could have been renewed for 15-year periods in accordance with the law.[133] These allegations are entirely erroneous; as it has been shown E-Games' permit was a continuation of E-Mex permit; thus, it was issued in the same terms and conditions of E-Mex permit which also includes the validity date.[134]

126. Under such understanding, E-Mex permit did not establish a 25-year validation period, instead it specified that is expiration date:

> TERMS
>
> A) VALIDITY
>
> **From the 25th May 2005 to the 24th May 2030.**
>
> The validity of this permit starts in the same date of its issuance.[135]

127. Hence, E-Games would have had a valid permit until May 24, 2030, but it would have not been valid until 2037, as Claimants incorrectly state. It is also important to clarify that the provision from the LFPA to which Claimant refer is not applicable, Claimants say in their Reply that such provision establishes "administrative acts have validity and there are enforceable from the date of entry into force in which they are issued".[136] It is not applicable, because the Permit-BIS Oficio clearly establishes that E-Games permit was given in the same terms and conditions that E-Mex permit; thus it is concluded that the validity of E-Games permit was the same as E-Mex's. In

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133 Reply, ¶¶ 84-85.

134 Exhibit C-16, p. 5: "Stressing that the acquired rights are naturally limited to the terms and conditions of the DGAJS/SCEVF/P-06/2005 permit, dated on May 25, 2005, and its amendments, which constitute as the origin and limit of their rights and obligations". Exhibit C-254, DGJS/SCEV/0827/2012 Oficio, p. 6: "Stressing that the rights recognized are naturally limited to the same terms ad conditions of the DGAJS/SCEVF/P-06/2005 permit, dated on May 25, 2005, and its amendments, which constitute as the origin and limit of their rights and obligations in favor of Exciting Games, S. de R.L. de C.V.. Permit and modification that are annexed in certified copy of the present document, for all the legal effects and its legal scope, in respect of the recognized rights of the requesting party.

135 Exhibit C-235, DGAJS/SCEVF/P-06/2005 Oficio, p. 1.

136 Reply, ¶ 84.

another sense, Claimants do not mention that the second paragraph of article 9 of the LFPA to which they refer establishes that when an administrative act gives a particular benefit to a private person (E-Games), it is compliance will be enforceable from the permit date indicated to start its validity.[137]

128. As Mr. Alfredo Lazcano indicates in its second report, the fundamental difference consists in that E-games permit was not a permit issued in accordance with article 32 of the RLFJ, *i.e.*, it was a permit in which it was recognized the change of legal status from operator to permit holder in the same terms and conditions that E-Games operated it's casinos, that is to say the conditions stablish in permit DGAJS/SCEVF/P-06/2005:

> However, given that, once again, the E-Games Permit was not granted as a result of a Permit application, but of the express request of E-Games to be recognized as a Permit Holder, SEGOB stated in Official Letter DGJS/SCEV/ 1426/2012 that E-Games could "continue to exploit its activity under the same terms, conditions, legal and material scope that is invested in Permit number DGAJS/SCEVF/P-06/2005 and the modifications it holds".[138] At no time did SEGOB issue a Permit that expressly contained the terms and conditions established in Article 32 of the Gaming Regulations[139] because these already existed in the E-Mex Permit, since the E-Games Permit was a continuation of the E-Mex Permit.[140]

129. In the same sense, the renewals of the permits to which claimants refer cannot be considered as "unlimited duration",[141] as article 33 of the RLF JS itself stablishes, permits might be extended for subsequent periods of 15 years.[142] The used of verb "might be" in the article

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137 Exhibit R-0064, LFPA: "Article 9.- The administrative act shall be valid and effective from the moment that the legal effects of a notification, made legally, start. The aforementioned shall not apply in the case in which a benefit is given to a private person, in such cases the private person shall require compliance to the issuing authority from the moment it was issued or in the date that was indicated to start the validity; the same shall apply for acts of inspection, investigation or oversight, in accordance with this law or other applicable provisions which are enforceable from the date that the Federal Public Administration effectuates them".

138 Exhibit C-16, Fifth paragraph of the Third Resolution of DJGS/SCEV/1426/2012, dated 15 November, 2012.

139 *See* Differences between Permit DGAJS/SCEVF/P-06/2005 and DGJS/SCEV/1426/2012, Exhibits C-235 and C-16.

140 RER-5, Second Expert Report from Mr. Alfredo Lazcano Sámano, ¶ 79.

141 Reply, ¶ 86.

142 Exhibit R-032, Article 33 of the RLFJS, "The permits indicated in section I **<u>may be</u>** extended for subsequent periods of up to 15 years, provided that permit holders are up to date in the fulfillment of all their obligations". [Emphasis added]

previously cited shows a possibility of the authority to act instead of a binding obligation. Thus, it cannot be ascertained that E-Games permit will have automatic and subsequent renewals of 15 years' periods because the rule determines that SEGOB is the authority that will determine if the permit's validity could be renewed or not, based on the permit holder's compliance with his obligations. Besides, the reference of 15 years is the maximum period for renewal established in the RLFJS, that is, SEGOB can decide to renew the permit only for two years and also act inside the applicable legal framework.

130. Claimants also say that in SEGOB's website and Mrs. Marcela Gonzales Salas first witness statement, specifically annex called "General Diagnosis of Casinos", it was recognized that E-Games permit was valid until 2037. [143] About this Mrs. Gonzalez Salas, second witness statement, expresses:

> As I stated in my First Statement, the document entitled "General Diagnosis of Casinos" is a working document that the General Directorate under my charge used to organize in an executive manner the information that was in the files of the Gambling Permits, and in no way it can be considered as an interpretive assessment of the legality or validity of the permits.[144]

131. From the evidence presented by the Respondent and Mrs. Marcela Gonzalez Salas witness statements, it has been shown that the validity, duration, and renewal of E-Games permit cannot be concluded from Claimants' subjective interpretation, made from documents website documents nor public servants' supporting visual aids. The validity and legality of E-Games permit it is stablished *per se* in the content of office number DJGS/SCEV/1426/201 itself, dated November 16, 2012, which takes as fundamental basis the conditions and terms from E-Mex permit.

F. The nullity and voidness of Permit-BIS Oficio was correctly analyzed in the amparo proceedings in which E-Games participated

132. Claimants allege that the Permit-BIS Oficio was "revoked" due to two reasons: *i)* the amparo 1668/2011 had many irregularities, and *ii)* these irregularities came from Mexican Federal Executive Branch.[145] None of Claimants' allegations are correct. The Amparo 1668/ 2011 was done under the applicable legal provisions and jurisprudential criteria. As it will be shown further, the facts of the case precisely support the federal judicial decisions. In the same vein, there is not

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143 Reply, ¶¶ 87 y 88.

144 RWS-4, Second Witness Statement from Mrs. Marcela González Salas y Petriciolli, ¶ 17.

145 Reply, ¶ 152.

an objective indication that could maintain the alleged Mexican Federal Executive Branch interferences in the Amparo 1668/2011.

1. The Sixteenth Court and Seventh Collegiate Court admitted in a correct manner the E-Mex amendment in Amparo proceeding 1668/2011 against 2009-BIS Oficio

133. Claimants accept that the Permit-BIS Oficio was declared null and void ("insubsistente") because E-Mex presented his third amendment to its amparo clompaint in Amparo 1668/2011: "Had the amendment been rejected, … there would [not] have been … any questions about any resolution involving the E-Games Independent Permit".[146] Although Claimants pretend to re-litigate the Sixteenth Court and the Seventh Collegiate Court reasoning, there was no instance that could identify a procedural error.[147] Claimants may not agree with the Mexican courts' decisions, but there was not a found an error in fact or in law.

134. Claimants reiterate that at least in three occasions, Mexican Courts could have discovered that E-Mex had knowledge about 2009-BIS Oficio before its amendment complaint. Therefore, Mexican courts should have rejected its amendment because it was out of time. *First*, in March 27, 2012, when E-Mex was notified of Amparo 356/2012; *second*, in April 9, 2012, when E-Mex presented itself in Amparo 356/2012; and *third*, in April 12, 2012, when E-Mex informed in Amparo 1668/2012 that it was a third interested party in Amparo 356/2012.[148] Nonetheless, all these suppositions are incorrect and they need to be clarified.

135. On April 18, 2012, the Third Court sent the copies of 356/2012 file which included E-Games amparo complaint (without annexes) from February 2012 to Third Court's decision from April 18, 2012.[149] Although, allegedly E-Games complaint had 2009-BIS Oficio, after a week (on April 26, 2012) E-Games informed to the Third Court that it requested SEGOV to show 2009-BIS Oficio in the Amparo proceeding 2356/2012.[150] Until May 10, 2012, the DGJS presented the 2009-

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146 Reply, ¶ 155.

147 Memorial on the Merits, ¶¶ 14, 216, 700, 776, 779.

148 Reply, ¶ 155.

149 *See* Exhibit R-117, Certified copies sent by the Third Court (Amparo 356/2012) to the Sixteenth Court (Amparo 1668/2011).

150 *See* Exhibit R-114, E-Games written submission to request the Third Court that SEGOB shows the 2009-BIS Oficio.

BIS Oficio.[151] The same day, the Third Court ordered that E-Games and E-Mex had to be notified,[152] precisely as E-Mex stated in its amendment complaint in the amparo proceedings 1668/2011.[153] Lastly, until May 24, 2012, the Third Court received E-Mex comments against the May 27, 2099 Oficio.[154]

136. Albeit, Claimants and their expert, Mr. Omar Guerrero, had the complete files of Amparo proceedings 1668/2011 and 356/2012, [155] they misinterpreted the Sixteenth Court and the Seventh Collegiate Court's conclusions to add E-Mex amendment complaint. Both files demonstrate E-Mex allegations when it amended its complaint: E-Mex acquired knowledge about 2009-BIS Oficio until May 2012. Notwithstanding this, Claimants base their theories in E-Mex's participation (as third interested party) in Amparo proceedings 356/2012, since March 2012, and that E-Games had already submitted the 2009-BIS Oficio; Claimants entirely neglect that E-Games itself requested the presentation of 2009-BIS Oficio in the Amparo proceedings 356/2012. In fact, E-Games requested this document because it would show its legal interest as an amparo complainant.

> As stated before, and to provide a better understanding, and to prove in the present Amparo proceedings the capacity of my principal as Operator, I request respectfully, in this act, to be issued, under our own cost, a certified copy of the official notices numbers DGAJS/SCEV/0550/2012, dated December 8, 2010 and DGAJS/SCEV/0260/2009-BIS, dated May 27, 2009.[156]

137. Thus, the Sixteenth Court as well as the Seventh Collegiate Court concluded that there was not a cause for inadmissibility for E-Mex's amendment complaint in Amparo proceedings 1668/2011: there was certainty that E-Mex was notified of 2009-BIS Oficio until May 2012.

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151 *See* Exhibit R-116, DGJS presents the 2009-BIS Oficio.

152 *See* Exhibit R-118, Third Court decision to notify personally, dated May 10, 2012.

153 *See* Exhibit C-269, E-Mex amendment complaint, dated June 5, 2012, in Amparo proceedings 1668/2012, p. 1

154 Exhibit R-115, E-Mex presents its views on the 27 May, 2009 Oficio, in Amparo proceedings 356/2012.

155 CER-2, Expert Report from Mr. Omar Guerrero, ¶9.

156 *See* Exhibit R-114, E-Games written submission to request the Third Court that SEGOB shows the 2009-BIS Oficio.

138. Despite the aforementioned, according to Claimants both national courts used the wrong legal standard to evaluate the cause for inadmissibility due to untimeliness.[157] *First*, when SEGOB presented the cause for inadmissibility via motion for complaint ("*Queja*") 68/2012, [158] which was decided by the Seventh Collegiate Court, it resolved: "There is not a manifest nor notorious cause of inadmissibility in respect of the presentation of the amendment complaint in this case, because there is no proof that ascertain indisputably the moment in which the complainant had knowledge of the said official notice, to be able to determine the period of time of the amendment complaint presentation. "[159] *Second*, when the Sixteenth Court decided that the Amparo 1668/2011, it studied the inadmissibility causes against E-Mex Amparo, among them those presented by E-Games.[160] In Amparo proceedings 1668/2011, the Sixteenth Court also resolved E-Games' allegation of untimeliness: "there is no evidence to say that [E-Mex] had received also the copies of [2009-BIS Oficio], annexes that are separate from the file".[161]

139. Claimants positions is that the untimeliness should not have been based on criteria based on manifest, undoubtedly and notorious evidence, which can be seen from the amendment complaint, but, instead that the Sixteenth Court and the Seventh Collegiate Court should have search for E-Mex true knowledge in the documents of file 356/2012, as supposedly the Mexican jurisprudence requires.[162]

140. In this sense, Claimants cite Mr. Omar Guerrero to support their position: "Mexican judicial criteria have determined that the date of knowledge of the act claimed by the complainant should be established on the basis of the evidence in the record, and only when they files do not provide for a date of knowledge of the act claimed, the date of the amparo complaint would be taken for certain".[163] However, the criterion that Claimants cite establishes:

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157 Reply, ¶¶ 169-181.

158 In contrast, E-Games never filed a complaint against the admission of the extension of the E-Mex lawsuit in Amparo 1668/2012 and wait until the sentence to invoke any grounds for impropriety.

159 Exhibit C-271, Motion complaint ("*Queja*") 68/2012, p. 16.

160 Counter-Memorial on the Merits, ¶ 243.

161 *See* Exhibit C-18, Amparo E-Games written submission to request the Third Court that SEGOB shows the 2009-BIS Oficio.

162 Reply, ¶ 160.

163 CER-2, Second Expert Report from Mr. Omar Guerrero, ¶ 23.

> when it is deduced from the reports ("*informes justificados*") that responsible authorities render that the complainant requested copies of the judicial proceedings that generated the claimed act, it should be understood that complainant acquired knowledge of the claimed act at the moment that the complainant received those copies; thus it will suffice to declare the inadmissibility cause established in the cited legal provision.[164]

141. That is, though the criterion refers to request for copies "in the judicial proceedings that generated the claimed act"; these copies are not provided by an Amparo judge, but, the responsible authority. This criterion does not apply to E-Mex case. For this criterion to be applicable, it would mean that E-Mex should have requested SEGOB (responsible authority) the copies of the claimed act, *i.e.*, 2009-BIS Oficio, but it did not happen. Here, what happen was, E-Games who initiated Amparo proceedings 356/2012 *i)* requested 2009-BIS Oficio, on April 18, 2012; *ii)* SEGOB presented the official notice until May 10, 2012, and *iii)* E-Mex acquired knowledge until May 15, 2012.[165] Even if Claimants emphasize that E-Mex requested copies of the Amparo proceedings 356/2012 and it received them in April 2012;[166] it does not change the fact that it is not proven that E-Mex did knew the 2009-BIS Oficio since April.[167]

142. In the same vein, Claimants assert that the Sixteenth Court could also corroborate E-Mex knowledge because on July 10th, 2012, the Sixteenth Court certified receiving 601 pages and two evidence bundles from Amparo proceedings 356/2012.[168] Also, Claimants allege that Respondent ignores this evidence. From the Counter-Memorial, Respondent established that Claimants' assertions were not precise because the copies that Claimants referred were the ones from April, not July 2012,[169] which do not contain the 2009-BIS Oficio.[170] Furthermore, it is important to clarify that the certification from July 10th, 2012, does not change the fact that evidence from

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164 Exhibit R-132, Criterion VI.2°. C. J/194, 15; Collegiate Courts; Volume XII, December 200, p. 1148, Federal Judicial Journal and its Gazette.

165 *See* Exhibit R-114, E-Games written submission to request the Third Court that SEGOB shows the 2009-BIS Oficio; Exhibit R-116, DGJS presents the 2009-BIS Oficio; Exhibit R-118, Third Court decision to notify personally, dated May 10, 2012.

166 Reply, ¶ 173.

167 *Id*.

168 *Id*., ¶ 159.

169 Counter-Memorial on the Merits, ¶ 233.

170 *See* Exhibit R-117, Certified copies sent by the Third Court (Amparo 356/2012) to the Sixteenth Court (Amparo 1668/2011).

Amparo proceeding 1668/2011 and Amparo proceeding 356/2012 demonstrates that E-Mex knew 2009-BIS Oficio until May 2012, as it alleged in its amendment complaint.

143. Evidently, the judicial criterion alleged by Claimants does not apply to E-Mex case, but also the documents from the file contradict Claimants' claim. Now, the fact that the Sixteenth Court as well as the Seventh Collegiate Court had based their decisions under terms like manifest and notorious come from Amparo Law provisions and the Supreme Court's jurisprudential criterion.[171]

144. Indeed, Amparo Law stablishes that when a district court judges receive an Amparo complaint or its amendment, they can: *i)* admit it, *ii)* warn the complainant, or *iii)* reject it as there are "manifest" and "unquestionably" inadmissible.[172][173] This case revolved around on whether the Sixteenth Court should admit the amendment complaint or reject it because there was a "manifest" an "notorious" cause for inadmissibility.

145. The Supreme Court has established that "manifest" is something that can be patently, notoriously or clearly ascertained and "notorious" or undoubtedly is the certitude and plain conviction of an idea or fact, that is to say, that it cannot be doubted because it is clear, certain and evident. Hence, the necessary standard to reject a complaint is: [174]

- that the inadmissibility is derived from the initial submission or its amendment, and its annexes, *i.e.*; it cannot be rejected if the inadmissibility comes from reports, pleadings or evidence, and
- that the inadmissibility cannot be contradicted by parties' allegations.

146. In fact, Claimants do not contradict the requirements established by the Supreme Court, but they try to justify why the cause for inadmissibility comply with these requirements.[175]

147. Further, the Supreme Court has expressed the risks to reject a complaint, or its amendment, when the inadmissibility cause is not "manifest" nor "notorious": "therefore, if these requirements

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171 It is important to mention that Mexican jurisprudence have binding degrees. Jurisprudence originated in collegiate courts will be binding for district courts of their circuit. The Supreme Court's jurisprudence is binding for all judicial organs.

172 RER-1, First Expert Report from Dr. Javier Mijangos, ¶51.

173 *See* RER-4, Second Expert Report from Dr. Javier Mijangos, ¶¶ 35, 38.

174 *See* RER-4, Second Expert Report from Dr. Javier Mijangos, ¶¶ 41 y 42.

175 Reply, ¶¶ 158-160.

do not arise, that is, if there is no clear and unquestionable cause of inadmissibility or if there is any doubt as to its operation, the claim should not be dismissed, since otherwise the complainant would be deprived of its right to file an amparo proceeding against an act that causes him/her harm and, therefore, the application for amparo should be admitted for processing in order to duly study the issue raised".[176]

148. Dr. Javier Mijangos upholds that if the complaint-or its amendment- is dismissed or rejected without satisfying such standard it would derived in an effect of unconstitutionality, because it would deprive complainants from their fundamental right of access to justice.[177] To conclude the contrary, as Mr. Omar Guerrero does, is contrary to the Supreme Court jurisprudence and it would contrive the constitutional State itself, "which aggravates the error in which the expert incurs".[178]

149. Thus, to determine that there is a manifest and notorious cause that generates the dismissal of E-Mex's amendment, a presumption is not sufficient, what it is required is to have an absolute and complete certitude about its inadmissibility; even if a small doubt exists, the amendment should be admit it; otherwise E-Mex would be left in state of defenselessness and its right to access to justice would be violated.

150. As it can be concluded from the aforementioned, the Sixteenth Court and the Seventh Collegiate Court's determinations were correct. Dr. Mijangos concludes that "both rulings are correct, both that of the Sixteenth Judge and the other in the amparo under review, since, in the case at hand, no jurisdictional authority could have been fully certain that E-Mex knew of the official communication in question on a different date, as argued by the expert hired by investors".[179] He also emphasizes that "the expert could even be right in the sense that the official communication was known by E-Mex on a date different from the one he stated, however, theorizing about such possibility is futile".[180]

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176 RER-1, First Expert Report from Dr. Javier Mijangos, ¶ 54, fn 8.

177 RER-4, Second Expert Report from Dr. Javier Mijangos, ¶¶ 42, 48.

178 *Id*., ¶ 66.

179 *Id*., ¶ 73.

180 *Id*., ¶ 73.

151. In consequence, contrary to what Claimants sustain, the Sixteenth Court could not dismiss E-Mex's amendment when it was submitted,[181] because there was not a "manifest" and "notorious" cause of dismissal, neither was it doable later, because the key moment that shows when E-Mex acquired knowledge was May 2012.

152. Besides what has been said in previous paragraphs, Claimants reiterate alleged irregularities as the following:[182]

- *One*, the Seventh Collegiate Court should not reject the evidence presented by SEGOB under complaint motion *("Queja"*) 68/2012.
- *Two*, the Seventh Collegiate Court should *ex officio* revised the adminissibility of the amendment in the Review 107/2013.
- *Three*, the Sixteenth Court and the Seventh Collegiate Court should have not admit the 2009-BIS Oficio because its effects finished with the Permit-BIS Oficio.[183]

153. Once again, Claimants may disagree with the national courts decisions, however, it is evident that none of these irregularities existed, E-Mex amendment was not manifest nor notoriously untimely, and the amparo files themselves demonstrate the key moment when it was possible to verify that E-Mex knew about the 2009-BIS Oficio. Trying to change the criterion, for revisions of files beyond the applicable standard would mean that the Sixteenth Court and the Seventh Collegiate Court should have ignored the biding criteria of the Supreme Court, and, indeed, act in a grave irregular manner.[184]

154. Respondent reiterates that presenting before the Arbitral Tribunal matters that were resolved in judicial proceedings is simply a way to litigate once again decisions of the Federal Judicial Power,[185] which is not the purpose of this Arbitration.

155. Lastly, Claimants reiterate that the Sixteenth Court did not serve notice of SEGOB's compliance communication in July 19, 2013, for the January 31, 2013 sentence, to E-Games which affected E-Games' due process rights, including its right of defense.[186] Claimants' allegations

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181 Reply, ¶ 156.

182 Reply, ¶¶ 162-169.

183 Reply, ¶¶ 170-182.

184 RER-4, Second Expert Report from Dr. Javier Mijangos, ¶ 72.

185 Counter-Memorial on the Merits, ¶ 216.

186 Reply, ¶¶ 182-183.

cannot be sustained. Claimants confirm that they did know about the First Compliance,[187] and they had full right of defense. E-Games challenge SEGOB's compliance via a contentious administrative proceeding in August 23, 2013.[188]

2. SEGOB complied, in accordance with the law, the Amparo proceeding 1668/2011 sentence

156. Claimants contend that the SEGOB and the Seventh Collegiate Court improperly revoked the Permitholder-BIS Oficio at the compliance stage of the Amparo 1668/2011. In particular, they claim that: *i)* there was excess in the compliance because the judgment only ordered, originally, the revocation of the 2009-BIS Oficio; *ii)* the Permitholder-BIS Oficio was revoked without entitling them to an independent judicial proceeding; *iii)* the Seventh Collegiate Court improperly determined that the Permitholder-BIS Oficio was a consequence of the 2009-BIS Oficio, and *iv)* the SEGOB revoked the 2009-BIS Oficio based on political motivations.[189]

157. Claimants write a story of alleged corruption and political influence of different administrative and judicial authorities to change the reasons for the dismissal of Permitholder-BIS Oficio.[190] However, they omit objective evidence to support their claims which are mere speculations and unsubstantiated statements. Likewise, Claimants do not exhibit any complaint or legal proceeding to combat the alleged acts of corruption and political influence they allegedly suffered.

158. In reality, the story is much simpler. The Permitholder BIS Oficio had to be declared null and void due to its link with the 2009-BIS Oficio, declared illegal and unconstitutional by the judicial authorities because it took as basis an assumption not provided for in the LFJS and the RLFJS, and recognized a figure that does not exist in the applicable law.[191]

159. In the First Compliance, SEGOB only declared null and void the 2009-BIS Oficio. However, E-Mex also requested that the acts derived from the 2009-BIS Oficio declared

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187 SEGOB notified the First Compliance on July 24, 2013, the Sixteenth Court did not have an obligation to notify E-Games and the Sixteenth Court did not violate E-Games right of defense.

188 *See* Exhibit R-060, E-Games' annulment complaint, from August 23, 2013.

189 Reply, ¶¶ 150-152.

190 *Id.*, ¶¶ 187, 191.

191 Exhibit C-18.

unconstitutional be rendered without effects.[192] To allow the continuance of the effects of an act declared unconstitutional, in addition to being illogical, would, in the first place, undermine the effectiveness of the amparo proceeding as a means of constitutional control,[193] and in second place, E-Mex, who suffered the impairment of its rights as a permit holder, would have to continue suffering the unconstitutional effects. The Claimants simply ignore that, in effect, they were obtaining benefits to which they were not legally entitled.

160. SEGOB, in its Second Compliance,[194] declared the Permitholder Oficio and the Permitholder-BIS Oficio null and void, since they were issued based on the declared unconstitutional official notice.

161. There is no doubt that the Permitholder Oficio and the Permitholder-BIS Oficio are closely linked and are a consequence of the 2009-BIS Oficio. The decision of the Seventh Collegiate Court in the Non-Compliance Complain only confirmed the clear link that E-Games created through its applications and actions before the SEGOB. Each of the SEGOB's[195] compliance actions were made in accordance with the law and there is no indication that its actions were taken to improperly affect E-Games.

162. As Dr. Mijangos concludes, the decisions of the Federal Judicial Branch related to the dismissal of the 2009-BIS Oficio and the Permitholder-BIS Oficio are legally and jurisprudentially supported and "none of the analyzed determinations fall under the assumption of mistake or legal error".[196]

163. Finally, although E-Games had the opportunity to prevent the SEGOB from declaring the Permitholder-BIS Oficio null and void, it withdrew its appeal. In September 2013, it filed the Motion for Complaint ("Queja") 167/2013, but on November 23, 2013 E-Games it withdrew it.[197]

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192 Exhibit C-21.

193 RER-4, Second Expert Report from Dr. Javier Mijangos, ¶¶ 101-02. RER-1, First Expert Report from Dr. Javier Mijangos, ¶¶ 131-136.

194 Exhibit C-289, SEGOB Resolution of August 28, 2013.

195 Exhibit C-290, Agreement of the Seventh Collegiate Court in Administrative Matters of the First Circuit of February 19, 2014.

196 RER-4, Second Expert Report from Dr. Javier Mijangos, ¶ 144.

197 Exhibit C-297-SPA. Sentence of Appeal of Nonconformity 5/2014 ("From which it is evident that the appellant consented to the ruling by which the judge ordered that the authorities should leave without

3. The Second Compliance by SEGOB was duly analyzed in national courts and no illegalities were found

164. The procedural sequence in which the Permitholder-BIS Oficio was involved, begins with the amendment of E-Mex's claim in the Amparo proceedings 1668/2011 and ends with the judgment of the Appeal of Nonconformity. The following are the most relevant facts.

- On June 5, 2012, E-Mex challenged the constitutionality of the 2009-BIS Oficio, and all its effects and consequences, by means amending its Complaint. [198]
- On January 31, 2013, the Sixteenth Court issued the judgment of the Amparo 1668/2011 in which it ruled that the 2009-BIS Oficio was illegal and unconstitutional, and therefore ordered SEGOB to declare it null and void.[199]

> From the precepts cited by the responsible authority in [Oficio 2009-BIS], there is no evidence of the figure of the direct operator of a permit, nor that by complying with the obligations set forth in Article 29 of the [RLFJS] rights are acquired for the exploitation of a permit without the intervention of the permit holder.
>
> [...]
>
> The violation to the detriment of [E-Mex] of its the guarantee of legality is evident, since the authority recognized the legal acquisition of the exploitation of a permit, without legal basis, limiting itself to stating that it is due to acquired rights, for complying with the operator obligations established by the LFJS and its regulations, without indicating precisely the legal precept applicable to the case and without applying the reasons given and the applicable rules, which reflects an improper substantiation and motivation of the official order complained of.

- On February 19, 2013, E-Games filed motion for Review 107/2013 against the Amparo 1668/2011 judgment.[200]
- On July 10, 2013, the Seventh Collegiate Court resolved the Motion for Review 107/2013, upheld the judgment of the Amparo 1668/2011 and the unconstitutionality of the 2009-BIS Oficio.[201]
- On July 19, 2013, SEGOB declared null and void the 2009-BIS Oficio, and denied E-Games' request that originated the 2009-BIS Oficio (First Compliance).[202]

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effects all the acts that had their origin in the federal gaming and sweepstakes permit..."), p.24; R-113, Motion for Complaint 167/2013 filed by E-Games ("... appellant withdraws from the for motion for complaint filed against the order of August twenty-six, two thousand thirteen"), p. 4.

198 Exhibit C-269, Third amended Amparo complaint filed on June 5, 2012, p. 4.

199 Exhibit C-18, Sentence of the Sixteenth Administrative Court in Mexico City, dated January 30, 2013, ¶¶ 200-202.

200 Exhibit C-283, E-Games motion of Review of February 19, 2013.

201 Exhibit R-100. Claimants cite this document as Exhibit C-20.

202 Exhibit C-272, SEGOB resolution of July 19, 2013.

- On August 23, 2013, E-Mex disagreed with the First Compliance and requested the Sixteenth Court to declare that the judgment had not been complied with because, in order to restore its constitutional rights, it should eliminate not only the 2009-BIS Oficio, "but also any subsequent resolution that has been taken in the same sense either as a consequence or simply using the same criteria".[203] E-Mex even specifically pointed out the Permitholder Oficio and Permitholder-BIS Oficio.[204]
- On August 26, 2013, the Sixteenth Court determined that SEGOB had not complied with the sentence, because it was bound to leave without effects "any other act or acts that have been issued as a consequence [of the 2009-BIS Oficio], in the understanding that it must be accredited in its records that there are different official notes that have as basis the mentioned permit and, if so, proceed to declare it null and void".[205] It is necessary to point out that it was the Sixteenth Court (and not the Seventh Collegiate Court) who established this form of compliance.
- On August 28, 2013, SEGOB declared null and void the Permitholder Oficio and the Permitholder-BIS Oficio (Second Compliance). SEGOB resolved that, from the content of both official notes, it was clear that they were linked to the 2009-BIS Oficio and to the merits of the decision of the Sixteenth Court.
- On September 9, 2013, E-Games filed a motion of complaint against the rule of August 26, 2013 from the Sixteenth Court.[206]
- On October 14, 2013, the Sixteenth Court ruled that SEGOB exceeded its authority in complying with the sentence of the Amparo 1668/2011; therefore, it filed before the Seventh Collegiate Court the Non- Compliance Claim 82/2013, to determine whether the SEGOB had exceeded or had incurred in defect in the compliance.[207]
- On February 19, 2014, the Seventh Collegiate Court resolved the Non-Compliance Complaint 82/2013, and concluded that SEGOB did not exceed the compliance.[208]

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

204 E-Mex's request mentions that "it is not enough that [SEGOB] has left without effects only the DGAJS/SCEV/260/2009-BIS oficio to consider that my client has been reinstated in the full enjoyment of its violated individual guarantees, in view of the existence of several resolutions issued by the responsible party with that precedent, with special mention of the oficio DGAJS/SCEV/827 dated August 15, 2012, in which it again recognizes acquired rights to [E-Games] over the permit of my client, as well as the [Permitholder-BIS Oficio], in which they 'perfect' the previously mentioned to grant [E-Games] the ownership of a permit under identical conditions to ours", C-21, p. 13

205 Exhibit C-23, Sixteenth Administrative Court ruling, dated August 26, 2013, p. 012.

206 *See* Exhibit R-113, Sentence of the Motion of Complaint 167/2013. On November 23, 2013, E-Games withdrew it.

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

208 Exhibit C-290, Ruling of the Seventh Collegiate Court in Administrative Matters of the First Circuit of February 19, 2014.

- On March 10, 2014, the Sixteenth Court considered as complied the judgement of the Amparo 1668/2011.[209]
- On March 31, 2014, E-Games filed an appeal of nonconformity in which it challenged *i)* the ruling of the Seventh Collegiate Court that resolved the Non- Compliance Complaint, and *ii)* the resolution issued on March 10, 2014 by the Sixteenth Court in which it considered the Amparo 1668/2011 sentence to have been complied with.[210]
- On September 13, 2014, the Supreme Court admitted the appeal regarding the March 10, 2014 resolution of the Sixteenth Court, however, since it was not a relevant or exceptional case, it referred it to the Seventh Collegiate Court.[211]
- On January 29, 2015, the Seventh Collegiate Court resolved the Motion for Reconsideration.[212]

165. As it can be seen, the procedural sequence was long and complex. Both E-Mex and E-Games filed several motions and exhausted all available remedies before the national courts. The determinations of the national courts were the result of this litigation between two private parties. It should be clarified that, during all these moments, E-Games was aware of the reasoning of the national courts and was never limited in filing the appeals it considered convenient to defend its position.

a. The Seventh Collegiate Court confirms that SEGOB did not exceed its authority in complying with the Amparo 1668/2011 sentence when it declared null and void the Permitholder-BIS Oficio

166. Claimants state that the declaration of null and void of the Permitholder-BIS Oficio was improper because: *i)* there was an excess in the compliance;[213] *ii)* it did not have an independent

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209 Exhibit C-291, Ruling of the Sixteen Judge in Administrative Matters in the First Circuit of March 10, 2014.

210 Exhibit C- 296, Appeal of Nonconformity filed by E-Games on March 31, 2014.

211 Exhibit C-26, Appeal of Nonconformity 496/2014 (.... it is noted that, given the number of appeals of non-conformity filed and turned to this Supreme Court, which are sufficient to define the respective criteria, it is convenient to delegate to the Collegiate Circuit Courts the competence to hear the appeals of non-conformity filed in terms of the provisions of sections I and II of article 201 of the Amparo Law, without prejudice that, in exceptional cases, they may request this Supreme Court of Justice of the Nation to resume its competence), pp. 43-44, 49-50. [Emphasis added].

212 Exhibit C-297, Sentence of Appeal of Nonconformity 5/2014 related to 9/2014, dated January 29, 2015.

213 Reply, ¶¶ 185-199.

judicial procedure;[214] *iii)* the Seventh Collegiate Court improperly determined that the Permitholder-BIS Oficio was a consequence of the 2009-BIS Oficio;[215] *iv)* SEGOB's reason for doing so was politically motivated;[216] and *v)* the Sixteenth Court had two options "more efficient than initiating the Non-Compliance Claim".[217]

167. The Sixteenth Court considered that the Second Compliance had been excessive because the Permitholder Oficio and the Permitholder-BIS Oficio were not a consequence of the 2009-BIS Oficio, and requested the Seventh Collegiate Court to decide this issue in a non-compliance complaint. The Seventh Collegiate Court ruled that the Permitholder Oficio and the Permitholder-BIS Oficio were indeed a consequence of the 2009-BIS Oficio and that, therefore, the Second Compliance of the SEGOB had not been excessive.

168. It should be pointed out that the difference in the criteria of the Sixteenth Court and the Seventh Collegiate Court did not address the issue of whether the acts derived from the 2009-BIS Oficio should be declared null and void, on their own merits, but rather whether they had been issued as a consequence of 2009-BIS Oficio. As in any legal system, the prevailing criterion was that of the hierarchically superior organ, *i.e.*, the Seventh Collegiate Court.

169. Dr. Javier Mijangos explains that some administrative acts, by their nature, produce effects not only at the moment of their issuance, but also at different moments over time. Therefore, the purpose of the amparo trial is to fight not only the administrative act, but also its effects, otherwise it would lose its practical and legal usefulness. In addition, he emphasizes that the amparo trial not only allows access to justice, but also constitutes a means of constitutional control that safeguards the principle of constitutional supremacy. Evidently, in its function of constitutional control, it cannot allow the effects of acts declared unconstitutional to subsist. It is precisely in this function where the doctrine of the fruits of vitiated acts makes sense, according to which, if the original act is unconstitutional, the derived acts shall end too.[218]

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214 *Id.*, ¶¶ 200-207.

215 *Id.*, ¶¶ 208-209.

216 *Id.*, ¶¶ 210-226.

217 *Id.*, ¶¶ 227-229.

218 RER-4, Second Expert Report from Dr. Javier Mijangos, ¶ 102; RER-1, First Expert Report from Dr. Javier Mijangos, ¶¶ 142, 144, 148.

170. Therefore, the nullity and voidness of the 2009-BIS Oficio was not sufficient to comply with the sentence in the Amparo 1668/2012, when that oficio was an administrative act with effects that extended beyond itself. The elimination of its effects, including Permitholder Oficio and the Permitholder-BIS Oficio was not only correct, but necessary.

171. Now, regarding the alleged violation of the principle of relativity of the judgment, Dr. Mijangos points out that such principle derives from the principle *res inter alios acta* and implies that the effects of the amparo judgments are limited to the plaintiff and do not make a general declaration, therefore, it cannot be considered that extending the protection of the amparo to the effects of the challenged act violates this principle.[219]

172. In relation to the alleged violation of due process,[220] it is clarified that in the Amparo 1668/2011 the litis was duly established by E-Mex: the 2009-BIS Oficio and its effects. Therefore, it was right that the nullity and voidness of the 2009-BIS Oficio also covered the related offices, in order to neutralize the effects of an act declared unconstitutional.[221]

173. Claimants developed a history of alleged corruption of various administrative and judicial authorities, including the President's Counsel and from a Justice of the Supreme Court, to allege that the Government of Mexico allegedly conspired in a coordinated fashion to eliminate the Permitholder-BIS Oficio.[222] This is false and part of their legal strategy in this arbitration.

- *One*, the decisions of the different courts that heard the procedural sequel show no coordination whatsoever. Indeed, the Claimants themselves support or reject the jurisdictional decisions as they see fit.[223]
- *Two*, Mr. José Raúl Landgrave has been categorical, *i)* only matters of high importance, such as a constitutional controversy, would be of the competence and interest to the Office of the Legal Counsel to the Presidency; and *ii)* the Second Compliance was judicially examined, and no irregularity was found.[224]

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219 RER-4, Second Expert Report from Dr. Javier Mijangos, ¶ 102.

220 Reply, Section *II*.L.4. (b), ¶¶ 200-207.

221 RER-4, Second Expert Report from Dr. Javier Mijangos, ¶ 107; RER-1, First Expert Report from Dr. Javier Mijangos, ¶¶ 112-113.

222 Reply, ¶¶ 210-226.

223 Claimants first attack the Sixteenth Court's admission of E-Mex's amendment complaint, but then defend the Sixteenth Court's decision on the grounds that the SEGOB exceeded its authority in the Second Compliance. *See* Reply, ¶¶155, 188

224 RWS-5, Second Witness Statement of Mr. José Raúl Landgrave Fuentes, ¶ 26.

174. Finally, Claimants point out that the Sixteenth Court had two options "more efficient than initiating the Non-Compliance Claim,"[225] however, neither option was appropriate. The sentence was clear, the Sixteenth Court determined that the 2009-Oficio BIS and its effects should be revoked.[226]

b. The Appeal of Nonconformity (*"Recurso de Inconformidad"*) was decided properly by the Supreme Court and the Seventh Collegiate Court

175. Claimants assert that the Supreme Court declined to study the Appeal of Nonconformity because of alleged procedural causes and sent it back to the Seventh Collegiate Court. Hence, the Seventh Collegiate Court would revise its decision in the Non-Compliance Complaint 82/2013, which hindered E-Games' opportunity to challenge the sentence.[227] However, this is not correct.

176. On March 31, 2014, E-Games challenged via Appeal of Nonconformity: *i)* the sentence of the Non-Compliance Complaint, and *ii)* the ruling dated March 10, 2014, from the Sixteenth Court related to the sentence of the Non-Compliance Complaint. E-Games expressly requested that if the Supreme Court considered adequate, the Supreme Court resume its competence and resolve accordingly, considering the exceptional nature of the matter.[228] E-Games knew the threshold it required to comply for the Supreme Court to decide directly its appeal of nonconformity. This is not an alleged procedural cause. The importance, relevance, exceptionality is a requirement of procedural admissibility.

177. On September 13, 2014, the Supreme Court resolved that: *i)* the appeal of nonconformity was not admissible in the case of the non-compliance complaint;[229] *ii)* the appeal of nonconformity was admissible in relation to the ruling dated March 10, 2014, and *iii)* it determined that the

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225 Reply, ¶¶ 227-229.

226 Using the alleged options proposed by Claimants, they pretend to make it appear that the sentence was ambiguous, however, that did not happen. Dr. Javier Mijangos explains that Claimants' options were inapplicable. RER-4, Second Expert Report of Dr. Javier Mijangos, ¶¶ 112-114; RER-1, First Expert Report of Dr. Javier Mijangos, ¶¶ 186-188.

227 Reply, ¶¶ 230-245.

228 Exhibit C-269, Appeal of Nonconformity ("*Recurso de Inconformidad*"), dated March 31, 2014, p. 88.

229 "The ruling that has been cited [the sentence of the non-compliance complaint] is not under the instances of article 201 of current Amparo Law, for the procedural admissibility of appeal of nonconformity". Exhibit C-26, p. 36.

Seventh Collegiate Court was competent to decide the appeal of nonconformity because the sentence compliance did not have a special nor a relevant characteristics.[230]

178. Evidently, the Appeal of Nonconformity developed under the usual standards, and E-Games knew them.[231] There was not the alleged influence of the former Federal Administration that supposedly caused the Appeal of Nonconformity to return to the Seventh Collegiate Court; instead, E-Games *i)* tried to re-litigate the Non-Compliance Complaint, and *ii)* failed to show that the challenge against the ruling dated March 10, 2014, was exceptional, special or relevant for the Supreme Court to attract the case.

179. About the Seventh Collegiate Court resolving the Appeal of Nonconformity, it did not imply that E-Games was left defenseless or that the challenges established under the Amparo Law have a structural problems against due process and are contrary to the American Convention of Human Rights.[232]

180. The Inter-American Court of Human Rights has stablished a standard for an effective remedy, *i)* the remedy should be able to identify possible violations of rights, and at the same time to remedy the violation of rights; and *ii)* the general conditions in the country that make it impossible [or allow] to achieve the goals of the remedy.[233]

181. When the Seventh Collegiate Court resolved the Non-Compliance Complaint, the court exercised the control and revision of SEGOB's Second Compliance.[234] During the course of these phases the litigious parties, including E-Games, had the opportunity to present their submissions and defend their rights.[235] In this sense, Amparo Law effectively allow to identify, and if so, remedy possible violation of rights because of the Second Compliance.

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230 In this sense, the Supreme Court indicated that E-Games arguments "are not effective for the pretended objective, in principle because there is no evidence of what are the special or relevant characteristics of the matter, in itself, that would lead for the National Supreme Court of Justice to resume is originating competence…". Exhibit C-26, p. 43.

231 RER-1, First Expert Report from Dr. Javier Mijangos, ¶¶ 295-296.

232 Reply, ¶ 238.

233 RER-4, Second Expert Report from Dr. Javier Mijangos, ¶ 120-122.

234 RER-1, First Expert Report from Dr. Javier Mijangos, ¶¶ 232-233.

235 RER-1, First Expert Report from Dr. Javier Mijangos, ¶ 233.

182. Later, when the Seventh Collegiate Court resolved the Appeal of Nonconformity, the matter of study, as decided by the Supreme Court, would only attend the March 10, 2014 ruling of the Sixteenth Court. At first, as Dr. Javier Mijangos points out "it is true what [Claimants] says in the sense that it makes no sense for the Collegiate Court to rule twice on the same thing, however, what we disagree with is the fact that this implies leaving the [E-Games] in a state of defenselessness, or worse, that the amparo remedy system has a structural deficiency. To consider it otherwise presupposes a very formalistic formation, contrary in fact to the whole logic of contemporary constitutionalism. That is to say, although it could be thought that it makes no sense for the Collegiate Court to rule twice on the same issue, the reality is that from the material point of view it does comply with the standard referred to by the Inter-American system of which Mexico is a part".[236]

183. Besides that, the March 10, 2014, ruling was revised thoroughly on its merits by the Seventh Collegiate Court.[237] The sentence of the Appeal of Nonconformity analyzed E-Games' arguments and concluded:[238]

- Albeit, Permit-BIS Oficio stated that it is an independent permit, it was issued based on the acquired rights of E-Games.

> Even insisting that the permit states that it is an autonomous permit, it cannot be disregarded that it was issued based on the acquired rights of the permit that was used by [E-Games] to act as an operator, that is E-Mex permit, dated twenty-fifth May two thousand and five, and its modifications; that much is so, that even the authority did not provide a new permit number, instead, it issued the same with a Bis suffix […].
>
> The aforementioned allows to conclude that the permit of the appellant is not autonomous nor independent of the permit issued to complainant [E-Mex].[239]

- E-Games consented the ruling from August 26, 2013 by which the Sixteenth Court ordered to nullify and void ("dejar insubsisntentes") the 2009-BIS Oficio' effects.
- It was incorrect that E-Games pretended to examine SEGOB's decision to declare null and void the official notices that derive from 2009-BIS Oficio, because that was how SEGOB had to comply with Amparo 1668/2011 sentence.

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236 RER-4, Second Expert Report from Dr. Javier Mijangos, ¶ 122.

237 RER-4, Second Expert Report from Dr. Javier Mijangos, ¶ 123.

238 Exhibit C-297, Sentence of the Appeal of Nonconformity, dated January 29, 2015, pp. 90-91, 103-104, 106, 112, 113.

239 Exhibit C-297, Sentence of the Appeal of Nonconformity, dated January 29, 2015, pp. 91.

- All the official notices that were declared null and void were based on the character of independent operator, by acquired rights, that is, the merits studied in the Amparo 1668/2011.
- The Permit Oficio and the Permit-BIS Oficio were strictly related.
- It was inadequate that E-Games pretended to defend the Permit-BIS Oficio using an appeal of nonconformity, because the remedy's matter of study was to analyze if SEGOB's acts reinstated the full enjoyment of E-Mex's rights.

184. Claimants attack the Amparo proceeding as if the system did not allow them to defend themselves. However, the procedural sequence explained in previous paragraphs is clear. E-Games presented its position against the Second Compliance, not once, but twice: in the Non-Compliance Complaint and the Appeal of Nonconformity. That E-Games was unsuccessful and that Claimants disagree with the sentence, does not imply, in any manner, that Respondent violated their rights of due process.

c. The Amparo 1151/2012' rulings were not binding for the Amparo 1668/2011

185. On December 18, 2012, E-Mex submitted its Amparo complaint against the lack of notifications from SEGOB when it issued permits in favor of E-Games and Producciones Moviles (Amparo 1151/2012).[240] Later, E-Mex submitted an amendment to dispute, among others, the Permit-BIS Oficio, and it was admitted by Second District Court.[241] E-Games challenged the amendment by a motion for complaint, because it considered that the amendment was untimely presented. On October 17, 2013, the First Collegiate Court that the amendment was inadmissible.[242]

186. Claimants assert that rulings in the Amparo 1151/2012 and E-Mex actions in those proceedings, prevented the revocation of the Permit-BIS Oficio in the phase of enforcement in the Amparo proceedings 1668/2011. In particular, Claimants affirm the following:[243]

- Based on the rulings from Amparo proceeding 1151/2012, E-Mex tacitly consented the Permit-BIS Oficio; thus a consented act could not be revoked, nor challenged in other Amparo proceeding.

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240 Exhibit C-273.

241 Exhibit C-293.

242 Reply, CPP 246-260.

243 Reply, ¶¶ 246-260.

- The Seventh Collegiate Court was bound to take into account Amparo proceedings 1151/2012, not because it was a precedent or jurisprudence, but because Amparo proceedings 1151/2012 were res judicata and the same matter was being discussed.
- The Sixteenth Court and the Seventh Collegiate Court should *ex offcio* analyze Amparo proceedings 1151/2012.
- E-Mex presented contradictory positions in the Amparo proceeding 1151/2012 and Amparo proceeding 1668/2011, in consequence, under the principle of own acts, the Sixteenth Court and the Seventh Collegiate Court could not revoke the Permit-BIS Oficio.

187. However, what was resolved under Amparo proceedings 1151/2012 does not have the legal effects alleged by Claimants. Claimants intend that this Tribunal changes into an appeal or review court for the rulings of national tribunals, where Claimants themselves acted and presented their submissions, and the result was unfavorable. The aforementioned is not the function of an investment Arbitral Tribunal under NAFTA.

188. *First*, Claimants assert that by disputing the Permit-BIS Oficio in Amparo proceeding 1151/2012, E-Mex implicitly recognized that such official notice could not be revoked during the enforcement stage in Amparo 1668/2011. Hence, based on the doctrine of own acts, the Permit-BIS Oficio could not be revoked in Amparo 1668/2011. To equate, the supposedly tacit knowledge from E-Mex to the doctrine of own acts is not applicable for qualifying the admissibility of an Amparo proceeding.

189. Dr. Javier Mijangos explains that the theory of own acts is employed in private law to study the principle of good faith. There is no basis for applying it in an admissibility cause for an Amparo proceeding.[244] In this sense, Dr. Mijangos considers that "it is not possible for a judge to evaluate and determine *a priori* the intention with which the claimant filed a specific amparo proceeding, so that it would not be possible for him to set the parameter of evaluation of which future actions would be excluded as prohibited"; thus, such theory is not applicable for the subject-matter of an Amparo, and it is equally non-applicable to prohibit challenging certain acts.[245] Furthermore it should also be said that the ruling of inadmissibility was determined in the Amparo proceedings

[244] RER-4, Second Expert Report from Dr. Javier Mijangos, ¶¶ 138-141. RER-1, First Expert Report from Dr. Javier Mijangos, ¶¶ 262- 265.

[245] RER-4, Second Expert Report from Dr. Javier Mijangos, ¶ 133.

1151/2012, on October 17, 2013. Two months before, the Second Compliance was ordered on August 26, 2013, to even talk about an "owns acts theory", as alleged by Claimants.

190. *Second*, the untimeliness of the Permit-BIS Oficio from the Amparo Proceeding 1151/2012 should not be extrapolated to the Amparo proceeding 1668/2011. The resolution of the First Collegiate Court is limited to that specific case. It cannot be considered a "decision that binds any court of the Mexican State to consider that E-Mex tacitly consented to such official communication in any trial, procedural means and moment".[246] Judicial organs cannot be bound to search which proceedings, which acts and which allegations have been put for by claimants to decide if proceedings continue or not. It is absurd that Claimants pretend that Mexican judicial organs, *ex officio*, perform these investigations.

191. *Third*, SEGOB was a party in the Amparo proceedings 1668/2011, SEGOB was not the adjudicator. Following its role as the responsible authority in the enforcement phase, SEGOB limited itself to comply with the adjudicator's order. SEGOB could not analyze which would have been the effect of Amparo proceeding 1151/2012 on Amparo 1668/2011, as this is not the role of the parties in the Amparo proceedings.[247]

G. Closure of E-Games' Casinos

192. Claimants in their Reply assert that SEGOB illegally close their casinos on April 24, 2014, using excessive police force and other illegal and irregular tactics; despite the fact that E-Games had presented the appeal of nonconformity and there were appeal procedures pending to resolve.[248] Nonetheless, and as it will be shown, SEGOB exercise its attributions and faculties in matter of games and raffles, in accordance with the LFJS and the RFLJS. Furthermore, Respondent sustains that Claimants had at all times access to legal remedies to dispute the actions of Respondent and defend their interests.

246 RER-1, First Expert Report from Dr. Javier Mijangos, ¶ 265.

247 RER-1, First Expert Report from Dr. Javier Mijangos, ¶ 270.

248 Reply, ¶ 246.

1. Inspection orders

a. The use of police force

193. Claimants assert that Respondent interprets in an erroneous manner article 10 of the LFJS,[249] following Mr. Gonzalez's opinion, the Mexican courts have established criteria to determine the case that justifies the use of police force, and, specifically, state that authorities like SEGOB have to determine if the use of police force is reasonable and proportional to the case at hand.[250]

194. Contrary to Claimants' argument, and as it will be explained in the following sections, the inspection orders issued on April 23, 2014 by SEGOB were duly legally based and applied to the facts in accordance to the applicable law. The evidence of these facts show that SEGOB's acts were in accordance with the law and it objective was to control and oversight the norms of games and raffles in Mexico, as it is established under article 3 of the LFJS: "The Federal Executive, through the Department of the Interior, is responsible for the regulation, authorization, control, and oversight of all gaming when they involve betting of any kind, as well as all sweepstakes, except for the National Lottery, which shall be governed by its own law ". [Added emphasis]

195. In this sense, federal and local authorities shall cooperate with SEGOB to comply with its activities of control and oversight of establishments under its competence.[251] In consequence, the use of police force by SEGOB is not extraordinary nor against the LFJS, as asserted by Claimants citing the inspection visits of April 14, 2014. As it was explained by Respondent in the Counter-Memorial, the objective of the inspection order was to verify if activities regulated by the LFJS were happening in the establishments operated by E-Games, [252] specifically, if those establishments were violating article 8 of the LFJS: "Any open or closed facility where prohibited games or gambling or sweepstakes take place without legal authorization shall be closed by the Secretariat of the Interior, without prejudice to any applicable penalties that may be levied. [Emphasis added]

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249 *Id.*, ¶ 269.

250 CER-6, Second Expert Report from Mr. Ezequiel Gonzalez Matus, ¶¶ 208-212.

251 Exhibit R-30, Article 10, LFJS.

252 Counter-Memorial on the Merits, ¶ 315.

196. Mr. Marcos Garcia states that "the accompaniment of the public force (as indicated in article 10 of the LFJS),with the sole purpose of safeguarding the integrity of the commissioned inspectors."[253] Thus, SEGOB exercising its legal attributions used the public force with the sole purpose to safeguard the public servants' integrity, without affecting Claimants.

197. In fact, this Tribunal should not disregard that there was general interest in media; at that time, the General Director of Games and Raffles, Ms. Marcela Gonzalez Salas, gave public comments replicated in several media notes. E-Mex, E-Games and Producciones Moviles permits were mentioned. In those moments, as mentioned earlier, the sector of games and raffles had a complicated time in the country, and the importance and relevance of the media interest had to be treated accordingly. Consequently, it was fully justified in SEGOB's faculties and attributions requiring the help of the police force. SEGOB's objective in requesting the police force helped protect the public servants' integrity and fulfil the inspection.

198. Mr. Alfredo Lazcano points out that the Claimants could be confusing the assistance of the public force with the deployment of the police force, since according to article 3, section VIII of the Agreement issuing the General Guidelines for the Regulation of the Use of Public Force by the Police Institutions of the Decentralized Bodies of the Secretariat of Public Security, legitimate use of force is understood as: "…the application of methods, techniques and tactics based on different levels of force, in the exercise of functions, under applicable legislation, the United Nations Basic Principles on the Use of Force and firearms as well as well as by the Code of Conduct for Law Enforcement Officials and these Guidelines."[254]

199. Indeed, from what was transcribed in the immediately paragraph above, it can be seen that the use of force is precisely about applying force to another,[255] a situation that never occurred during the verification visits of April 24, 2014, since the Claimants only indicated that there was a "presence of the police force"[256] if it was excessive or not, it is a matter that could well be mere subjective assessments. However, it is clarified that the presence of the authority, in itself, does

253 RWS-3, First Witness Statement of Mr. Marcos García Hernández, ¶ 8.

254 RER-5, Second expert report of Mr. Alfredo Lazcano Sámano, ¶ 143.

255 *Id.*, ¶ 144.

256 Reply, ¶¶ 268 y 268.

not constitute a "use of force", as it is simply the first form of contact that the agents have with the general public.

200. Similarly, Mr. Alfredo Lazcano specified in his second expert report:

> In this regard, given that the public force was not used, it was not necessary to use "any reasoning of SEGOB that justifies, nor is the legal basis indicated, for having used the public force in the closure of the Casinos (Establishments)"140. SEGOB invoking Article 10 of the Gaming Law[257] in each and every one of the Verification Orders, based its decision to summon the presence of the police force, which did not use, in any of the inspections, of the public force.[258]

201. On the other hand, the Claimants also point out that, at the time of the verification visits of April 24, 2014, SEGOB incurred in a series of irregularities such as: i) an aggressive incursion into casinos of military-type;[259] ii) the intention to close the casinos and not carry out a routine inspection[260] and iii) they were openly hostile and aggressive towards the employees.[261] However, the Claimants have not produced reliable evidence of these alleged irregularities incurred by SEGOB at the time of the inspection visits on April 24, 2014

202. The Respondent maintains from its Counter-Memorial[262] that the inspection visits to the E-Games casinos were carried out in accordance with the LFJS and the RLFJS and due process rights were always respected. The allegations referred to by the Claimants constitute subjective assessments of the events that occurred, since they have not provided evidence to support such arguments. In fact, the means of challenge that the Claimants asserted at the time denied E-Games' requests, because they were inadmissible, as will be explained in detail later.

203. The Claimants states that the analysis performed by Mr. Marcos García did not have justification whatsoever with the recorded evidence in the arbitration procedure, particularly

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257 This article states that "*all federal authorities, local authorities and the public force will cooperate with [SEGOB] to enforce the determinations that it issues under this [Gaming Law]*.

258 RER-5, Second expert report of Mr. Alfredo Lazcano Sámano, ¶ 145.

259 Reply, ¶ 271.

260 *Id.*, ¶ 272.

261 *Id.*, ¶ 273.

262 Counter-Memorial on the Merits, ¶ 314.

because Mr. García was not present during inspections of E-Games casinos, for which this testimony was inaccurate and, therefore, the tribunal should dismiss it.[263]

204. Although it is true that Mr. Marcos García was not present during the inspection visits that took place on April 24, 2014, it is also true that Mr. Marcos García statement cannot be deemed inaccurate because it was made on the basis of the exercise of the functions that he performed as Deputy General Director of Regulation and Verification of the General Directorate of Games and Raffles in SEGOB during 2013-2015, that is, as head of the DGJS area in charge of carrying out the verifications to establishments. [264]

205. Mr. García points out that: "the logistics of the inspection visits carried out by SEGOB in the exercise of its powers were coordinated from the Deputy General Directorate in my charge, for which I am fully aware of the manner in which these visits were organized and planned, as well as the way in which they were developed and ended. By virtue of the foregoing, given my first-hand knowledge of the matter on which my statements deal, no probative value should be subtracted from them."[265] Likewise, Mr. Marcos García points out that:

> [F]irst, as I stated in my First Witness Statement, the verification visits to E-Games establishments were planned and organized in the same way as any other verification visit carried out by the Deputy Direction General of Regulation and Verification under my care based on the legal framework in force at that time. In that sense, the establishments subject to the verification visits were not given any special treatment either for or against. Second, in my capacity as the hierarchical superior of the persons who acted as inspectors in the referred verification visits, I never received complaints from the representatives of other establishments that were the subject of previous verification visits in which they were commissioned, regarding the way they conducted themselves, so I do not conceive that they had the hostile attitudes that the Claimants represented by QE express, and rather I consider that these are subjective appraisals. [266]

206. Therefore, Mr. Marcos García statement should not be dismissed as requested by the Claimants.

207. The Claimants further argue that there is documentary evidence confirming that SEGOB visited the E-Games casinos for the only purpose of closing them, even going so far as to state that SEGOB officials had express instructions to "proceed to the corresponding close down." These

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263 Reply, ¶ 274. Citing Second Witness Statement of Mr. Héctor Ruiz, CWS-67, ¶¶ 14-16.

264 Exhibit C-402, Verification Orders of SEGOB of April 23, 2014.

265 RWS-6, Second Witness Statement of Mr. Marcos García Hernández, ¶10.

266 *Id.*, ¶ 8.

alleged instructions specifically consisted of: (i) using police force to prevent a person or document from entering the establishments; (ii) ask the manager to identify himself and appoint two witnesses; and (iii) the manager could only provide SEGOB with physical documents in its possession at the time of the inspection, and could not request any document by email or postal mail.[267]

208. In this regard, Mr. Marcos García points out that "[he] do[es] not know the origin of the document to which the Claimants represented by QE refer, having it in front of me, I do not find any element that proves that it was prepared by any person assigned to the Deputy Direction General of Regulation and Verification under my care, since from its content there are no seals or autograph signatures, but rather I consider that it was a document prepared in support of memory, I am referring to the document identified as Exhibit C-403."[268]

209. Claimants' arguments that the internal document identified as Exhibit C-403 gave express instructions to SEGOB officials to close down the E-Games establishments are inaccurate. Regardless of what was stated by Mr. García, regarding the fact that he does not know the source of the document, what is stated there does not contravene the provisions of the LFJS or the LFPA and, in any event, the breach for which the E-Games casinos were closed down was for not having a valid and current permit to operate.

210. Mr. Alfredo Lazcano points out that "the infraction committed by E-Games was to operate the Establishments without having a valid and current Permit, and the sanction decreed by SEGOB was the closure of the Establishments"[269] which evidence once again, that the SEGOB officials did not have any instruction in this regard, but rather they were exercising their functions of verification and control over the E-Games establishments, which were not complying with the provisions of the LFJS and the RLFJS.

211. Therefore, it must be specified that requesting the assistance of the police force in the inspection visits of April 24, 2014 was fully justified and the inspection orders of April 23 of that

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267 Reply, ¶¶ 275 and 276.

268 RWS-6, Second Witness Statement of Mr. Marcos García Hernández, ¶ 17.

269 Exhibit RER-5, Second expert report of Mr. Alfredo Lazcano Sámano, ¶ 171.

same year complied with all the formalities and requirements for the use of such force, for which the Claimants' statements translate into unfounded arguments lacking in evidence.

b. Verification visit formalities

212. The Respondent considers necessary to explain how the inspection visits to the E-Games Casinos were carried out, because contrary to what the Claimants argue, their due process rights were always respected. The Respondent wishes to point out to the Tribunal that B-Mex position is not reasonable from a legal point of view, and that the Claimants had at all times access to the means of defense that they considered pertinent – they even used them.

213. On April 23, 2014, the DGJS issued verification orders for the E-Games establishments, which must be executed the following day. The orders did not refer to the name of any particular company at the top, so it could be thought that they were not addressed to any establishment, however, they indicated in the body of the document (second paragraph) the full address in where the commissioned inspectors had to appear in order to conduct the corresponding inspections.

214. In this context, it is important to point out that the objective of inspection orders was to verify whether activities regulated by the LFJS were performed in those establishments, because since August 28, 2013, the Permitholder number DGJS/SCEV/1426/2012 had been declared invalid in compliance with the J.A. 1668/2011, and on March 10, 2014, the Sixteenth Court confirmed that SEGOB had correctly complied with said resolution, which indicated that by the date the inspection visits were conducted, the E-Games establishments were operating without a valid permit.

215. In their Reply, the Claimants mention the fact that, so as to close down an establishment, it is necessary for the inspection order to comply with the requirements established in article 63 of the LFPA and 145 of the RLFJS, which require that clearly identify the name of the company to which the establishments belong. However, the Claimants argue that the inspection orders of April 23, 2014 were addressed to E-Mex and not to E-Games, and that despite the fact that the managers of the E-Games establishments made observations in this regard, SEGOB officials refused to listen to them and proceeded to close down the casinos.[270]

[270] Reply, ¶¶ 284-285.

216. The fact that a particular name did not appear at the top of the inspection orders does not mean that they could not be executed or that they were not addressed to the E-Games establishments, since given the location where the establishments were located and by the reference made to the Permit holder number DGJS/SCEV/1426/2012, it was clear that the inspection orders were addressed to the E-Games casinos, in addition to being duly founded and reasoned in the applicable legislation.

217. Mr. Alfredo Lazcano points out:

> The first deficiency pointed out by the QEU&S Claimants is that the Verification Orders did not state the name of the person who was to be verified, in accordance with Article 145 of the Gaming Regulations143. However, the same Article 145144 refers to the LFPA, which establishes in its Article 63 that "the verifiers, to carry out visits, must be provided with a written order with an autograph signature issued by the competent authority, in which the place or area to be verified must be specified, the purpose of the visit, the scope it must have and the legal provisions that support it". The Verification Orders were issued based on the provisions of the LFPA and meet all the requirements set forth in the aforementioned Article 63 for this purpose, which, although it differs from the content of Article 145 of the Gaming Regulations in terms of the name of the person to whom the verification is performed refers to, due to the principle of normative hierarchy, what is indicated by the LFPA must be followed before the Gaming Regulations. Therefore, I consider that the Verification Orders "fully complied with Mexican law.[271]

218. Although the names of E-Mex and E-Games were recorded in the verification act of April 24, corresponding to the San Jerónimo Casino, this does not mean that SEGOB had the intention of inspecting the E-Mex casinos,[272] but rather it was obviously an error by the inspectors at the time of establishing the corresponding data to the outcome of the verification visit of that establishment. Proof of this is that in the other verification acts corresponding to the E-Games casinos, the name of E-Mex was not recorded.[273]

2. Verification Acts

219. On April 24, 2014, the SEGOB executed the inspection orders for the E-Games casinos and in each of the inspection visits, the SEGOB drew up a record of the facts in which all the actions carried out at that time were recorded.

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271 Exhibit RER-5, Second expert report of Mr. Alfredo Lazcano Sámano, ¶ 147.

272 Counter-Memorial on the Merits, ¶ 322.

273 Exhibits C-300, C-301, C-302, C-303, C-304, Verification Acts of Mexico City, Cuernavaca, Puebla, Naucalpan and Villahermosa casinos.

220. The Claimants hold that, despite the requirements established in the LFPA, the "inspection certificates" addressed to E-Games, which are actually verification acts, contained serious deficiencies that SEGOB overlooked: *(i)* the inspector had to provide proper credentials, *(ii)* the inspector had to provide to the person in charge of the establishment with a copy of the inspection order, *(iii)* the inspector had to provide the verification act in the presence of two witnesses, in addition to a list of information with the date and time the inspection ended. Likewise, they argue that the acts did not indicate: *(i)* the date and time the inspection ended; (ii) whether the inspection order was presented to the person in charge of the establishment; *(iii)* the name of the person in charge of the establishment, as well as the names of two witnesses.[274]

221. The Respondent categorically denies that the verification acts drawn up on the occasion of the inspection visits that took place on April 24, 2014 on the E-Games establishments, do not meet all the requirements established in the LFPA, specifically those provided in Articles 66 and 67 of the LFPA that are supplementary to the LFJS and that textually establish:

> Article 66.- A detail report **will be drawn up** for any verification visit, **in the presence of two witnesses** proposed by the person with whom the diligence has been understood or by the person who practices it if the former has refused to propose them.
>
> **A copy of all report** will be left to the person with whom the diligence was conducted, even if it had refused to sign, which will not affect the validity of the diligence or the document in question, as long as the verifier records such circumstance in the report itself.
>
> Article 67.- The reports will record:
>
> I. Name, denomination or trade name of the person visited;
>
> II. Hour, day, month and year in which the diligence begins and ends;
>
> III. Street, number, population or neighborhood, telephone or other form of communication available, municipality or delegation, postal code and federal entity in which the place where the visit is made is located;
>
> IV. Number and date of the commission letter that motivated it;
>
> V. Name and position of the person with whom the diligence was understood;
>
> VI. Name and address of the persons who acted as witnesses;
>
> VII. Data relating to the verification visit;
>
> VII. Declaration of the person visited, if it wish to make it; and

274 Reply, ¶¶ 286-287.

> IX. Name and signature of those who participated in the diligence, including those who carried it out. If the person visited or his legal representative refuses to sign, this will not affect the validity of the record, and the verifier must establish the relative reason.
>
> [Emphasis added]

222. Following is a description of compliance with the requirements of each verification act under the LFPA:

LFPA Requirement	Cuernavaca	Naucalpan	Puebla	San Jerónimo	Tabasco
I. Visited Name	✓	✓	✓	✓	✓
II. Hour, day, month and year, in which the proceeding begins and end	Only have the proceeding of the diligence	✓	✓	Only have the proceeding of the diligence	Only have the proceeding of the diligence
III. Street, number, population or neighborhood, telephone or other available form of communication, municipality or delegation, postal code and federal entity in which the place where the visit is made is located	✓	✓	✓	✓	✓
IV. Number and date of the commission letter	✓	✓	✓	✓	✓
V. Name and position of the person with whom the diligence was understood.	✓	✓	✓	✓	✓
VI. Name and address of witnesses	✓	✓	✓	✓	✓
VII. Data relating to the verification visit	✓	✓	✓	✓	✓
VIII. Declaration of the person	✓	✓	✓	✓	✓ (it was recorded that the

LFPA Requirement	Cuernavaca	Naucalpan	Puebla	San Jerónimo	Tabasco
visited (if it want to do it)					person with whom the diligence was understood reserved the use of the word)
IX. Name and signature of those who intervened; or reason for signature refusal.	The names of the person who attended the procedure and of the witnesses are missing; there are only the signatures of those who participated	✓	✓	✓	✓
Record of delivery of a copy of the report	✓	✓	✓	✓	✓

223. From the table above, it can be seen that, contrary to what the Claimants argue, all the verification acts meet the requirements established in the LFPA, with the exception of the data regarding the time which the verification procedure of the casinos of Cuernavaca, San Jerónimo and Tabasco ended. However, in Mr. Alfredo Lazcano's opinion the formal deficiencies alleged by the Claimants would only affect the validity of the Acts and, where appropriate, they should have been pointed out by E-Games so that SEGOB had been able to remedy such deficiencies.[275] However, it is reiterated that none of these possible deficiencies affected the effectiveness of the legal effects of such acts.[276]

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[275] Exhibit RER-5, Second expert report of Mr. Alfredo Lazcano Sámano, ¶ 155.

[276] *See* Exhibit R-064, LFPA, Article 7, *"[The omission or irregularity in the elements and requirements indicated in Sections XII to XVI of article 3 of this [LFPA], will produce the annulment of the administrative act.*

The act declared voidable will be considered valid; it will enjoy presumption of legitimacy and enforceability; and it will be remedied by the administrative bodies through full compliance with the requirements of the legal system for the full validity and effectiveness of the act. Both public servants and individuals will have the obligation to comply with it.]"

224. Similarly, it should be noted that in the act of Cuernavaca casino only include the signatures of the people who participated in the procedure, but their names are not recorded, however, in the annexes that are part of said document and that the Claimants omit[277] can be seen the copies of the official identifications of the people who participated and signed in the last page of the act of such casino. The above demonstrates that the SEGOB's commissioned inspectors verified that they were indeed the persons with whom the diligence was being understood in order to comply with what was ordered in the LFPA and that there were records proving such situation.

225. Finally, it should be noted that the SEGOB's commissioned inspectors delivered a copy of the verification acts to the E-Games' representatives. Proof of this is that the names and signatures of the E-Games' representatives appear in the acts, at the top of the first pages.[278] This situation simply demonstrates the bad faith with which the Claimants conduct themselves with respect to acts in which their legal representatives intervened and signed in accordance.

226. Based on the foregoing, it is clear that the inspection orders issued on April 23, 2014 were duly founded and reasoned in order to carry out the corresponding inspection visits, as well as the obligation to carry out the proceeding in accordance with applicable Mexican regulations. Such obligations were fully complied with, as evidenced by the closure acts in which all the events that occurred during the inspection and provisional closure procedures of April 24, 2014 were recorded. It should be noted that the Claimants did not assert none of these situations now argue.

3. Means of appeal pending resolution before the closure of the E-Games casinos

227. The Claimants argue in their Reply that SEGOB could not close down the E-Games casinos, because: i) on March 31, 2014, E-Games filed a Motion for Reconsideration against the judgment issued on the Non-Compliance Complaint, which was *sub judice*;[279] and ii) E-Games was granted a precautionary measure issued on September 2, 2013,[280] against the first attempt at compliance.[281] As demonstrated below, Claimants' assertions are incorrect.

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277 Exhibit R-106, Verification Act of Cuernavaca with Annexes.

278 Memorial on the Merits, ¶ 324, citing Exhibits C-300, C-301, C.302, C-303, C-304, Verification Acts of Ciudad de México, Cuernavaca, Puebla, Naucalpan y Villahermosa Casinos.

279 Exhibit C-296, Appeal of Inconformity dated March, 31, 2014.

280 Exhibit C-299, Caution measure dated september 2, 2013.

281 Reply, ¶¶ 290-299.

228. The precautionary measure of September 2, 2013, was revoked by the authority itself through a judgment of September 22, 2014, precisely because it was determined that the non-subsistence of the E-Games permit had been in effect since March 10, 2014. In turn, Motion for Reconsideration did not suspend the effects of the revocation of the E-Games permit. Consequently, the SEGOB was not prevented from exercising its verification and control powers over the E-Games casinos, nor from closing them in the event that they did not have a valid permit under the LFJS and the RLFJS. In the section *infra*, each of these means of appeal filed by the Claimants will be explained in more detail.

4. Precautionary Measure (September 2, 2013) Second Regional Chamber Hidalgo –Mexico of the Federal Tax and Administrative Court Case File 4635/13-11-02-3

229. Contrary to what the Claimants point out, the Respondent clearly did not dismiss the judicial order of September 2, 2013, nor did it take actions that breach such order, since as it has been explained from the Counter-Memorial,[282] SEGOB had not an express prohibition whatsoever from performing its powers of control and surveillance in accordance with the provisions of the LFJS and the RLFJS.

230. On August 23, 2013, E-Games filed a JCA lawsuit before TFJFA against the first compliance that SEGOB gave to the judgment of J.A. 1668/2011. [283] Such judgment ordered the SEGOB to declare the 2009-BIS Oficio voided, due to it was not duly founded in the RLFJS:

> Consequently, as the proposed argument is founded, the Justice of the Union Protects to Entretenimiento de México, a variable capital corporation, against *oficio* DGAJS/0260/2009-BIS, dated May twenty-seven, two thousand nine, to the effect that it leaves it unsubstantiated and issues another in which, following the guidelines of this judgment, in a well-founded and motivated manner resolves what is appropriate in relation to the request of May eighteen, two thousand and nine.[284]

231. For what was ordered to the SEGOB in the J.A. 1668/2011, E-Games requested in its JCA lawsuit the precautionary measure because it considered that with the declaration of voiding of the 2009-BIS Oficio would also affect the Permitholder's validity granted in 2012:

> [I] deem that it is appropriate to grant the requested precautionary measure, by virtue of the fact that, first of all, I am requesting that things be kept in the state in which they are

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282 Counter-Memorial on the Merits, ¶ 331.

283 Exhibit C-261, First fulfillment dated july, 19, 2013.

284 Exhibit C-018, Judgment from J.A. 1668/2011, p. 202.

> found and that they not have the effects and consequences of the disputed *oficio*, and that is, if it is not granted , irreparable damage would be caused to my client, which could consist of the subsistence of the compliance agreement as ordered by the [Sixteenth Court] in the guarantee trial 1668/2011, described in the *oficio* DGJS/DGA/DPA/ 0820/2013 [First compliance] that is in dispute could cause obstruction in the regulated and economic activity that was recognized to my client through the *oficio* DGJS/SCEV/1426/2012 [Permitholder-BIS Oficio]; namely, the defendant authority or others with legal powers, could eventually estimate that my client does not legally operate the rooms it operates, since it lawfully exercises its regulated and commercial activity in the present, under the already invoked *oficio* DGJS/1426/ 2012.[285]
>
> [Emphasis Added]

232. On September 2, 2013, the Second Regional Chamber Hidalgo-Mexico (Second Regional Chamber), from TFJFA admitted the E-Games lawsuit, and granted the provisional precautionary measure requested, which consisted of "keeping things in the state they are in, until the corresponding interlocutory judgment is issued."[286] However, such measure was revoked on October 4, 2013, replacing it with another in accordance with the following terms:

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

233. On March 10, 2014, the Second Regional Chamber of the TFJFA determined that with the issuance of the agreement dated August 28, 2013 (second compliance of SEGOB with respect to the J.A. 1668/2011 judgment), it had fully given compliance with what was ordered by the Sixteenth Court.[287] It is important to note that with this second compliance, SEGOB voided both the 2009-BIS Oficio and the Permitholder-BIS Oficio issued in 2012, so it was evident that E-Games at that time was no longer operating its establishments under any valid permit, since all the *oficios* issued by the SEGOB and derived from 2009-BIS Oficio, had already been declared voided on that date.

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285 Exhibit R-060, Action for Annulment of E-Games of August 23, 2013, pp. 13-14.

286 Exhibit C-299, Precautionary Measure of September 2, 2013.

287 Exhibit C-291, Ruling from March 10, 2014.

234. The Claimants do not dispute the fact that compliance with the Amparo judgment was correct, rather until after SEGOB conducted the verification visits on April 24, 2014, in which it determined that the establishments operated by E- Games did not have a valid permit to operate. In other words, it was not until after the provisional closures of April 24, 2014 were carried out, when E-Games filed a motion of complaint on May 9, 2014, with the Second Regional Chamber for considering, among others, that SEGOB had breached the precautionary measure of October 4, 2013:

> [t]he Respondent authority by closing the establishments of my principal breached the precautionary measure issued in its favor…since the government defendant in this proceeding is prevented from enforcing the judgment issued Amparo 1668/2011…until the motion for reconsideration filed by my principal against the judgment dated February 19, 2014, rendered in the non-compliance complaint 82/2013, as well as against the ruling dated March 10, 2014.[288]

235. In response to the foregoing, on May 14, 2014, SEGOB requested the modification of the precautionary measure of October 4, 2013 to the Second Regional Chamber, informing that in compliance with the amparo judgment number 1668/2011, SEGOB had annulled the 2009-BIS Oficio and its consequences, such as the Permitholder-BIS Oficio issued in 2012, so the precautionary measure should be voided in all its terms, since at that time supervening events had occurred, as it was the agreement of March 10, 2012, by virtue of which the reviewing body of the J.A. 1668/2011 declared that the compliance resolutions issued by SEGOB duly complied with the protective ruling.[289]

236. Through a report dated June 10, 2013, SEGOB informed the Second Regional Chamber that its powers to verify the operation of the E-Games casinos were not limited, and therefore, its actions were performed in compliance with its attribution of verification, control and surveillance provided for in the LFJS and its Regulations.[290] Situation that had no relation to the precautionary measure requested by E-Games, because in the first place, that measure depended only on the Permitholder-BIS 2012 being in force, which was what allowed E-Games to continue operating

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288 Exhibit R-062, SEGOB's report to the Second Regional Chamber dated June 10, 2014, pp. 2-3.

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

290 Exhibit R-061, SEGOB's report to the Second Regional Chamber of June 10, 2014, p. 3 *("the verification performed by the [DGJS] does not originate from any court ruling but from the verification, oversight, supervisory, and sanctioning authority set forth by the [LFJS – Articles 3 and 4] and its Regulations").*

its casinos, and secondly, the measure itself textually stated that its purpose was not: "to prevent the execution of the order issued by the [Sixteenth Court] in the Amparo proceedings 1668/2011 and much less to annul the ruling rendered by the foregoing federal court."[291]

237. The Claimants should not minimize the implication of incurring an administrative responsibility for any public official in the exercise of its functions. The concerns of the DGJS for monitoring the due compliance of the LFJS and its Regulations under the situation that the E-Games permit had been revoked since 2013, were not minor, they were more than justified and even supported by the Courts, since on September 22, 2014, the Second Regional Chamber determined that the motion of complaint that E-Games had filed for considering that the provisional closures of its casinos had violated the precautionary measure, was left without matter.[292]

238. The evidence of these facts demonstrates that neither the inspection visits nor the closures of the E-Games casinos carried out on April 24, 2014, breached the precautionary measure as the Claimants erroneously argue. E-Games did not even appear in the trial of the motion of complaint to defend its interests regarding the request made by SEGOB on May 14, 2014 to revoke said precautionary measure.[293] It is not correct that the Claimants attempt to litigate before this Arbitration Tribunal, interests that they did not defend at the appropriate procedural moment.

239. The Claimants' arguments in the sense of the motion of complaint and the precautionary measure no longer made sense because the closures of the establishments were already a fact accomplished, and therefore, E-Games focused solely on the reopening of its casinos, are unfounded.

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291 Exhibit R-061, Revocation of the Precautionary Measure dated September 22, 2014, p. 6.

292 Exhibit R-065, Ruling dismissing the E-Games motion of complaint of September 22, 2014, *"II.- The judgment dated October 4, 20132 [sic] is modified and the definitive precautionary measure for the execution of the act is DENIED, for the reasons and grounds specified in the last recital of this ruling…" (emphasis added) and if in that measure, by ruling dated May 21, 2014 (folio 543 of the records of the suspension folder) the complaint filed on May 9, 2014, by the plaintiff, was considered filed against the judgment dated May 4 October 2013 (folios 110 to 121 of the records of the suspension folder) by which the precautionary measure was granted, this Court agrees as follows****: THE MOTION FOR COMPLAINT AGAINST THE DEFINITIVE SUSPENSION JUDGMENT IS LEFT WITHOUT SUBJECT MATTER****, filed by the plaintiff, since on this same date the judgment dated October 4, 2013 was revoked.-*

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

5. Petition of reconsideration (Motion for Reconsideration Exp. 5/2014)

240. The Claimants incur in another inaccuracy to suggest the existence of an irregularity that never happened, because as has been indicated from the Counter-Memorial,[294] it was not until May 6, 2014 that the Supreme Court admitted the motion for reconsideration filed by E-Games on March 31, 2014. Accordingly, it is evident that on the date on which the inspection visits and provisional closures of the Claimants' casinos were carried out (April 24, 2014), the motion for reconsideration had not yet been admitted by the Supreme Court. In addition to the above, it is clarified that said motion did not prevent SEGOB from exercising its surveillance and control powers to conduct inspection visits to E-Games casinos and, where appropriate, close them down in accordance with the applicable regulations. Mr. Mijangos points out:

> [T]he appeal of non-conformity -in accordance with its legal regulation and the criteria that the Federal Judicial Branch has issued on it-, when presented for resolution, does not generate the suspension of the acts that the authority may carry out on the occasion of the amparo ruling in question, which would imply, in this case, that the filing of the appeal of non-conformity did not prevent the Directorate-General of Games and Raffles from exercising its powers in the matter since the permit granted to Exciting Games had disappeared –in legal terms due to the aforementioned judgments.[295]

241. In any case, on the date on which the inspection visits and provisional closures of April 24, 2014 were carried out, E-Games was not operating its establishments with a valid permit and SEGOB was not prevented from undertaking any action against the operation of E-Games casinos without a valid permit.

6. Administrative proceedings against closures

242. In their Reply, the Claimants insist on the argument that the Respondent did not grant them basic procedural rights during the administrative procedures that SEGOB began after it conducted the inspection visits on April 24, 2014. Among the alleged improper measures that Mexico adopted, they point out: i) the violations of the prescription provisions and the procedural rights of E-Games in the review procedures themselves; ii) the improper denial of E-Games' motion for review without considering E-Games' key arguments; and iii) the illegitimate refusal to provide Claimants with access to the closing administrative review files. In this regard, the Claimants

294 Counter-Memorial on the Merits, ¶ 328.

295 RER-1, First expert report of Mr. Javier Mijangos, ¶ 241.

emphasize that the legal figure of due process in Mexico, which must be understood as "a procedural guarantee present in all types of proceedings, not only in criminal proceedings, but also in civil, administrative or any other type of proceedings", and in the case at hand, the Respondent used its constitutional and administrative legal framework to unlawfully discriminate against the Claimants and undermine their rights of due process constitutionally guaranteed in the administrative closure proceedings against their establishments.[296]

243. In this regard, Mr. Alfredo Lazcano points out that SEGOB did not breach the procedural rights of E-Games at any stage of the procedure, since "Article 68 of the LFPA establishes that it is those visited, that is, E-Games, who may make observations and offer evidence regarding the diligence established in a verification act within the following five days. Ergo, it was not SEGOB that did not meet the deadline, but E-Games that did not exercise its right" [297]. It is clear that the party that had the procedural burden to assert its rights was E-Games, which decided not to exercise them and instead use this arbitration as a motion for review on the actions of the jurisdictional authorities in Mexico.

7. E-Games filed an Appeal for Review against the provisional closures that was dismissed in accordance with the applicable regulations and decided not to challenge said determination

244. In its Reply, E-Games argued that it filed a Motion for Review against the inspection orders and verification acts of SEGOB that ordered the provisional closure of its casinos. In such appeal, in essence, it stated that the closure did not follow the procedure provided for in accordance with Mexican administrative law, because the Motion for Reconsideration 406/2012 and the judicial order of file 4635/13-II-02-3 were found pending resolution, so in the absence of a final determination on the status of the Independent E-Games permit, the permit was still valid on April 24, 2014.[298]

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296 Reply, ¶¶ 304 - 307.

297 RER-5, Second expert report of Mr. Alfredo Lazcano Sámano, ¶ 159.

298 Reply, ¶¶ 320. Citing the Exhibit CWS-52, Fourth Witness Statement of Mr. Julio Gutiérrez, ¶¶ 85-86.

245. The Claimants further argue that SEGOB dismissed the Motion for Review, in clear contravention of Article 92 of the LFPA, which establishes that the authority resolving a Motion for Review to review and analyze each of every claim asserted by the petitioner. [299]

246. Contrary to what the Claimants point out, the Motion for Review filed by E-Games was resolved by SEGOB on June 5, 2014. In its resolution, SEGOB determined that the Motion was inadmissible because the LFPA expressly establishes that the Administrative Review only proceeds against "administrative acts and resolutions that put an end to an administrative proceeding, an instance or resolve a file".[300]

247. It is clear that the inspection orders and the provisional closures that were established in the verification acts of April 24, 2014, could not be challenged based on this Motion, since "they are procedural acts […] that only serve to illustrate and provide all the necessary data for a final decision to be made, then these do not put an end to the administrative procedure."[301] Due to the foregoing, the Motion for Review filed by E-Games on May 30, 2014, was dismissed. However, in this dismissal it was pointed out that E-Games had the opportunity to defend itself and submit the evidence it considered necessary during the sanctioning procedure, since the resolutions that, in its case, fell to such procedure, could be challenged through of the Motion for Review in question. [302]

248. SEGOB stated the motives, foundations and reasons by which it decided that the Motion for Review filed against the inspection orders and the verification acts was inadmissible and therefore, had to be dismissed. In this regard, E-Games had legal resources to challenge the inadmissibility of the resolution, but it decided not to exercise them. The fact that E-Games had decided not to challenge the determination of SEGOB in which it its Motion for Review was dismissed against the inspection orders and the verification acts of April 24, 2014, is solely

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299 Reply, ¶ 324.

300 Exhibit R-064, Article 83 of LFPA.

301 Exhibit C-360, Ruling dismissing from SEGOB dated June 5, 2014.

302 *Id.*, p. 13 "Then, the closure operates in a provisional and transitory manner, on one hand, its purpose is to prevent the continuation of the development of prohibited activities without the respective authorization and, on the other hand, because its imposition prevails until the establishment of the sanctioned administrative procedure, where the present offender may provide the evidence that he considers conducive and expose what is appropriate to his right and, in which it will be definitively resolved on the update or not of the respective infraction."

attributable to its legal representatives, who by failing to do so, validated what was resolved by SEGOB in such agreement.

8. Mexico did not breach the rights of the Claimants in the administrative sanction procedures

249. The Respondent considers necessary to specify that the closing administrative review procedures referred to by the Claimants in their Reply are actually the sanctioning procedures provided for in Article 17 of the LFJS. [303] Although the LFPA is applied in a supplementary manner to the LFJS, the truth is that what is established by the LFJS must be addressed primarily. Such law states that the verification visits constitute administrative acts through which the authority, through its inspectors, exercises control and surveillance acts with respect to the establishments that must be subject precisely to the provisions of the LFJS and the RLFJS. In this regard, the authority may collect all the means of proof that it deems necessary to initiate the sanctioning procedure and conclude it through a final resolution, with the only limitation that the evidence provided to the procedure is not prohibited in LFJS. Next, the chronology of the events and actions that occurred in the sanctioning procedures of the E-Games casinos will be explained in detail.

250. Once the Inspection Visits of April 24, 2014, in which SEGOB's monitoring and surveillance powers provided for in both the LFJS and RLFJS were exercised, on July 7, 2014, SEGOB issued a ruling with which began the sanctioning procedure against E-Games. As of the notification of this ruling (July 17, 2014) is when the SEGOB formally began the sanctioning procedure provided for in the LFJS. In the same way, it is highlighted that E-Games was granted the right to a hearing established in articles 14 and 16 of the Constitution to submit its defense, as well as the evidence it considered pertinent to disprove the allege breaches:

> Likewise, under the provisions of articles 15, 38 and 72 of the Federal Law of Administrative Procedure, in accordance with article 3 of the Federal Law of Games

[303] El Artículo 17 de la LFJS establece que "[t]he infractions of this Law that do not constitute crimes, its regulations or the provisions issued by the Ministry of the Interior, will be sanctioned by the same Ministry, with a fine of one hundred to ten thousand pesos or arrest for up to fifteen days, the permit may be revoked and the establishment closed if the infractions are serious or frequent. When the infraction is committed by the players, referees, bookmakers or by any other person who performs functions in the show, game, establishment or draw in question; It may also be sanctioned with suspension for up to one year or permanent disqualification from performing the respective activity or function."

> and Raffles and 2 third paragraph of the Regulation of the Law itself, you are granted the period of fifteen business days counted from the day following the day on which the notification of this ruling takes effect, so that it may state what its right corresponds and offer the evidence it deems pertinent, being aware that otherwise your right to do so will be deemed precluded, in terms of what is established by article 288 of the Federal Code of Civil Procedures of supplementary application to the matter, by express provision of article 2 of the Federal Law of Administrative Procedure.[304]
>
> [Emphasis Added]

251. On July 8, 2014, E-Games filed before SEGOB a written request in accordance with article 60 of the LFPA in which it requested that the administrative closure procedures be declared expired in the following terms:

> To date, my principal has not received any notification that has resolved the administrative proceeding initiated against Exciting Games S. de R.L. of C.V. and in the same way, my principal has not been notified of any internal ruling issued by the General Directorate of Games and Raffles, by means of which the aforementioned administrative proceeding has been settled, since the term established in article 60 of the Federal Law of Administrative Procedure has elapsed. The foregoing under the following:
>
> DECLARATIONS
>
> That by virtue of having elapsed in excess of the term for that Authority to issue [sic] resolution in the Verification Visit Administrative Proceeding, initiated to my client through the Orders [sic] of visit with numbers of *Oficios* DGAJS/700/2014 (Kash Naucalpan), DGAJS/684/2014 (Kash Tabasco), DGAJS/692/2014 (Kash DF); DGAJS/704/2014 (Kash Cuernavaca); DGAJS/688/2014 (Kash Puebla); DGAJS/696/2014 (Kash Interlomas, also known as Master Tournament), all dated April 24, 2014; I request that this Authority proceed to make the Declaration referred to in article 60, third paragraph of the Federal Law of Administrative Procedure and to order the lifting of the closures decreed in such proceedings, leaving without effect everything that has been done in the administrative proceedings of verification visit of aforementioned.[305]

252. In this regard, and as explained in the Counter-Memorial,[306] E-Games incorrectly based its prescription request on Article 60, third paragraph of the LFPA, which states that the proceedings initiated *ex officio* will be considered expired upon request of an interested party or *ex officio*, within 30 days counted from the expiration of the term to issue a resolution. However, SEGOB

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

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

306 Counter-Memorial on the Merits, ¶ 348.

assessed E-Games' request and concluded that article 60 of the LFPA was not applicable to the specific case, because SEGOB's actions within the sanctioning administrative procedures were within the time limits and terms provided for in both the LFJS and the LFPA to substantiate and resolve the procedure at issue.[307]

253. In response to the ruling to initiate the sanctioning procedure (July 7, 2014), notified on July 17, 2014, E-Games presented on August 7 of the same year, its defense brief and the evidence it considered pertinent to disprove the non-compliances that were imputed to it. In such brief, E-Games specifically mentioned that: i) the sanctioning procedure had expired; ii) the Motion for Reconsideration of case file 406/2014 was pending resolution; and iii) E-Games did not operate slot machines.[308]

254. As stated in paragraph 236 *supra*, SEGOB resolved though ruling dated October 9, 2014 that, from the exercise of its powers of inspection and surveillance, it had the obligation to initiate the sanctioning procedure regarding the imputable breaches to E-Games since April 24, 2014, but due to the relevance of the expiration argument asserted through the written request of July 8, 2014, SEGOB resolved, at that time, the following:

> [A]fter commencing the administrative proceeding with service of process of the ruling dated the seventh of July of the year two thousand fourteen, conducted on the following seventeenth, it is undeniable that this agency is monitoring the procedural stages comprising this particular administrative proceeding, as it has been safeguarding the principles established in Articles 14 and 16 of the Federal Constitution, since this Authority is still gathering the necessary items to properly put together this case file for purposes of learning the legal truth and decide on the facts raised; therefore it may be affirmed that it is acting within the term set forth by Article 60 of the [LFPA] to substantiate and rule on.[309]
>
> [Emphasis added]

255. Finally, on February 26, 2015, and after analyzing and assessing all the records that made up the administrative closure files, the SEGOB issued the final resolutions of the sanctioning procedures regarding the casinos of Naucalpan, San Jerónimo, Cuernavaca, Puebla and Villahermosa, it assessed all the evidence provided by E-Games and each of the defenses presented throughout said procedures, and it concluded that the E-Games casinos "did not have a valid permit

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

308 Exhibit, R- 068, E-Games Motion file from August 7, 2014.

309 Exhibit, R-069, SEGOB Ruling October 9, 2014, p. 7.

to play games with bets and games of random and it had in operation and functioning devices called by the [LFJS] as slot machines."[310] As a result of these resolutions, the SEGOB declared the definitive closure of E-Games casinos:

> [O]n the date the inspection was conducted by the Directorate of Games and Sweepstakes on the establishment subject to this determination of the company 'Exciting Games S. de R.L. de C.V.', this company was already aware that the [E-Games permit] had expired and no judicial or administrative ruling had been issued as of that date that would limit or prevent this Administrative Agency from exercising its duties and powers that have been legally conferred upon this [DGJS]. In other words, the [DGJS] is responsible for addressing, processing and dispatching matters related to the supervision and surveillance of compliance with the [LFJS] and its Regulations, and therefore if, while exercising these powers, it discovers any conduct or omission that may constitute an alleged violation of the LFJS or its Regulations, it is required to commence the respective administrative proceeding and, where appropriate, penalize them …
>
> […]
>
> In view of the foregoing resolution, turn attentive official letter to the Directorate of Inspection and Surveillance of the General Directorate of Games and Raffles of the Ministry of the Interior, so that it appoints personnel to its worthy position in order to close down. definitively -d establishment located at Avenida Jardines de San Mateo, number eight, Neighborhood Santa Cruz Acatlán, Naucalpan, State of Mexico, called "KASH".[311]

256. Based on the foregoing, the SEGOB safeguarded at all times the principles of legality and due process established in both the CPEUM and the LFPA, since it obtained all the necessary elements for the proper integration of the administrative files initiated due to the irregularities detected in the E-Games establishments on April 24, 2014, and with the purpose of knowing the legal truth about the facts raised in the administrative procedures at issue.

257. Likewise, and with regard to the argument that E-Games did not have slot machines in its establishments, and therefore, it was an invention to justify the illegal closures and another tactic to ensure the disappearance of E-Games,[312] it is important to point out that article 12 of the LFJS establishes that "slot machines in any of its forms are prohibited." In this regard, and from the verification visits conducted to the Claimants' establishments on April 24, 2014, it can be seen that it was attested that within the verified properties, several types of machines for gaming with betting and raffles were found, from which prior review by the inspectors commissioned for this purpose,

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310 Exhibit C-361, Closure Administrative Proceedings - Naucalpan Casino, p. 317.

311 Exhibit C-361, Closure Administrative Proceedings - Naucalpan Casino, p. 321.

312 Reply, ¶ 318.

it was determined that they did not comply with the provisions of the LFJS. The above is so, because the concept of "slot machines" encompasses all the devices through which the user makes a bet by inserting money, a token, an electronic device or any other payment object. Therefore, it is clear that the machines that were operating in the Claimants' establishments contravened the provisions of the LFJS, since although they were not machines that received money in cash, they were machines in which the users made use of them through electronic means and, specially, for the plain fact that they were in establishments that did not have a valid permit to operate:

> [I]n compliance with the inspection of oversight powers conferred upon this [DGJS], it conducted an inspection on [April 24, 2014], which confirmed that 184 machines were found on the premises, which, upon inspection, were devices in which a user wages a bet by inserting money, a token, electronic device or any other method of payment for purposes of obtaining a prize not previously determinable.[313]
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> [Emphasis Added]

258. In Mr. Alfredo Lazcano's opinion, the use of slot machines is irrelevant to the particular case due to the following:

> In this sense, the QEU&S Claimants, on the one hand, deny having operated slot machines in their Establishments, while affirming that SEGOB justified the closure of the Establishments precisely because of the operation of slot machines163. In my opinion, both positions are inconsequential. SEGOB closed the Establishments because gambling activities with bets and drawings were carried out in them without a valid Permit to do so, since the E-Games Permit had been declared non-existent. How these games were offered to the public doesn't really matter. Whether through permitted devices or not, what was illegal was the capture of bets and not the means through which they were captured.
>
> In conclusion, even if E-Games had not operated slot machines, but "the types of machines that SEGOB had authorized in the E-Games Independent Permit and only those machines", SEGOB was obliged to close the Establishments because the Permit was no longer valid.[314]

259. In their Reply, the Claimants once again decontextualize the evidence submitted in the closing proceedings, improperly pointing out that SEGOB did not issue the *oficios* regarding the first and second phases of the proceeding within the time limits set forth in the LFPA.[315] They even argue that the Respondent intentionally delayed the issuance of the resolutions of July 7 and 18, 2014, with the sole intention of waiting for the Supreme Court to rule on the Motion for

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313 Exhibit C-361, Closure Administrative Proceedings - Naucalpan Casino, p. 316.

314 RER-5, Second expert report of Mr. Alfredo Lazcano Sámano, ¶¶ 167 and 168.

315 Reply, ¶¶ 310 and 314.

Reconsideration 406/2012 because it wanted to ensure another way for preserving the definitive closure of E-Games casinos. [316]

260. The Respondent holds that the Claimants' statements are for the sole purpose of confusing to the Tribunal, since in accordance with Mexican law, the phases of the procedure that they refer to are not provided for in such law.[317] In this regard, Mr. Alfredo Lazcano points out the following:

> [t]he Sanctioning Procedure actually began with the commission of the sanctioned conduct, that is, with the operation of the Establishments from the moment the E-Games Permit was declared non-subsistent and it ended when SEGOB declared the definitive closure of the Establishments, for which there was a term of five years according to Article 79 of the LFPA, which establishes that "the power of the authority to impose administrative sanctions prescribes in five years. The terms of the prescription shall be continuous and shall be counted from the day the administrative offense or infraction was committed if it was consummated or, from the time it ceased if it were continuous".
>
> Due to the foregoing, I consider that the argument of expiration of the Sanctioning Procedure is false, as well as that the right to a hearing of E-Games was violated by SEGOB, since it did present "its defense brief and the evidence it considered pertinent.[318]

261. In short, the Claimants have not been able to sustain that the Respondent violated basic procedural rights to their detriment during the substantiation of the administrative closure proceedings, since the legal means were always available to challenge the actions or omissions from SEGOB that it considered they caused him a grievance.

9. The Motion for Review filed by E-Games against the final closures was inadmissible and it decided to withdraw its challenge

262. Against the final resolutions of February 26, 2015, E-Games filed a Motion for Review[319] in which it repeated the expiration arguments provided for in article 60 of the LFPA that it asserted in the administrative sanction proceedings, it also argued that the Motion for Reconsideration before the Supreme Court case file 5/2014 was pending resolution, whereby it considered that SEGOB was prevented from carrying out the verification visits of April 24, 2014 and, therefore, the closure of their establishments.

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316 *Id.*, ¶ 316.

317 *See* Exhibit R-030, article 17 of the LFJS.

318 RER-5, Second expert report of Mr. Alfredo Lazcano Sámano, ¶¶ 163 and 164.

319 Exhibit R-071, Motion for Review of E-Games dated March 26, 2015.

263. On August 17, 2015, the SEGOB Undersecretary of the Interior resolved the Motion filed by E-Games and determined that the DGJS actions in conducting the inspection visits of April 24, 2014, as well as in sanctioning proceedings, were in accordance with law devoid of irregularities.[320] Likewise, at the end of the resolution, it was indicated that if E-Games considered it pertinent, because it did not agree with SEGOB's determination regarding the Motion for Review, it was able to challenge the resolution through the JCA, this with the purpose of asserting their rights:

> RESOLVE
>
> **FIRST.-** Based on the provisions of article 91, section II of the Federal Law of Administrative Proceeding, the resolutions issued in Administrative Proceeding AJP/0063/14-VII, AJP/0064/14-VII, AJP/0065/14 are CONFIRMED -VII, AJP/0066/14-VII, AJP/0067/14-VII and AJP/0068/14-VII, issued by María Marcela González Salas y Petriciolli, then General Director of Games and Raffles, on February 26 and March 3, 2014, in terms of the reasoning set forth in this judgment.----------
>
> […]
>
> **FOURTH.-** Let the appellant know that he has 45 forty-five days counted from the day following the notification of this provision, to file the Nullity Trial in the terms of the provisions of number 13 of the Federal Law of Administrative Contentious Procedure and 83 of the Federal Law of Administrative Procedure----------
> […][321]

264. On October 26, 2015, E-Games challenged the resolution of the Motion for Review through JCA and heard this trial in the First Northeast Chamber of the State of Mexico of the Federal Administrative Court (formerly TFJFA).[322] However, the Claimants decided to withdraw from this lawsuit to initiate this arbitration, so the Federal Administrative Court decided to dismiss it.[323]

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320 Exhibit R-072, SEGOB Resolution SG/200/098/015 from August 17, 2015.

321 *Id.*

322 Exhibit R-104, Ruling dated Octuber 28, 2015. Case file. 5888/15-11-01-2.

323 Exhibit R-105, Ruling dated June 22, 2016. Case file. 5888/15-11-01-2. *"It is reported with the personal appearance made in the premises of this Chamber on the day in which the action is taken, in which C. Julio Carlos Gutiérrez Morales, in legal representation of the moral person cited in the item, in the presence of the Secretary of Agreements ratifies the withdrawal of the plaintiff regarding this annulment trial, in order to suit their interests. Therefore, based on the provisions of articles 9, section I of the Federal Law of Contentious-Administrative Procedure and 38, section V of the Organic Law of the Federal Court of Fiscal and Administrative Justice,* ***THE PRESENT TRIAL IS DISMISSED, due to the withdrawal plaintiff's statement of the entirety of this nullity trial****"*

265. Mr. Julio Gutiérrez states that "[a]gainst the final closure orders. This was decided by the Assistant Secretary of Interior by means of a decision dated August 17, 2015, whereby the final resolutions issued in the Administrative Proceedings of Closure were upheld. E-Games brought a nullity lawsuit against such resolution, under number 5888/15-11-01-2, which was first heard by the First North-East Courtroom in Mexico State for the Federal Court of Administrative Justice. However, in the face of the Claimants' decision to submit the matter to investment arbitration proceedings under Chapter XI of the North American Free Trade Agreement, E-Games abandoned the nullity lawsuit."[324] [Emphasis added].

266. Mr. Julio Gutiérrez statement expressly acknowledges that the Claimants themselves made the decision to withdraw from the JCA and even indicates that it was for initiating this arbitration.

10. The Claimants have had access at all times to the case files of the administrative closure proceedings

267. The Claimants in their Reply argue again that despite having asked SEGOB on numerous occasions for copies of the administrative files of the closing proceedings, the SEGOB has denied them access to such case files. In fact, they argue that the Respondent steadfastly refused to submit the case files to the Claimants, which is what the Tribunal ordered it to do in these proceedings.[325]

268. The Respondent reiterates that as of July 17, 2014, the SEGOB notified to E-Games of the beginning of sanctioning procedures and ordered that the files were made available to it so that it could consult them at all times.[326] Through *Oficio* DGJS/DGAAD/DJ/1875/2017 dated November 30, 2017,[327] the SEGOB made available to Mr. Julio Gutiérrez the requested records of the administrative proceedings AJP/0063/14-VII, AJP/0064 /14-VII, AJP/0065/14-VII, AJP/0066/14-VII, AJP/0067/14-VII and AJP/0068/14-VII. However, E-Games did not go to the DGJS facilities to collect them. For this reason, the SEGOB made available the certified copies before the First Administrative District Court in Mexico City.[328]

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324 CWS-52, Fourth Witness Statement of Mr. Julio Gutiérrez Morales, ¶ 91.

325 Reply, ¶ 326.

326 Exhibit R-066, Ruling to Commence the Disciplinary Proceeding AJP/0068/14-VII, regarding the Naucalpan casino.

327 Exhibit R-107, *Oficio* DGJS/DGAAD/DJ/1875/2017 of November 30, 2017.

328 Exhibit R-098, *Oficio* DGJS/DGAAD/129/2017 del 21 of December, 2017, p. 4.

269. Mr. Gutiérrez points out that it is not true that the Claimants had not collected them. In fact, it mentions that, between February 2018 and February 2020, Mr. Gutiérrez and other members of his law firm visited the SEGOB offices to obtain copies of the case files on several times. During these visits, neither Mr. Gutiérrez nor the other members of his office were authorized to get a copy of the registry book or take photographs of the book despite having paid the full amount required.[329]

270. The Respondent asks the Tribunal to carefully consider the statements from Mr. Julio Gutiérrez, in the sense that he "supposedly" went between February 2018 and February 2020 to collect the records of the administrative files that they requested from SEGOB, since that it is highly questionable that to date no document has been submitted that could prove his statement and that these efforts to get a copy of the case files in question were made just after the *Oficio* DGJS/DGAAD/DJ/ 1875/2017 dated November 30, 2017[330] was issued, and that even such copies is made available to them in the Court before which they themselves filed the amparo for SEGOB to provide them with such copies.

271. Based on the foregoing, the Respondent respectfully requests the Tribunal to dismiss the Claimants' argument regarding the fact that the Respondent steadfastly refused to provide the administrative records. Claimants' suggestion that Respondent deliberately concealed documents must be proved by more than mere insinuations and subjective assessments.

H. Seals Removal

272. In their Reply, the Claimants reiterate their argument that the Respondent arbitrarily and improperly removed the closure seals on their casinos, with the exception of the casino located in Puebla, and it improperly handed over legal possession of the premises to persons who were not E-Games, for which they state that they suffered important denials of due process and could not protect the assets located within the establishments.[331] This argument is flawed for the following reasons.

273. To determine the scope of the concept of "seals removal", Mr. Lazcano points out:

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329 Reply, ¶ 328. Citing CWS-52, Fifth Witness Statement of Mr. Julio Gutiérrez Morales, ¶¶ 140-142.

330 Exhibit R-107, *Oficio* DGJS/DGAAD/DJ/1875/2017 of November 30, 2017.

331 Reply, ¶¶ 330 and 331.

> occurs when the authority that decreed the closure as a sanction for the commission of an infraction removes - or authorizes the removal of - the seals of the places where they were affixed. This regularly occurs after a request to remove the seals made by any person who proves to have a legal interest in the closure seals being removed – which is not necessarily configured by the person who committed the infraction from which the closure derived -. The request to remove the seals can be made directly to the administrative authority that ordered the closure or it can be requested through a judicial procedure.[332]

274. The owners of the properties where the Claimants' casinos were located, requested the seals removal through the lawsuits they filed against the Gaming Companies for breach of the lease contracts. The actions that SEGOB carried out to seals removal were performed in compliance with court orders, so it is clear that removal was completely valid and legal under Mexican law and, furthermore, incidentally, it was duly justified.

275. Likewise, it is important to specify that, with the close down of E-Games establishments, what the SEGOB permanently prevented was the holding of games with bets and raffles, and not the use of the properties in which the establishments were located, which, in addition, contrary to what the Claimants indicate,[333] were not owned by E-Games, this is why, as the judgments of the leasing lawsuits were issued, the SEGOB, in compliance with such judgments, removed the seals to give legal possession to the owners of the properties.

276. As explained from the Counter-Memorial, E-Games and Gaming Companies, in some lawsuits, had or should have had knowledge of the lawsuits that gave rise to the seals removal in the establishments where their casinos operated, since they were a defendant in such jurisdictional proceedings.[334] Therefore, the Claimants' accusations that they suffered significant due process denials are meaningless, since as the defendant in the lawsuits brought by the owners of the properties where their casinos were located, it is unlikely that they did not had knowledge of the

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332 RER-5, Second expert report of Mr. Alfredo Lazcano Sámano, ¶ 170.

333 Reply, ¶ 356 *("SEGOB's politically motivated and intentional lifting of the seals thus illegally deprived Claimants of their due process and property rights");* ¶ 719 *("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.");* ¶ 893 *("During this time, E-Games retained property rights to those locations and to the costly material inside of them (which were investments of Claimants")*

334 Counter-Memorial on the Merits, ¶ 368.

legal actions derived from such proceedings. In this regard, it is clear that the Claimants intend to blame the Respondent for their own carelessness in omitting or properly defending their interests.

1. Naucalpan Casino

277. The Claimants argue that the removal of the closure seals and the return of the premises where the Naucalpan Casino operated were subsequent to a fire that consumed the establishment in May 2017.[335] In addition, they state that Mr. Alfredo Moreno Quijano never acted on behalf of E-Games to effect the removal of the machines that were in that location, but rather he acted for personal benefit in order to derail the Claimants' efforts under this arbitration.[336]

278. The Respondent considers necessary to stress two important aspects that happened in this establishment: i) there is a ruling dated December 5, 2016, through which the Fifth Civil Court of the First Instance of the Tlalnepantla Judicial District, ordered permanently to SEGOB to remove the closure seals and place the property in the material and legal possession of the plaintiff in the lawsuit, that is, Messrs. Jovita Guadalupe Rodríguez Deciga, María de los Ángeles Rodríguez Deciga, Silvia Araceli Rodríguez Huerta and Jose Juan Rodriguez Huerta;[337] ii) within the judicial records that the Claimants themselves mention in their Reply,[338] it is observed that the plaintiff in the lawsuit was Mrs. Jovita Guadalupe Rodríguez Deciga, *et. al.* and within the ruling dated November 18, 2015 on which they base their statement to argue that no authority ordered the removal of the seals, express reference is made to the fact that "a final judgment has been issued and it has been ordered to place in legal possession and material of such property to the plaintiff, a circumstance that in its case would imply the breaking of the seal [sic] of closure",[339] which, contrary to what the Claimants point out, it reinforces the position of the Respondent in the sense that it was by court order that SEGOB lifted the closure seals on such establishment and not on its own initiative.

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335 Reply, ¶ 341.

336 *Id.*, ¶ 343.

337 Exhibit R-073, *Oficio* DGJS/DGAAD/106/2017 of September 5, 2017, p. 3. *"[Consequently, turn the documents over to the Executor assigned to this Court and the property subject to this trial is constituted and put in material and legal possession of the plaintiff, all of the above, to stop violating the property right of the plaintiff about the property]"*

338 Reply, ¶ 333.

339 Exhibit C-408, Ruling dated November 18, 2015, p. 1.

279. The Claimants insist that SEGOB, after the seals removal, did not notify to the Claimants that the seals had already been removed, "despite the valuable assets housed in the premises, including Claimants' gaming machines."[340] This Claimants' statement contradicts what they themselves argue regarding they were aware that it was Mr. Alfredo Moreno Quijano who removed the machines from the Naucalpan Casino without their consent.[341] It is more than obvious that if the Claimants were aware that Mr. Alfredo Moreno Quijano or one of the "bad actors in Mexico"[342] had illegally removed the machines, they were also aware that such persons had broken the closure seals, since that it was materially impossible to remove the elements (machines and any other property) that were inside the casino facilities, without first violating them.

280. Similarly, the Claimants cannot argue that, when SEGOB carried out the seals removal, "valuable assets" were inside the facilities, when they were fully aware that the machines had already been previously removed by completely unrelated persons. to SEGOB (*i.e.* Mr. Alfredo Moreno Quijano). The Claimants once again distort the facts and try to transfer their responsibility for the mismanagement and handling of their investment, since today they intend to hold the Respondent was responsible for what happened at the Naucalpan Casino, stating that "SEGOB permitted third parties to break the closure seals, enter the Casino and improperly remove Claimants' machines."[343] However, it should be noted that the theft of the Claimants' assets constituted a criminal act[344] that the Claimants acknowledge was carried out by persons acting "against the interests of the Claimants and for their own personal benefit" (*i.e.* Mr. Alfredo Moreno Quijano),[345] so the Claimants cannot argue that it was SEGOB's responsibility, let alone that it was SEGOB who allowed such criminal act, besides of the fact that the Claimants do not provide any evidence to prove their statement.

281. Likewise, it is important to highlight that, at the time of the verification visit to the Naucalpan Casino, resulting from which the closure seals were placed on such establishment, it

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340 Reply, ¶ 341.

341 *Id*., ¶ 343.

342 CWS-60, Fourth Witness Statement Mrs. Erin Burr, ¶ 136.

343 Reply, ¶ 344.

344 Exhibit R-099, Article 187 of Criminal Federal Code, "*[Whoever breaks the seals placed by order of the public authority will be applied thirty to one hundred and eighty days of work in favor of the community.]"*

345 Reply, ¶ 343.

was left as the depositary of the assets that were interior of the same, to Mr. Patricio Gerardo Chávez Nuño, who held himself out as an administrative employee of the casino, reiterating his sworn, so this person who was left responsible for safeguarding the machinery and assets that were inside the property:

> In this act and swearing the charge, C. Patricio Gerardo Chávez Nuño is left as the depositary of the real estate as well as the personal property, values, artifacts and documents that are inside it, reiterating his sworn the position, and stating that the establishment is operating twenty-four hours[346]

282. Based on the foregoing, it is unquestionable that the Claimants, having had full knowledge of (i) who carried out the theft of their assets, and, (ii) who acted as depositary, could have filed criminal complaints against such persons, however, they chose not to do so and now claim that the Respondent is responsible for the decision in the omission not to initiate the corresponding complaints, so once again the Claimants misrepresent the facts that occurred. Likewise, once again the negligence of the Claimants to perform an adequate defense of their interests before Mexican courts is evident.

2. Mexico City Casino (San Jerónimo)

283. The Claimants insist that the lifting of seals carried out in the establishment located in San Jerónimo was carried out ex officio by SEGOB, [347] taking into consideration that "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." [348] The Claimants ignore the fact that when the Forty-first Civil Court in Mexico City ordered, by resolution of April 27, 2017, that the property in question should be vacated and that possession should be delivered to the owners, [349] the lifting of the seals was a direct consequence of the correct compliance with said resolution, since it was materially impossible for the defendant to vacate the property and hand over possession of it to the plaintiff, without having access to the interior of the facilities; Likewise, this resolution caused that

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346 Exhibit C-303, Verification Act from April 24, 2014, Naucalpan Casino, p. 8.

347 Reply ¶ 347

348 *Id.*,

349 Anexo R-077, Judgment of the Forty-first Civil Judge in Mexico City, April 27, 2017, p. 11, "Consequently, the defendant morality JUEGOS DE VIDEO Y ENTERTENIMIENTO DEL D.F., S. DE R.L. DE C.V. vacating and handing over the real estate object of the contract"

"the legal cause for which the closure seals were imposed would cease to exist,"[350] giving rise to SEGOB, at the request of the company Del Bosque Corporación, S.A. de C.V., plaintiff in the trial of rescission of the lease, will carry out the lifting of the closing seals on said property.

284. During the procedure by which the seals were removed at the San Jerónimo Casino, carried out on July 6, 2017, the E-Games representative, Mr. Zavala González, left the place despite the fact that the commissioned inspectors asked him to wait until the end of it;[351] although the Claimants argue in their Reply that "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",[352] this saying is completely unrelated to the SEGOB's actions since it was not its authority to determine whether or not such person in the proceeding acted "for the benefit" of the Claimants, when he acted as representative of the Claimants; the only evidence of this specific action is that the Claimants were aware of the seals removal, or else there was negligence of them with respect to following up on the matters that pertain to their interests.

3. Cuernavaca Casino

285. In their Reply, the Claimants state that in the Cuernavaca Casino the "court did not order SEGOB to lift the seals"[353] Contrary to what the Claimants point out, the resolution of the Third Civil and Commercial Court of the First Judicial District of the State of Morelos, on February 17, 2017, ordered the defendant the physical, real, material and legal return of the property"[354] which, as in the Mexico City Casino, required that the seals be removed by the competent authority, this being a necessary requirement to comply with the aforementioned resolution. For this reason, the

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350 Exhibit R-076, Ruling from SEGOB dated July 3, 2017.

351 Counter-Memorial on the Merits, ¶ 380; Citing Exhibit R-078, Detail Report of July 6, 2017, pp. 4 and 5.

352 Reply, ¶ 354; "*despite the fact that the Claimants refer to the procedure in which Mr. Zavala González participated in the lifting of the seals of the Villahermosa Casino, it seems that the correct was to refer to that of the Mexico City Casino, since it is in the only procedure in which said representative of E-Games is located."*

353 Reply, ¶ 348.

354 Exhibit C-409, Judgment from February 17, 2017 issued by the Third Civil and Commercial Court of the First Judicial District, p. 65. *"The defendant is sentenced to the physical, real, material and legal return of the property located at Vicente Guerrero Avenue number 1, Neighborhood Lomas de la Selva of this City, Cuernavaca Morelos"*

SEGOB, "in order to materialize the decision adopted by the judicial authority",[355] ordered that the seals removal procedure was carried out, which was performed on December 21, 2017, handing over possession of the property to Inmobiliaria Esmeralda, S.A. of CV.[356]

286. Once again, it can be seen that SEGOB's actions were carried out based on what was ordered by a judicial authority, without it being "*sua sponte*, under its own discretion"[357] as the Claimants misrepresent.

4. Villahermosa Casino

287. In the Villahermosa Casino, the situation was alike, since a special mortgage judgment was filed for non-payment of rent.[358] However, as stated in the Counter-Memorial, the Claimants' own reluctance to participate in such lawsuit was what caused them to have no further information on the legal status of the property.[359] The Claimants, then, cannot continue to argue that they were not aware of the legal actions that took place in the establishments that operated their casinos.[360] Well, as it was said earlier, they always had at their disposal the pertinent actions in which the lifting of the seals was recorded, as well as the material return of the property where their casinos operated.

288. In the detail record of removal of seals from case file 370/2015, it can be seen that on March 19, 2021, the SEGOB carried out the seals removal derived from the administrative proceeding that was performed with the case file AJD/001/21-III.[361] It should be noted that the Claimants were notified of such seals removal, through *oficio* DGJS/DIV/0444/2021 dated March

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355 Exhibit R-079, *Oficio* from SEGOB of December 11, 2017.

356 *See* Exhibit R-080, Detail Report dated December 21, 2017.

357 Reply, ¶ 351.

358 *See* Exhibit R-081, Written request of Tabasco S.A. de C.V. addressed to SEGOB of June 14, 2016, p. 3.

359 Counter-Memorial on the Merits, ¶ 386.

360 Reply, ¶ 351

361 Exhibit R-120, Case file 370/2015, Detail Report of seals removal from March 19, 2021, pp. 1-11 *"I. Through* oficio *DGJS/DJ/289/2021, dated March 10 (ten) 2021 (two thousand and twenty-one), signed by Lic. Rocío Méndez Mancilla, Legal Director, requested the Inspection and Surveillance Directorate to withdraw the definitive closure stamps of the property located on Periférico Avenue without number, Neighborhood Carrizal, Villahermosa Tabasco, due to the ruling dated March 08 (eight), 2021 (two thousand and twenty-one) issued by the General Director of Games and Raffles, dictated in records of administrative case file AJD/001/21-III."*

17, 2021, however, they did not appear for such proceeding.[362] Likewise, they failed to refer to this situation in their Reply, which clearly evidences the advantageous manner in which they act, since they were always fully aware that the seals removal was carried out after this arbitration began, however, they have referred at all times to the fact that such act was carried out by SEGOB in an improper manner,[363] and as a fact prior to their claims.

289. Similarly, the fact that SEGOB carried out the seals removal of the Villahermosa Casino long after the Second Civil Court of First Instance of the State of Tabasco issued its resolution dated July 2, 2019, in which the Eviction trial promoted by Promotora de Tabasco, S.A. de C.V. was resolved.,[364] it denotes that SEGOB did not act arbitrarily and mutually, but once the corresponding jurisdictional procedures were carried out which culminated in the seals removal of this establishment in 2021.

5. Puebla Casino

290. In the case of the Casino located in Puebla, the owner of the property demanded the termination of the leasing contract before the Fourth Specialized Civil Judge in the City of Puebla,[365] derived from which, on August 16, 2016, such Judge ordered the vacating and material return of the property.[366]

291. It is important to mention that Scotiabank Inverlat, S.A. also filed an amparo proceeding whose resolution ordered to the SEGOB to "comply with the protective ruling",[367] therefore, in compliance with such court order, on July 13, 2017, the SEGOB removed the closure seals, returning the property to the plaintiff in the trial.[368] This once again demonstrates that SEGOB's actions were based on court orders, without acting in a discretionary manner as the Claimants

362 *Id.*, p.5.

363 Reply, ¶ 351.

364 *See,* Exhibit C-412, Judgment from July 2, 2019, issued by the Second Court of First Instance of the State of Tabasco.

365 Exhibit R-073, Oficio DGJS/DGAAAD/106/2017 of September 5, 2017, pp. 2 and 3.

366 Exhibit R-083, Judgment from del Fourth Specialized Civil Judge from the Judiciary District of Puebla from August 16, 2016, p. 14

367 Exhibit C-414, *Oficio* DGJS/DGARV/3546/2017 of July 5, 2017.

368 Counter-Memorial on the Merits, ¶ 389.

intend, since the evidence presented demonstrates that the actions of the Government of Mexico were at all times in accordance with the law and in accordance with applicable legislation.

292. The Respondent respectfully notes that, it cannot go unnoticed by the Tribunal that the Claimants acknowledge that "an administrative judge later ordered the lifting of the seals as a result of an *amparo* proceeding",[369] which discredits their own statement regarding that SEGOB " *did not* simply lift the seals in compliance with a judicial order",[370] further demonstrating that it was aware of what was happening in the several trials in which the return of the properties to their respective owners was ordered.

6. SEGOB had no obligation to notify the Claimants regarding the the seals removal

293. Regardless of what was stated in the previous paragraphs, Mr. Lazcano explains that, since the Claimants did not have a property right over the real estate where their casinos operated, the SEGOB did not have the obligation to notify regarding the lifting of the seals of closure, because in the strict sense, E-Games had no legal interest in having the properties returned to it, since they were returned to their legitimate owners through the respective civil lawsuits that were filed.[371]

294. In any case, what the Claimants may be confusing is the state of closure of their establishments, which was caused by not having a valid and current permit, a situation that never changed and therefore, the SEGOB could not order the seals removal by mutual own, but only in compliance with a court order or at the request of whoever had the legitimate interest to request it, even the fact that the legal status in which the authorization was found at that time would have been a possibility E-Games would have changed, however, it did not happen. Therefore, the Claimants' argument that the SEGOB should have notified Mr. Gutiérrez, since it knew that he was an attorney for E-Games,[372] lacks support and validity, since if they were so interested in the assets located within the properties should have been aware of the lawsuits by virtue of which the properties were returned to their legitimate owners.

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369 Reply, ¶ 350.

370 *Id.*, ¶ 333.

371 RER-2, First expert report of Mr. Alfredo Lazcano Sámano, ¶¶ 187-190.

372 Reply, ¶ 353.

295. Similarly, the Claimants argue that, as a result of the SEGOB closing their casinos, they were deprived of an address in Mexico for notification purposes in the several lawsuits in which they did not appear.[373] However, it should be noted that Mexican law provides for other means of subpoena to trial a person who does not have a fixed address or of whom there is no knowledge,[374] so the Claimants' argument lacks effectiveness to demonstrate that there was no carelessness in the defense of their interests, both in the removal of seals and in the restitution of possession of the premises to their legitimate owners, proof of this is the way in which the jurisdictional authorities tried to notify the Gaming Companies and even so the trials went in absentia:

> XIII.- And since the defendant was subpoenaed by means of edicts, it is logical to notify him of this resolution by that means of communication, edicts that must be published twice every three days in the newspaper "El País", in accordance with article 639 of the Code of Civil Procedures for the Federal District.[375]

296. As can be seen, the SEGOB acted in strict compliance with court orders that determined the material and legal return of the properties to their respective owners was appropriate; therefore, there was no discretion from SEGOB when carrying out the seals removal, as the Claimants intend to make believe throughout their Memorial of Claim and Reply. Therefore, the Claimants cannot argue damage to due process, nor to their property rights, since they were not the legitimate owners of the establishments where their casinos operated, and under that understanding, the SEGOB had no obligation to notify them regarding any matter related to the seals removal, or the material return of the property, in addition to the fact that, as previously stated, the Claimants had, or should have had, knowledge regarding what happened in the trials through which it was ordered return the properties to their respective owners for having the contractual lease relationship.

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373 *Id.*, ¶ 353.

374 *See*, for example, Exhibit R-102, Civil Procedures Code of the Mexico City, Article 122 *"The notification by edicts proceeds: I. In the case of uncertain persons; II. In the case of people whose address is unknown, prior report from an institution that has an official registry of people; in this case, the trial must be followed with the requirements and formalities referred to in the Ninth Title of this Code. In the cases of the two preceding sections, the edicts will be published three times, three days apart, in the judicial bulletin and in the local newspaper indicated by the judge, with two working days between each publication, making it known that who is summoned must present, within a term [sic] that will not be less than fifteen days nor will it exceed sixty days" [emphasis added]*

375 Exhibit C-410, Judgment of April 27, 2017, issued by the Forty-First Civil Court in Mexico City, p. 11.

I. E-Games permit applications

1. Deficiencies in the applications for new permits

297. In addressing the new permits applications and seeking to dismiss Respondent´s allegations, the Claimants consider that the Respondent´s arguments are unsuccessful because: i) SEGOB could issued new permits with the purpose to modify the legal situation of E-Games, allowing to operate it again, it would have accredited the requirement of having the legal possession of the establishments where they will operate; ii) given the deficiencies in the applications, the Respondent elude the procedure established in article 17-A of LFPA, and iii) such elution prevented them from appeling the rejection of SEGOB to their new applications.376 The Respondent rejects this assertions and, in addition to what is argue in the Counter Memorial, deepens and clarifies the facts that the Claimants distort.

298. To clarify the point wheter SEGOB could have issued new permits to modify the legal situation of E-Games, it´s neccesary to point out in the first place that the condition refers to the fact that the establishments in wich they have requested for new permits were closed. How it was explained in the Counter Memorial[377], from the analysis that SEGOB carried out on the applications of E-Games, it concluded, that they could not operate their casinos because they were closed for operating without a valid permit.

299. The Claimants insist that SEGOB´s decision was that in order to obtain a permit, it was necessary that the casinos were open and operating. In other words, The Claimants asume without any legal and logical support that it was the same to have closed establishments as have a closure on those establishements for not operate with a valid permit, they argue: "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".[378] This is imprecise and incorrect e impreciso as it is going to be explained below.

300. *First*, this fact is supported by the RLFJS which establishes that, in order to obtain a permit to hold games with bets and raffles, it is required, among others, to accompany the information

376 Reply, ¶¶ 357-362.

377 *See* Counter Memorial on the Merits, ¶¶ 392-394.

378 Reply, ¶ 358.

and documentation that proves the legal possession of the establishments were it is intended to operate.[379] *Second*, Claimant´s establishments were not only closed, which was irrelevant, but had been closed by an authority. *Third*, given that the Claimant´s establishments for which the had applied for new permits were closed, there was a legal impediment to operate in those establishments.[380] As explain by Mr. Lazcano "a closure is not an isolated administrative act, but (...) it is a sanction and therefore forms part of what is known in theory as sanctioning administrative law."[381] *Fourth*, this sanction was imposed due to the ilegal action of E-Games when operating its establishments without a valid and current permit.[382]

301. Now, the Claimants state that the casinos of E-Games could operate if SEGOB have granted them the new permits that they requested[383], since they assume that: i) the only requirement that they didn´t accomplish was the legal accreditation of the possession of the establishments, and ii) SEGOB had the faculty to change in a single act the legal situation by granting new permits. This is false.

302. The Claimants ignore that the applications and the documentation they submitted to obtain the new permits, did not accomplish with the totality of the requirements provided in the RLFJS as SEGOB determined on August 15, 2014, since: i) they could not operate the casinos because they were closed for operating withouth a valid permit and, therefore, there was a legal impediment to operate in said property,[384] ii) they din´t explain the source of the investment;[385] iii) they did not comply with the requirement to present documentation proving that the applicant has the favorable opinión of the corresponding federal entity or delegation authority for the installation of the

379 Exhibit R-033, RLFJS. Article 22, "*For the purposes of the pemits provided in section I of article 20, in addittion to the requiremnts indicated in the previous article, the applicant must accompany to the request the following information and documentation: […] VIII.- Indicate the legal modality according to which the requesting Company has or intends to obtain the legitimate possession or ownerships of the property in which the establishment is installed."*

380 *See* Counter Memorial on the Merits, ¶ 394.

381 RER-5, Second expert report of Mr. Lazcano, ¶ 162, adressing RER-2, First expert report of Mr. Lazcano, ¶ 176.

382 *Id.*

383 Reply, ¶¶ 358-359.

384 Counter Memorial on the Merits, ¶ 394.

385 *Id.*, ¶ 395.

establishment whose permit is requested,[386] y iv) it was necessary to verify the authenticity of the favourable opinions presented for the casinos located in Cuernavaca an San Jerónimo, since SEGOB did not have the certainty about the veracity of the signatures from the public servants that issued the documents and also did not have the seals of the authority.[387]

303. In fact, the Claimants din´t present the documentation or objective evidence to refute SEGOB´s determination, but they only focus on establishing that the reason for the denial of their requests was that E-Games could not use the establishments where their casinos[388] operated because they were closed, which clearly was not the case.

304. About the alleged faculty of SEGOB to change the legal situation [closure] of E-Games by granting new permits, the Respondent clarifies that this was not possible under the Mexican law. As explain by Mr. Lazcano, the closure is a sanction that, its revocation should have been through a resolution in the corresponding sanctioning procedure:

> Indeed, the closure of the Establishments was constituted as a sanction for the illegal action of E-Games to operate said Establishments without a valid and current Permit, which is why the Sanctioning Procedure mentioned in paragraph 157 of this document was initiated. […]. The revocation of the closures, if any, should have been given as a resolution of said Sanctioning Procedure…[389]

305. Therefore, it was not possible for SEGOB to granted the new permits requested by E-Games to revoke the closures of the casinos, because this have to be ordered in the resolution of the corresponding sanctioning procedure.[390] However, the Respondent emphasizes that, even if E-Games had accredited the requirement of having legal possession of the establishments, its requests would have been rejected, since it did not achieve with all the requirements demanded by the RLFJS.

306. On the other hand, the Claimants erroneously state that the Respondent "completely circumvented the procedure established in article 17-A of the Law of Federal Administrative

386 *See, Id.*, ¶ 396.

387 *See, Id.*, ¶ 399.

388 *See,* Reply, ¶ 362.

389 RER-5, Second expert report of Mr. Lazcano, ¶ 182.

390 *See Id*., ¶¶ 183 y 184.

Procedures (sic)" [391] and seek to extend the effects of this provision to situations not foreseen in the LFPA

307. Claimants point out, with the support of their expert Mr. González, that "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 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". [392] These allegations are incorrect.

308. AAs explain by Mr. Lazcano, article 17-A of the LFPA is applicable "exclusively to the writings presented by the applicants, but not to the documents that are attached to them."[393], therefore, the obligation that SEGOB had in any case, was that if they detected any lack or non-compliance in the application, which indeed not occur, they should request E-Games to correct the non-compliance, it means, that this requirement only applies to the written request and not for the documentation that is attached to the said request.

> Official Letter referred to in Article 17-A of the LFPA, and about which the authority is obliged to prevent missing data or non-compliance with requirements, was, in fact, Official Letter requesting the Permit that E-Games submitted by each of the Establishments. However, SEGOB's assessment on which the refusal to grant Permits was based refers to the documents that accompanied the application and not merely to the application (or writing).[394]

309. In this sense, the Respondent clearly did not fail to comply with the provisions of article 17-A of the LFPA, since SEGOB did not detect any deficiency or lack of information in the E-Games application documents (for example, the address, nationality or full name), for which it was not necessary to notify him so that he could correct any deficiency in the said applications. As Mr. Lazcano concludes, it is wrong to argue that article 17-A of the LFPA was not addressed because SEGOB was obliged to notify E-Games about the requirements that it had allegedly not met, since the non-compliance with the requirements that regulates article 17-A of the LFPA refers to the form requirements of the permit application and not to the substantive requirements for the

391 Reply., ¶ 363.

392 *Id.*, ¶ 364.

393 RER-5, Second expert report of Mr. Lazcano, ¶ 186.

394 *Id.*, ¶ 188.

granting of this. [395] It should be noted that the rejection of the E-Games applications was due to non-compliance with the substantive requirements established by the RLFJS, not formally.

310. Lastly, the Claimants, alleged failure of SEGOB to carry out the procedure provided for in article 17-A of the LFPA, and in its attempt to hold the Respondent responsible for its acts and omissions, affirm that this omission prevented them from appealing SEGOB's rejection of their new applications, which is false, because the said procedure was not applicable, the truth is that neither the appeal for review nor the annulment trial[396] require that the procedure provided for in article 17-A of the LFPA be exhausted, as a condition for accessing to these legal remedies. Likewise, SEGOB informed E-Games in all its response letters about the right it had to challenge SEGOB's resolution.[397]

2. Megasport permit application is different from the E-Games

311. Once again, the Claimants try to make the Tribunal believe that SEGOB had a discriminatory treatment in the granting of new permits to E-Games with respect to what happened with Megasport, they pointing out that the Respondent fails in its attempt to distinguish the situation of E-Games Games and Megasport. In their opinion, the fact that Megasport closed its establishments before SEGOB closed them, does not make sense and is not justified under Mexican law, and they consider that this fact is irrelevant and that it only confirms the discriminatory behavior of the Respondent.[398]

312. The Claimants do not mention or address a fundamental aspect that differentiates the situation between E-Games and Megasport, the E-Games casinos had been closed by SEGOB, while "SEGOB closed one of the Megasport establishments, " Casino 777 Fortuna" [399] and, consequently, "Megasport informed to SEGOB […] the closure of 40 establishments located throughout the country."[400]

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395 *Id.*

396 Legal remedies that were available to challenge SEGOB´s decision under the Mexican law.

397 RER-5, Second expert report of Mr. Alfredo Lazcano Sámano, ¶ 189.

398 Reply, ¶¶ 366-367.

399 Counter Memorial on the Merits, ¶ 405

400 *Id*.

313. For the Claimants, the same treatment should be given to different legal situations [closure and closed], however, both situations have different legal effects, in particular, the closure constitutes "a legal impediment to operate in said properties [of E- Games]"[401] for being a sanction under Mexican law.

314. The Respondent reiterates that what was relevant and differentiating between the factual situations of E-Games and Megasport was the legal situation in which their casinos were at the time of requesting for new permits to operate, not the fact that their facilities were open or closed. In this sense, it is false that there was an artificial, irrelevant and unfounded distinction, as well as a discriminatory conduct of the Respondent as indicated by the Claimants.[402] It cannot be concluded logically or legally that the closure of an establishment ordered and carried out by an authority (i.e. SEGOB) due to non-compliance with the requirements to operate, is the same as a voluntary closure of an establishment that did not have an order from an authority as a precedent.

315. The Claimants do not refute that, unlike what Megasport did, "decided to continue operating the six casinos illegally without a valid permit, despite the fact that the Sixteenth Court had confirmed the revocation of the Permit Holder-BIS Oficio since 10 March 2014,"[403], while Megasport, in addition to challenging the resolution that canceled its permit to operate, "avoided the closure of its casinos by shutting them down as soon as their permit to operate was revoked."[404]

J. The Respondent did not interfere with Claimant´s efforts to sell their assets from the casinos

316. The Counter-Memorial explained that "[t]he Respondent cannot be responsible for the fact that the Claimants were not successful in their negotiations to sell their Casinos or transfer their businesses and that "it seems that the causes were due to a lack of Claimants' own agreements, misunderstandings, and 'irregular' operations."[405]

317. In their Reply, the Claimants again accuse the Respondent of interfering with the Claimants' efforts to sell their casino assets and that "in an attempt to evade responsibility for its

401 Counter Memorial on the Merits, ¶ 394.

402 Reply, ¶ 367.

403 Counter Memorial on the Merits, ¶ 407.

404 *Id.*

405 *Id.*, ¶ 418.

actions [the Respondent] inaccurately blames to the Claimants for their inability to sell the Casinos."[406] Furthermore, the Claimants point out that "SEGOB expressly rejected and hindered all of the Claimants' efforts" and that multiple General Directors of the DGJS "went to explicitly state that they would not allow the Casinos to reopen as long as US shareholders remained involved."[407]

318. In relation to Televisa´s business, the Claimants point out that "when the representatives of Televisa communicated to SEGOB (and specifically to Ms. Salas) their interest in the Claimants' Casinos, SEGOB did not would approve the proposed transaction"[408] and that: "(i) Mexico improperly and intentionally interfered with the Claimants' efforts to reopen the Casinos or sell the Casino assets after the closure of the Casinos and (ii) denied the Claimants the opportunity to mitigate their damages."[409]

319. The foregoing is false, since, as has been demonstrated by the statement made by Ms. González Salas[410], SEGOB never intended to block or interfere with the sale of Claimants' casinos. In fact, Ms. González Salas reiterates that she met with "with Messrs. José Antonio García (PlayCity) and Juan Cortina Gallardo, who intended to acquire the E-Games centers to operate them, however, I reiterate that I limited myself to pointing out that they had to find out the situation of those casinos, since they were not in a legal condition to be reopened"[411], which does not imply in any way an interference or improper intention on the part of SEGOB for the reopening of the Claimants' casinos or for the sale of their assets.

320. Furthermore, the documents obtained in the document production phase of this proceeding show that the Claimants voluntarily walked away from the transaction with Televisa and instead opted for this arbitration. For example, in Mr. John Conley's email to Mr. Gordon Burr dated October 2015, Mr. Conley states that if arbitration were filed under NAFTA, the agreement with Televisa would be dead:

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406 Reply, ¶ 368.

407 *Id.*, ¶ 370.

408 *Id.*, ¶ 373.

409 *Id.*, ¶ 376.

410 RWS-1, First witness statement of Ms. Marcela González Salas, ¶¶ 22, 23 y 24.

411 RWS-4, Second witness statement of Ms. Marcela González Salas, ¶ 29.

> Gordon, before we start voting on NAFTA I would like to call an investor meeting to explain where we are with Televisa. I asked Erin to give me the e-mail address she uses to send general correspondence to the all the investors but have never received it. I had surgery on my hand today so I have been kind of out of it. I'm sure you have spoken to Julio and he has a couple of things to do before you can file. Can't we wait to file your suit until we get the Televisa deal done? If not I want to hear it from the investors, because if you file a formal NAFTA suit now Televisa deal is dead.[412]
>
> [Emphasis added]

321. Likewise, in the email sent by Mr. Gordon Burr to Mr. Alfonso Rendón, also in October 2015, Mr. Gordon Burr highlights the expected benefits of this arbitration, instead of the sale to Televisa:

> If we win NAFTA the Mexican investors will collect 10 times what they will in a Televisa sale your family will collect millions and will not even be able to vote on the filing so how could they be held responsible for the suit. I fail to see how this would be a problem for you.[413]
>
> [Emphasis added]

322. As can be seen, the Claimants voluntarily withdrew from the negotiation with Televisa, because it was in their interests to continue with the arbitration under NAFTA, than to continue trying to sell their casinos or assets. Therefore, the manipulation and distortion of the facts that the Claimants continuously carry out is evident.

323. In addittion, the Claimants pointed out that "[M]r. 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."[414] The Respondent wishes to note that the Claimants repeatedly in their Memorial as well as in their Reply, have made the same argument, relying exclusively on Mr. Burr's Witness Statement; however, they have not shown any document to support their claims. Neither present the witness statement of Mrs. José Antonio García and/or Juan Cortina Gallardo, while the Respondent has presented two witness statements by Ms.

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412 Exhibit R-112, Email of Mr. John Conley to Mr. Gordon Burr, Subject: NAFTA (October 12, 2015), p. 5.

413 Exhibit R-112, E-mail of Mr. Gordon Burr to Mr. Alfonso Rendón, Subjetc: Kash Sale (October, 19, 2015), p. 7.

414 Reply, ¶ 371.

González Salas, who was at the meetings, once again, the Claimants' distortion of the facts is evident.

324. Likewise, the Claimants argue that Mr. Luis Felipe Cangas, who was General Director of Games and Raffles of SEGOB, after the departure of Ms. González Salas in March 2015, said "that the casinos would not reopen until the American shareholders of the Games Companies were no longer directly involved in the Games Companies,"[415] which is false and just one more sample of the distortion of the facts that the Claimants have maintained throughout this arbitration, in their attempt to build a narrative that fits in their objectives, but the following needs to be highlighted.

325. *First*, by the date on which Mr. Luis Felipe Cangas assumed the position of General Director of Games and Raffles at SEGOB, the resolution of Amparo 1668/2011 was considered fulfilled, and also was declared that the E-Games Permit was null and void, as well as the resolution of the Appeal for Dissent, on January 29, 2015, in which it was indicated that SEGOB had complied with the sentence without incurring in excess or defect, due to what, by then, was irrelevant the fact that foreign investors were there or not, because nothing would change the status of their permit, which had already been declared non-subsistent. *Second*, Ms. González Salas has reiterated that she never requested that foreign investors not be present at E-Games to reopen their casinos.

326. Similarly, the Claimants try again to hold the Respondent responsible for its failed negotiations with Mrs. Benjamín Chow and Luc Pelchat, which, as indicated in the Counter-Memorial, apparently could not materialize due to misunderstandings with the Plaintiffs, the lack of agreement and "irregular" operations.[416] However, the Claimants insist on this point, stating that "the transaction failed mainly because SEGOB did not give approval to Mrs. Chow and Pelchat for the Casinos to reopen."[417] This is false. The explanation is simpler, as has been pointed out and regardless of the Claimants' attempt mentioned above, the truth is that the casinos could not reopen if they did not have a valid and current permit. The Claimants have not provided any document that supports that they had such permission so that, in accordance with Mexican law, they could reopen their casinos.

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415 *Id.*, ¶ 374.

416 Counter Memorial on the Merits, ¶¶ 415 - 418.

417 Reply, ¶ 374, citing Exhibit CWS-50, Third witness statement of Mr. Gordon Burr, ¶ 114.

327. Furthermore, the Claimants point out that, after the closure of their casinos, they approached to potential partners and high-profile buyers, including CODERE; however, the Claimants do not present any document or witness statement from CODERE that could confirm the alleged operation that they would have with that permit holder and they only present the statements of Mr. Gordon Burr[418] and Ms. Erin Burr. [419]

328. Furthermore, the Claimants indicate that the Tribunal should make an adverse inference based on the fact that Mexico did not produce documents related to Mexico's alleged interference with the Claimants' efforts to sell the casinos; however, the Tribunal must reject this request, since, as explained above, Mexico did not interfere in the Claimants' efforts to sell their casinos or assets, that is why Mexico does not have the requested information since the facts narrated by the claims do not exist.

K. México did not initiate baseless and punitive investigations against the Claimants

329. The Claimants argue in their Reply that the Respondent's tax and criminal investigations were not substantially justified in their Counter-Memorial and reiterate that they were "unfounded, harassing, repressive and politically motivated"[420]. This is false. As noted throughout the Counter Memorial[421], the performance of the SAT when initiating its powers of verification [tax investigations] and throughout the corresponding procedure, was carried out within the current legal framework. Regarding criminal measures, SEGOB acted based on its powers and obligations in accordance with current legislation. However, the Respondent will elaborate on these points below.

1. The alleged tax measures taken in retaliation

330. Claimants point out that: i) Mexico used tax audits to continue its politically motivated campaign against Claimants and in retaliation for filing this arbitration; ii) as a result of this campaign, the SAT issued an unfounded resolution that imposed a tax credit on it; iii) even though

418 CWS-50, Third witness statement of Mr. Gordon Burr, ¶¶ 109-115.

419 CWS-51, Third witness statement of Ms. Erin Burr, ¶¶ 117-122.

420 Reply, ¶ 400.

421 *See* Counter Memorial on the Merits, Section II, Subsection S.

they used the same methodology previously approved by the SAT in 2012 for the 2011 period, it determined that they had failed to comply with their tax obligations, which demonstrates both the illegality of the determination and the political burden against them, and iv) the political burden of the matter caused that the legal remedies they initiated were unsuccessful.[422]

331. Contrary to what the Claimants point out, the explanation and reality of the facts is very simple. The Claimants failed to comply with their tax obligations, for which they were reviewed based on the established legal procedures, in which they had the opportunity to present their arguments and evidence, however, they could not justify or refute the omissions that were detected and, therefore, a tax credit was determined for the omission of the payment of various contributions. The Claimants had access to all legal remedies to challenge said tax credit, obtaining a partial victory. Therefore, there was no retaliation or illegality against the Claimants in the tax investigations.

332. As indicated by the Respondent, the tax authorities of the Mexican Government at no time retaliated against the Claimants, on the contrary, using their powers under Mexican law and respecting established legal procedures, they determined and demonstrated before jurisdictional authorities that E-Games had not complied with its tax obligations.

333. The Claimants try to build an argument of "harassment" based on the fact that they obtained an adverse determination from the SAT, stating that "it was due to political reasons and in retaliation for the fact that the Claimants had presented this arbitration."[423]. However, they fail to note, among other things, that the tax investigation began on September 21, 2012, well before Claimants filed the NOI on May 23, 2014,[424] in accordance with what was stated in the determination of the SAT of February 28, 2014:

> This Strategic Control Administration "6" […] of the Tax Administration Service […] proceeds to determine the Tax Credit […] for the fiscal year from January 1, 2009 to December 31, 2009, derived from the visit home inspection carried out under order number IDD9500016/12, contained in official letter number 500-05-2012-50794 of September 19, 2012, issued by the undersigned, same official letter that prior summons dated September 20, 2012, was duly delivered on the 21st of the same month and year, to C. Efraín Cabos Bonilla, in his capacity as third party of the taxpayer Exciting Games,

422 *See* Reply, ¶¶ 401-403 y 850-857.

423 Reply, ¶ 857.

424 Notice of Intent dated May, 23, 2014.

> 'S. of R.L. de C.V., who for proof of receipt stamped in his own handwriting on the original that was delivered to him and in a part of the aforementioned official letter the following legend: "Prior identification of the visitors and reading of this official document, I received original.[425]
>
> [Emphasis added].

334. Likewise, the Claimants try to construct the idea that the tax investigation of the SAT and the determination of the tax credit issued on February 28, 2014 for the amount of $170,475,625.02 with respect to various taxes, as well as for the distribution of profits for $5,601,964.87.512, was used "to continue its [SAT] campaign with political motivations against the Claimants" [426] and asserts that the Respondent has not justified the alleged unfounded and harassing fiscal investigation against it; However, this is not correct.

335. As indicated in the Counter-Memorial "[t]he resolution issued by the SAT, on February 28, 2014, derived from the verification powers that said authority has in tax matters,"[427] this resolution is duly founded and motivated. In addition, as the SAT pointed out, the verifications they carry out, are carried out on technical bases, not political motivations, in order to select taxpayers who, according to these bases, are found to be failing to comply with their tax obligations:

> The selection of taxpayers for the programming of tax reviews is generated based on the receipt of inputs (inputs) by different Administrative Units of the SAT, various dependencies of the Public Administration and other sources of collection; The purpose of said selection is to verify the correct compliance with the tax obligations of taxpayers, for which examination procedures are carried out on technical bases, which aim to select taxpayers for tax review purposes, in which behaviors that presume that they are not correctly complying with their tax obligations.[428]
>
> [Emphasis added]

336. The foregoing shows how the SAT carries out the detection and selection of taxpayers to initiate its verification powers on objective bases, contrary to what the Claimants intend to argue based on a fictitious history of illegality and political persecution, on which they have not provided objective evidence to support it, only speculations and conjectures that are not verified with evidence. In addition, the Respondent notes that documents in this arbitration demonstrate the

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425 Exhibit R-087, Official letter from SAT dated February 28, 2014.

426 Reply, ¶ 401.

427 Counter Memorial on the Merits, ¶ 430.

428 Exhibit R-088, Official letter from SAT dated October, 13, 2020.

Claimants' own acknowledgment of their breach of tax obligations in Mexico, as Mr. John Conley admits:

> JOHN CONLEY:[…] SEGOB didn't want me. When I was negotiating with Televisa, they told me SEGOB thought we were still associated with Rojas and that there were major tax issues, which there are – and tax issues aren't like Gordon says there are, we didn't pay our fucking taxes, didn't pay them. He said we didn't have to, but now [UNINTEL]. We didn't pay period. They are due every month. We didn't pay.[429]
>
> [Emphasis added]
>
> JOHN CONLEY: The reason I [UNTNTEL] it even came up at all is we didn't pay our individual income taxes on the different juegos on the five companies, for 2013. And 1 asked Arturo, "What the fuck? We don't pay our taxes?" I mean, they can shut us down for that Why not Arturo?[430]

337. This shows the falsity of the Claimants' accusations about the SAT acted out of political motivation and retaliation against them. The truth is that the Claimants did not comply with the tax legislation applicable under Mexican law, even though, according to their statement, they "asked for advice from the SAT regarding the reporting obligations of E-Games of the casino operations"[431], it is even highlighted that the Claimants openly confirm not having paid their taxes for the 2013 fiscal year, so that, with said behavior and the technical analysis carried out by the SAT on the fulfillment of their fiscal obligations, it was foreseeable that they would be reviewed by the authority and sanctioned for their non-compliance in accordance with the provisions of current legislation, as finally occurred.

338. Finally, another aspect that the Claimants argue is the alleged political charge of the matter, which, in their opinion, made the legal remedies they pursued useless.[432] This is false and, like the previous allegations, the Claimants do not present objective evidence to support their statement. The Claimants try to justify in this way what they could not prove in the corresponding legal procedures, that is, the fulfillment of their fiscal obligations.

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429 Exhibit CRT-07, p. 5; Exhibit R-110, Meeting Starbucks John Conley.

430 Exhibit CRT-08, p. 7.

431 Reply, ⁋ 402.

432 *See Id.*, ¶¶ 403 y 850.

339. As noted in the Counter Memorial[433], the Claimants had at their disposal all the means of defense and legal remedies[434] to challenge the resolution of the SAT, which means that they had the opportunity to present arguments, allegations and evidence before judicial authorities, as they actually did, obtaining a partial victory, since the amount on the distribution of profits was revoked,[435] reducing the total amount to be paid. Evidently, this partial victory would not have occurred if there had been a political campaign against the Claimants as they erroneously point out.

340. The Claimants fail in their attempt to build an argument to justify that the unfavorable result they obtained was due to political motivations, for the sole reason that their arguments did not prevail before the jurisdictional authorities. It has been pointed out and demonstrated that the SAT's resolution was duly founded and motivated in accordance with Mexican legislation, which was confirmed by various jurisdictional authorities.

2. The alleged criminal measures taken un retaliation

341. The Claimants assert that: i) the criminal investigations against E-Games and its representatives were in retaliation for the filing of this arbitration, and ii) such investigations were discretionary, based on an illegal closure.[436] This is completely false as noted in the Counter Memorial[437] and is going to be explain below.

342. The Claimants resort again to the alleged history of harassment and political persecution they suffered without presenting objective evidence to verify their statement. However, they fail in their attempt, because again the justification and reality of the facts is simpler than the fictional story they build. SEGOB detected the probable commission of a crime by finding them operating their casinos without a valid and current permit, for which it had to inform the competent authorities so that they could initiate the corresponding investigations in accordance with the Mexican legislation.

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433 Counter Memorial on the Merits, ⁋⁋ 428 y 430.

434 Appeal for Review, Nullity Trial and Amparo Trial.

435 CWS-52, Fourth witness statement of Mr. Julio Gutiérrez, ¶ 107 y Exhibit R-101, Judgment of the Superior Chamber of the Federal Court of Fiscal and Administrative Justice dated March, 8, 2016, p. 936.

436 Reply, ¶ 407 y 408.

437 *See* Counter Memorial on the Merits, Section II.S.2.

343. As it was mentioned in the Counter Memorial[438], Mexican legislation establishes that is a crime to operate casinos without a valid and current permit issued by SEGOB:

> Prison shall be imposed from 3 months to three years and a fine of 500 to 10,000 pesos, and dismissal from employment, if applicable: […] II.- To the owners, organizers, managers or administrators of establishments open or closed in which prohibited games and bets are carried out, without authorization from the Ministry of the Interior, as well as those who participate in the company in any way.[439]
>
> [Emphasis added]

344. For purposes of the foregoing, it is important to point out that the Sixteenth Court issued a resolution on March 10, 2014, in which it confirmed that SEGOB had complied with Amparo 1668/2011, and as part of that compliance, the SEGOB had declared the E-Games permit invalid. Therefore, since at least March 10, 2014, Claimants have been operating their casinos without a valid permit from SEGOB.[440]

345. The SEGOB detected during the verification of the casinos, in the excercise of its powers of verification and control,[441] that E-Games were open and operating without a valid and current permit, for which it proceeded to close them. Consequently, as Ms. González Salas points out, SEGOB had to file a complaint with the competent authorities for the probable commission of the crime of illegal betting, as it actually did:

> If a casino does not have a permit to operate, it must be closed and as i stated in my first witness statement, in the paraghaph 22, SEGOB must file the corresponding complaint for the crime of illegal gambling.[442]
>
> [Emphasis added]

346. According to second paragraph of article 222 of the CNPP[443], SEGOB, having knowledge of facts constituting a probable crime, had no other option but to file the corresponding complaint,

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438 Counter Memorial on the Merits, ¶ 432.

439 Exhibit R-030, LFJS, Article 12, fraction II.

440 Counter Memorial on the Merits, ¶ 408.

441 *See* RER-5, Second expert report of Mr. Alfredo Lazcano Sámano, ¶ 134.

442 RWS-4, Second witness statement of Ms. Marcela González Salas, ¶ 32, *See* RWS-1, First witness statement of Ms. Marcela González Salas, ¶ 22.

443 Exhibit R-039, CNPP, Article 222, second paragraph: "Whoever in the exercise of public functions becomes aware of the probable existence of a fact that the law indicates as a crime, is obliged to report it immediately to the Public Ministry, providing all the information he has, making the accused available to him, if they have been detained in flagrancia. Whoever has the legal duty to report and does not do so, will be subject to the corresponding sanctions. [Énfasis añadido]

since, under Mexican law, the authorities have the obligation to do so. This is explained by Mr. Lazcano:

> [W]hen an act that constitutes the commission of a probable crime is updated, the SEGOB not only has the right, but also the obligation in the exercise of its functions, to present a criminal complaint before the ministerial authorities in order to initiate a investigation against the alleged perpetrators, which finds its support in the second paragraph of article 222 of the National Code of Criminal Procedures.[444]
>
> [Emphasis added]

347. Therefore, the Claimants fail in their attempt to justify that the criminal investigations initiated against them in retaliation for the presentation of this arbitration, since this was clearly not the case. Said investigations occurred as a result of the Claimants operating without a valid and current permit, as Mr. Lazcano concludes "it was done in compliance with a legal obligation and not with political motivation and with the aim of intimidating, harassing and punishing the Claimants […] for initiating this Arbitration"[445]. SEGOB was required by law to file a complaint in accordance with the second paragraph of article 222 of the CNPP, so that the ministerial authorities (PGR today FGR) began with the corresponding criminal investigations, there was no margin of discretion for SEGOB as indicated by the claimants.

348. It is important to point out that, in accordance with the Mexican legal system, criminal investigations are intended for the PGR (today FGR) to gather evidence to clarify the facts that could constitute crimes and, where appropriate, evidence to support the investigation. exercise of criminal action, the accusation against an accused and the reparation of the damage caused. Contrary to what the Claimants suppose, the criminal investigations are carried out in accordance with the principles established in the CNPP and in the CPEUM, including the principles of legality, presumption of innocence, due process, among others. In this sense, the fact that criminal investigations were initiated by the PGR (today the FGR), does not mean that, automatically, the exercise of criminal action is determined in all cases, which would imply that the investigation to a criminal judge, since, as has been said, in the criminal investigation stage the PGR (today the FGR) only gathers indicia and evidence to determine whether the facts it investigated constitute a crime, therefore, once again the Claimants misrepresent the facts, considering that "[t]he criminal investigations of retaliation by the representatives of E-Games have caused substantial damages

444 RER-5, Second expert report of Mr. Alfredo Lazcano Sámano, ¶ 140.

445 *Id*., ¶ 141.

to the Claimants, have interfered with the ability of the Claimants to continue operating and benefiting from their investment in Mexico and have kept E-Games representatives living in fear of unjustified criminal sanction."[446]

349. Likewise, the Claimants consider that the criminal investigations were based on an illegal closure. This is false, as the Respondent has stated, SEGOB has the power to take care of the compliance with the LFJS, so it issued verification orders that led to the inspection of the Claimants' establishments, finding that they were carrying out gambling activities with gambling and sweepstakes without a valid and current permit; consequently, following the provisions of the LFJS, they proceeded to close it.[447]

L. Producciones Móviles and E-Games were in different cicumstances

350. The Claimants continue to argue that Producciones Móviles currently has a valid permit, while E-Games had its permit revoked. In the Memorial, [448] the Claimants stated that Mexico's actions not only demonstrated the application of different rules in similar circumstances, but also a total rejection of the principle of legal certainty in administrative law, since SEGOB had to assume similar positions regarding the permission of both companies.[449] In the opinion of Mr. Ezequiel González: "SEGOB is obliged to apply the law under the rulings of the Mexican courts and, in fact, even to adopt administrative guidelines compatible with those rulings. Otherwise, SEGOB would end up making inconsistent and arbitrary decisions on the same issues. This is precisely what happened here, when SEGOB left the independent permit of E-Games unsubstantiated, but kept the one of Producciones Móviles."[450]

351. It is important to mention that, although there are similarities between E-Games and Producciones Móviles because both companies were operators of E-Mex, the permit that was granted to Producciones Móviles was never the result of the official letter 2009-BIS, which was the document with the acquired rights of E-Games over the E-Mex permit, and in addition, was

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446 Reply, ¶ 411.

447 *See* RER-5, Second expert report of Mr. Alfredo Lazcano Samano, ¶¶ 134 y 135.

448 Memorial on the Merits, ¶ 155.

449 Reply, ¶ 394.

450 Reply, ¶ 396. Citing the Second expert report of Mr. Ezequiel González Matus, CER-6, ¶ 123.

the official letter from which the subsequent acts of SEGOB emanated and culminated in the granting of the official letter of Permit Holder-BIS.

352. The Official Letter of Permit Holder-BIS was declared null and void in strict compliance with the judgment of Amparo 1668/2011, which ordered to leave null and void all the letters that were a consequence of the Official Letter 2009-BIS.

> Consequently, as the proposed argument is founded, the Justice of the Union Protects Entertainment of Mexico, a variable capital corporation, against the official letter DGAJS/0260/2009-BIS, dated May,27, 2009, for the effect of leaving it unsubstantiated and issuing another in which, following the guidelines of this sentence, in a well-founded and motivated manner, resolve what is appropriate in relation to the request of May,18, 2009.[451]

353. The Respondent reiterates that SEGOB did not declare the non-subsistence of the E-Games permit of its own free will, but rather, in strict compliance with a court order, and nowhere in the judgment of J.A. 1668/2011, the Judge ruled on the permit of Producciones Móviles, so SEGOB could not act against said company.

354. Whether or not the permits of E-Games and Producciones Móviles had a certain similarity is irrelevant to the case in question, since there was never a court ruling ordering the non-subsistence or revocation of the Producciones Móviles permit. By leaving E-Games' permission unsubstantiated, SEGOB only acted within the legal framework of its attributions and powers in matters of games and raffles, that is, it never had the objective of allowing Producciones Móviles to continue operating its casinos and that E-Games did not. If the SEGOB had declared insubstantial or revoked the permission of Producciones Móviles by mutual agreement, it would have acted improperly affecting the rights of Producciones Móviles in violation of its guarantee of due process, since it was never even part of the J.A. 1668/2011.

355. Mr. Lazcano point out:

> The similarity that existed between E-Games and Producciones Móviles ended at the moment in which the Federal Justice ruled that the rights of E-Mex had been violated by the administrative acts granted in favor of E-Games, considering them in violation of their individual guarantees, not so the administrative acts granted in favor of Producciones Móviles (Producciones Móviles, for example, never requested to be an "Independent Operator"), therefore, it ordered that they be declared invalid by SEGOB.[452]

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451 Exhibit C-018, Judgment J.A. 1668/2011, C-018, p. 202.

452 RER-5, Second expert report of Mr. Alfredo Lazcano Samano, ¶ 111.

356. In summary, Producciones Móviles' permit could in no way be legally declared invalid or revoked based on the judgment issued as a result of the amparo lawsuit that E-Mex filed against E-Games, since Producciones Móviles did not was part of the J.A. 1668/2011 and, in terms of the provisions of Mexican law, [453] this situation culminated in the due compliance that SEGOB gave by declaring unsubstantiated only the letter 2009-BIS and its consequent derivations, so that beyond establishing whether there were circumstances between E-Games and Producciones Móviles, it is important for this Tribunal to take into consideration that SEGOB's actions were not arbitrary or in bad faith, but rather, as has already been stated, were in strict compliance with Amparo Ruling 1668 /2011.

357. On the other hand, during the document production phase, the Claimants requested documents related to Mexico's decision to allow the Producciones Móviles Casinos to remain open, for which they consider that the Tribunal must make adverse inferences due to the lack of production of such documents.[454] The Respondent does not have documents related to said request[455] because, as discussed in the Counter-Memorial and in the preceding paragraphs, there is no documentation that complies with the Claimants' request, since SEGOB only complied with what was ordered in the judgment. of amparo 1668/2011, which nowhere ordered SEGOB to declare the Producciones Móviles permit invalid, for which it was not necessary to carry out an analysis such as the one that the Claimants claim exists in the files of SEGOB and in the SE.

M. Petolof y E-Games were in different circumstances

358. In its Counter-Memorial, the Respondent argued that Petolof's case did not apply to E-Games and that similar circumstances did not exist for the following reasons:

- The legal regime to which Petolof and E-Games were subject was different, since Petolof was only subject to the LFJS, while said law and its Regulations were applicable to E-Games. [456]

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453 Exhibit R-054, Ley de Amparo, articles 71, fraction I, 192 y 214.

454 Reply, ¶ 398.

455 *Id.*

456 Counter Memorial on the Merits, ¶¶ 442, 444-448.

- The scope of the operating contract between E-Mex and E-Games, and the contract between Petolof and EDN were substantially different. [457]
- The issuance of the Petolof Resolution was a consequence of the protection granted to Petolof and, subsequently, the DGJS/DGAAD/DCRCA/P-01/2016 permit was issued by SEGOB in compliance with a TFJFA ruling. [458]
- The non-subsistence of the E-Games permit was not an act that SEGOB had decided on its own, but was a consequence of compliance with the ruling issued in the amparo proceeding 1668/2011 promoted by E-Mex, which ordered to stop all the acts derived from the Official Letter 2009-BIS. [459]

359. The arguments offered by the Claimants in their Reply to address these considerations will be examined below.

1. The legal regime to which Petolof and E-Games were subject was different

360. Supported by the expert report given by Mr. Ezequiel González Matus, the Claimants argue in their Reply that the main similarity between the Petolof case and the E-Games case is the concept of acquired rights that emanate from the contractual agreement between a permit holder and a third party.[460] The Claimants intend to minimize the existence of a different regulatory framework with the argument that "it is irrelevant whether or not that right was generated during the validity of the Gaming Regulations, because acquired rights are a legal concept that does not depend on the validity of the Regulations of games."[461]

361. As stated in its Counter-Memorial, the Respondent considers that the difference between the legal regime to which Petolof and E-Games were subject is relevant.[462] When issuing the Petolof Resolution, SEGOB only took into account the LFJS, since it could not apply the Regulation to Petolof without incurring in a retroactive application of said RLFJS. On the other

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457 *Id.*, ¶¶ 442, 444, 449-453.

458 *Id.*, ¶¶ 426-427, 454-456.

459 *Id.*, ¶¶ 424 y 427.

460 Reply, ¶ 56.

461 *Id.*, ¶¶ 58, 383-386.

462 Counter Memorial on the Merits, ¶¶ 445-448.

hand, E-Games was subject to both the LFJS and its Regulations, a situation that was reflected in the official letters issued by SEGOB.

362. Similarly, as Mr. Lazcano explains, this distinction is important because "Petolof did not have the legal status of Operator because its relationship with EDN was perfected until 1999 (that is, before the entry into force of the Gaming Regulations in 2004) when the figure of Operator had not yet been incorporated into the Mexican legal framework, while E-Games was indeed an Operator."[463]

363. Petolof was a partner of EDN, as it exploited its permit under a *joint-venture* agreement with EDN. E-Games was not a partner of E-Mex, but an"operator" in accordance with article 30 of the RLFJS.

364. The foregoing was reflected in the Petolof Resolution itself, in which SEGOB stated that the rights acquired by Pelotof were limited and did not extend to the ownership of a permit nor did they include all the rights that had been initially granted to EDN. In other words, even when SEGOB recognized certain rights acquired through the Petolof Resolution, these were limited and at no time was Petolof recognized as an "independent operator" of the EDN permit.[464]

2. Petolof and E-Games contracts had different scopes

365. The Claimants again invoke the doctrine of acquired rights to minimize the contractual differences that existed between Petolof and E-Games. They maintain that "the concept of acquired rights is not conditioned to a certain type of legal relationship. 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)."[465]

366. Said argument does not address the merits of the Respondent's argument.[466] The contract between Petolof and EDN granted Petolof the status of "associate" of EDN and with it, rights of

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463 RER-2, First expert report of Mr. Alfredo Lazcano Samano, ¶ 93.

464 Exhibit C-253, Current Permit UG-010/2008 (Petolof Resolution), p. 16. When analyzing the scope of the figure of "acquired rights", the SEGOB determined the following: "... due to the foregoing, the figure of acquired rights on the permit was updated insofar as it refers solely and exclusively to "foreign books" and in favor of the appearing PETOLOF SA de CV, not the ownership of the permit in question" (Emphasis added).

465 Reply, ¶¶ 58, 387-388.

466 Counter Memorial on the Merits, ¶¶ 449-453.

use and exploitation of different movable and immovable property (including permit 000003 granted to EDN), share rights of joint and separate administration, among others. The contract between E-Games and E-Mex was limited to the simple joint exploitation of the E-Mex Permit between said company, as permit holder, and E-Games, as operator.

367. The difference is substantive, since through the contract with EDN, Petolof acquired rights over the EDN permit, which E-Games did not have, nor could it have agreed to with respect to the E-Mex Permit, by virtue of the content of the articles 30 and 31 of the RLFJS. Said articles prohibit the execution of agreements when the operator assumes the corporate or administrative control of the permit holder company; as well as the transfer, assignment, alienation or commercialization of a permit.

368. In this understanding, the criteria used by SEGOB in relation to Petolof took into account the nature of the contract with EDN and the circumstances that put at risk a number of rights acquired by Petolof up to that time (for example, shareholders, property, possessory, among others) which were part of his assets as a moral person. This consideration was not decisive in the case of E-Games, given that the nature of its contract with E-Mex did not grant it the same rights over the E-Mex Permit.

369. The foregoing is clearly evidenced by the language used by SEGOB in the Petolof Resolution:

> In that same way, we have that the authority chose to recognize acquired or created rights due to the reflection that emerges from the reasoning and considerations expressed in the preceding paragraphs, thus, this authority reasons and limits said rights, in attention to the fact that that the aforementioned right acquired and recognized here by this authority, cannot include all the rights of the permit granted to Espectáculos y Deportes del Norte S.A. de C.V., in favor of PETOLOF, S.A de C.V., since the aforementioned contract does not provide for this[467]
>
> [Emphasis added].

[467] Exhibit C-253, Current Permit UG-010/2008 (Petolof Resolution), p. 16.

3. SEGOB issued the Petolof Resolution and granted the permit in compliance with a judicial orders

370. In their Reply, the claimants supported by the expert report of Mr. Ezequiel González Matus, argue that "[t]he Mexican court at no time ruled that SEGOB should issue a permit based on the principle of acquired rights."[468] For his part, Mr. González Matus points out:

> Mexico alleges that SEGOB granted the permit to PETOLOF in compliance with a court order and not on a discretionary basis.103 This is not correct. The judgement rendered by the Eighth District Judge in Tamaulipas State in Amparo 176/2005-3 only ordered SEGOB to reinstate the administrative procedure to PETOLOF on the grounds that its hearing guarantee had been violated. The judgment of that amparo trial in no way ordered SEGOB to issue a permit based on the criterion of acquired rights. It was assumed at the discretion of SEGOB itself as a substantial argument for granting the permit to PETOLOF.[469]
>
> [Emphasis added]

371. It is clear that Mr. González Matus confuses the content of the Petolof Resolution dated October 28, 2008 in the administrative procedure UG-010/2008, derived from the amparo ruling,[470] with the issuance of the permit DGJS/DGAAD/DCRCA/P-01/2016 on May 27, 2016, in compliance with a judgment of the TFJFA.

372. The Respondent indicated in its Counter-Memorial that "a simple reading of the Petolof permit allows us to observe that SEGOB granted said permit in compliance with a ruling of the TFJFA".[471] Furthermore, the Respondent transcribed the following excerpt from permit DGJS/DGAAD/DCRCA/P-01/2016 issued by SEGOB on May 27, 2016:

> That in compliance with the resolution of August 20, 2015, issued in the records of the Federal Contentious-Administrative Trial 786/15-17-12-3, filed in the Tenth Metropolitan Regional Chamber of the Federal Court of Tax and Administrative Justice, This administrative authority grants this permit in substitution of the different 000003 of July 14, 1978 and its subsequent modifications, in favor of the legal entity: "Petolof, S.A. of C.V."[472]

373. It should be noted that the Claimants do not share Mr. González Matus's apparent confusion between the Petolof Resolution of October 2008 and the Petolof permit of May 2016. The

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468 Reply¶ 381.

469 CER-6, Second expert report of Mr. Ezequiel González Matus, ¶ 116.

470 Exhibit C-253, Current Permit UG-010/2008 (Petolof Resolution).

471 Counter Memorial on the Merits, ¶ 455.

472 Exhibit C-328, Permit DGJS/DGAAD/DCRCA/P-01/2016 of Petolof, p. 1.

Claimants state in their Reply that "it is not clear in the Petolof permit whether the Mexican court ordered SEGOB to issue a new permit or, as it did earlier during the EDN administrative process, SEGOB simply provided Petolof with due process rights." [473] With the foregoing, it is clear that the Claimants do distinguish between the amparo proceeding processed before the District Court, which gave rise to the Petolof Resolution in 2008, and the contentious-administrative proceeding processed before the TFJFA, which gave rise to the issuance of the permission from Petolof in 2016.

a. Contentious administrative trial 786/15-17-12-3 before the TFJFA

374. As indicated in the Respondent's Counter-Memorial, contentious-administrative proceeding 786/15-17-12-3, had as background a request by Petolof to substitute the permit originally granted to EDN, for a new permit.[474]

375. On January 8, 2015, Petolof filed a brief before the TFJFA demanding the resolution by fictitious refusal of his request. [475] As explained in the judgment issued by the TFJFA, the fictitious refusal is a legal figure provided for in article 17 of the LFPA that implies considering an application as denied once three months have elapsed from its presentation. Petolof argued that SEGOB had violated the content of article 17 of the LFPA by failing to agree to what was stated in its request of August 29, 2014.[476]

376. The ruling issued on August 20, 2015 agreed with Petolof and ordered SEGOB to issue him a new permit in the following terms:

> Then, once the foregoing has been verified, what is appropriate according to law is to declare the nullity of the contested resolution, so that the Directorate of Games and Raffles of the Ministry of the Interior, issues a new permit in substitution of the permit *** ***, dated July 14, 1978, in accordance with the provisions of the Regulations of the Federal Law on Games and Raffles, published in the Official Gazette of the Federation on September 17, 2004, respecting the term and terms of the permit granted originally, as well as each and every one of its subsequent modifications and taking into

473 Reply, ¶ 391.

474 Counter Memorial on the Merits, ¶ 456.

475 Exhibit R-108, Judgment 786/15-17-12-3, p. 2, result 1°.

476 *Id.*, p. 4, second considering.

> account what was determined in the letter of October 28, 2008, issued in procedure UG-010/2008.[477]

377. The foregoing confirms that SEGOB did issue Petolof's permit pursuant to a court order. Specifically, the resolution of August 20, 2015 issued by the Twelfth Metropolitan Regional Chamber of the TFJFA in the contentious-administrative trial 786/15-17-12-3.

4. SEGOB could not declare the non-subsistence of the Petolof permit

378. In their Reply, the Claimants argue that the fact that SEGOB "allowed Petolof, who obtained the status of independent operator on the basis of 'acquired rights,' to continue operating the casinos" and that it "[n]o revoked the permission of Producciones Móviles, which obtained its gaming license under the same circumstances as E-Games", is evidence that said authority "acted in an inconsistent and discriminatory manner, allowing two Mexican gaming companies to continue operating, even though both were in circumstances very similar to E-Games." [478] However, it is clear that the situation of Petolof and E-Games were completely different.

379. The non-subsistence of the E-Games permit was not an act that SEGOB had decided on its own, but was done to comply with the sentence issued in the amparo proceeding 1668/2011 promoted by E-Mex, which ordered to render all trades derived from the operator null and void (i.e., Trade 2009-BIS).[479] It is reasonable to assume that if E-Mex had not filed the amparo proceeding 1668/2011 that culminated in the non-subsistence of the Official Letter 2009-BIS, as well as all the acts derived from it, said permit would continue to be in force.

380. In the Petolof case, EDN never challenged the granting of the permit and, by not challenging it, it tacitly consented. SEGOB had no reason to declare invalid or revoke Petolof's permit. In contrast, E-Mex did challenge the Official Letter 2009-BIS with the result that we all know.

381. Finally, it is illustrative of the way in which SEGOB has never considered that the Petolof case constituted a precedent that could have been applicable to the Claimants' case, that Oficio 2009-BIS does not refer to it. Likewise, the Official Letter 2009-BIS does not indicate that the

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477 *Id.*, p. 19, fourth considering.

478 Reply, ¶ 704.

479 Counter Memorial on the Merits, ¶ 421.

Petolof case was taken as a reference by the Claimants themselves to request recognition of their operator status.

N. Political campaign and bribery allegations

1. The alleged political intervention of the Mexican Government

382. The Claimants throughout this procedure have argued that as a result of the change of administration that began the six-year term of President Enrique Peña Nieto, on December 1, 2012, the Mexican government devised an entire political campaign that had the purpose of "ensuring [the] disappearance [of the Claimants] and eliminate them from the gaming sector", [480] to benefit its business competitors, specifically Grupo Caliente, arguing throughout its Reply Brief that it was due to this and the friendship of the incoming government with the Hank family, that the Official Letter of Permit Holder-BIS was revoked, and that this also influenced the actions of the authorities in the different administrative procedures and how they were resolved. However, the Claimants have not presented concise evidence to substantiate these allegations, therefore these accusations are unfounded and, therefore, the Respondent rejects them in full for the reasons explained below.

383. Assuming that the Claimants' arguments were true, in the way that the Respondent intended to affect the Claimants' interests, as part of a "political campaign", the participation of various government agents would have been necessary to carry out such action. In this regard, the Respondent has the testimony of four former public officials, whose participation would have been key to achieving what the Claimants argued; however, all of them claim that they never received instructions of any kind from anyone to affect E-Games.

384. *First,* Ms. González Salas, to whom the Claimants attribute that she made statements to the press motivated by political issues and that her actions in her capacity as General Director of Games and Raffles of SEGOB were guided by political motivations,[481] however, Ms. González Salas assures that the only motivation she had for making the press statements in January 2013 was the interest that existed at that time on the part of various media, who had recently issued notes

480 Reply, ¶ 3.

481 Reply, ¶¶ 5, 88, 118, 676, 731.

regarding the permits granted by the outgoing administration, [482] making it clear that she did not receive instructions from any person to make the statements to the press, but that they "were due to the impact and media relevance that the issue took."[483]

385. Similarly, the Claimants argue that the actions carried out by Ms. González Salas were intended to benefit Grupo Caliente and the Hank family, who were supporters of the President Enrique Peña Nieto and close to the PRI. [484] In this regard, Ms. González Salas reiterates that "[t]here were no political motivations against or in favor of E-Games, nor for or against any other permit holder," [485] and that "all permit holders had routine inspections, both desk and on the spot, so there was no political motivation as Claimants have said." [486]

386. *Second,* Mr. Marcos García, who, at the time, was serving as Deputy General Director of Regulation and Verification of the DGJS, explains that the verification visits made to the establishments operated by the Claimants were planned and organized in the same way than any other verification visit that was carried out in the General Directorate under his charge, basing them on the same legal framework in force at the time and without special treatment being given at any time, nor in favor of the Claimants, much less in their against; [487] In the same way, Mr. Marcos García assures that, although the order to carry out the verification visit to any establishment came from the DGJS as a requirement of formality in the procedure, he never received any instructions to go against any permit holder, [488] it is in other words, it did not act according to any political motivation and much less acted with the purpose of affecting the interests of the Claimants.

387. *Third,* Mr. José Raúl Landgrave, who had the capacity of General Director of Constitutional Procedures of SEGOB, responds to Claimants' statements that SEGOB "took advantage of the decision of the amparo judge to advance with their political agenda and put the

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482 *See,* RWS-4, Second witness statement of Ms. María Marcela González Salas, ¶ 8.

483 *Id.* ¶ 10.

484 Reply, ¶ 128.

485 RWS-4, Second witness statement of Ms. María Marcela González Salas, ¶ 14, citing her first witness statement RWS-1, ¶¶ 17 y 19 a 21.

486 RWS-4, Second witness statement of Ms. María Marcela González Salas, ¶ 14.

487 RWS-6, Second witness statement of Mr. Marcos Eulogio García Hernández, ¶ 8.

488 *Id.*, ¶ 18.

claimants out of business in large part to favor the Hank family"; [489] To this end, Mr. Landgrave asserts that the General Directorate in charge of him "is of a primarily technical nature[,] [i]n other words, it is a position that requires decisions to be made based on factors other than political issues, which seek to have a specific result: to obtain favorable resolutions in the constitutional procedures", [490] also assuring that "there were never any political motivations against or in favor of E-Games, or any other permit holder." [491]

388. *Fourth,* Mr. Carlos Véjar, who held the position of General Director of the International Trade Legal Consultancy of the SE, explains in his Witness Statement how the two meetings held with the Claimants were before they submitted their NOI. It should be remembered that the Claimants directly involve said official in the actions that, according to what they allude to, demonstrate the alleged political motivations against them. [492] In this regard, Mr. Véjar places special emphasis on the fact that neither in his personal capacity, nor within the scope of his powers as a public official of the SE, he made value judgments regarding the Claimants' situation,[493] and that all his participation in the meetings with the Claimants were based on the powers he had as a public official, [494] so there was no political motivation against the Claimants.

389. As can be seen, four of the former public officials who were directly involved in the situation raised by the Claimants agree that there was no political motivation or instruction aimed at treating E-Games in a special way, much less affecting your interests.

390. On the other hand, the Claimants note that "the Supreme Court of Mexico dismissed E-Games' motion to disagree on procedural grounds one week after President Peña Nieto's lead attorney, Mr. Castillejos, met with the Judge Alberto Pérez Dayán, despite the fact that the Court had been analyzing the merits of the matter for four months."[495] Ensuring, furthermore, that there was an alleged "direct pressure from the President's personal lawyer",[496] who influenced both the

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489 Reply, ¶ 220.

490 RWS-2, First witness statement of Mr. José Raúl Landgrave Fuentes, ¶ 6.

491 RWS-5, Second witness statement of Mr. José Raúl Landgrave Fuentes, ¶ 24.

492 Reply, ¶ 118; Memorial on the Merits, ¶ 209.

493 *See*, RWS-7, Witness statement of Mr. Carlos Véjar Borrego, ¶ 14.

494 *Id.*, ¶¶ 7 y 9.

495 Reply, ⁋ 873

496 *Id.*, ¶ 150.

closure procedures and the outcome of the appeal filed by the Claimants against i) the judgment of the Seventh Court Collegiate that resolved the Incident of Non-Execution, and ii) the agreement issued on March 10, 2014 by the Sixteenth Court in which the sentence of Amparo 1668/2011 was deemed fulfilled. [497] This is also false. The Respondent will address this below.

391. In the first place, it must be taken into account that the Federal Executive's Legal Advisor is not the "personal lawyer of the President", as the Claimants point out, but rather is the head of the Federal Public Administration agency which has as function.

> review and validate the decrees, agreements and other legal instruments that are submitted to the consideration of the President of the Republic, as well as the draft bills that the Head of the Executive presents to the Congress of the Union, taking care that these, in their content and way, they are attached to the Constitution and the Laws that emanate from it.[498]

392. Similarly, said governing body has the following attribution:

> [r]epresent the President of the Republic when he so agrees, in actions of unconstitutionality and constitutional controversies provided for in article 105 of the Constitution, as well as in all those trials in which the Head of the Federal Executive intervenes in any capacity.[499]

393. As can be seen, the only scenarios in which the Legal Counsel can represent the President are provided for in article 105 of the CPEUM, as well as in trials, but only in which the Head of the Executive is a party. It goes without saying that President Enrique Peña Nieto was not a party to any of the appeals filed by the Claimants and that they did not promote any controversy that falls under the provisions of Article 105 of the CPEUM.[500]

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497 *Id.*, ¶ 873.

498 Exhibit R-119, Functions of the Legal Department of the Federal Executive (https://www.gob.mx/cjef/que-hacemos)

499 *Id*.

500 Exhibit R-091, CPEUM, Article 105 ("5. The Supreme Court of Justice of the Nation will know, in the terms indicated by the regulatory law, of the following matters: I. Of the constitutional controversies that, on the constitutionality of the general norms, acts or omissions, with the exception of those that are refer to electoral matters, […]. II. Of the actions of unconstitutionality whose purpose is to raise the possible contradiction between a general rule and this Constitution. […]. III. Ex officio or at the well-founded request of the corresponding Collegiate Court of Appeal or the Federal Executive, through the Counselor or Legal Adviser of the Government, as well as the Attorney General of the Republic in matters in which the Public Ministry intervenes, it may know of appeals against judgments of the District Courts issued in those processes in which the Federation is a party and that due to their interest and importance so warrant.")

394. In the second place, the Respondent denies that the Peña Nieto administration, through Mr. Castillejos, has illegally lobbied the Supreme Court and, therefore, the Respondent denies that there was an alleged influence on the part of the CJEF to directly affect to the Claimants. Mr. Landgrave stated that he never received "instructions from the Legal Adviser [sic] or any member of his team, or a request for information from that area regarding amparo 1668/2011."[501] He also denies having received instructions from someone within the CJEF on how to conduct or act in court with respect to Amparo 1668/2011, including the Appeal for Dissent.

395. Likewise, the officials who had direct contact with the Claimants' situation would have been aware of the alleged interest on the part of the CJEF, due to the hierarchical level in which they worked; however, and as can be seen above, none received any instruction or knowledge of the alleged political motivations alleged by the Claimants. The Claimants have not shown evidence where their investment was of importance to the PRI administration at that time or that it was relevant.

396. It is necessary to note that, as stated in the Counter-Memorial,[502] the Claimants also argued the existence of "political motives" during the PAN administration, prior to the administration of President Enrique Peña Nieto;[503] the Respondent considers it is important that the Tribunal questions whether it is credible that both PAN and PRI, under different administrations have joined forces with political motives with the purpose of harming the Claimants, or these latter are once again making baseless accusations in order to support their case in this arbitration. As it is established in this Rejoinder Memorial, the situation is the second one. It is not credible that two different administrations have agreed to declare null and void the Permitholder-BIS Oficio in order to harm the Claimants. Mrs. Marcela González Salas[504], Mr. José Raúl Landgrave[505] and Mr. Marcos García Hernández[506] assert that they act in accordance to their attributions and in

501 RWS-2, First witness statement of Mr. Juan Raúl Landgrave Fuentes, ¶ 32.

502 *See*, Counter Memorial on the Merits, ¶ 201.

503 Memorial, ¶ 197.

504 Exhibit RWS-1 First Witness Statement of Marcela Salas ⁋ 6; RWS-4 Second Witness Statement of Mrs. Salas ⁋⁋ 5 y 10.

505 Exhibit RWS- 2 First Witness Statement of Mr. Landgrave ⁋⁋ 24 y 32; RWS-5 Second Witness Statement of Mr. Landgrave ⁋⁋ 5 y 20.

506 Exhibit RWS-3 First Witness Statement of Marcos García Hernández ⁋ 10; RWS-6 Second Witness Statement of Mr. Marcos García ⁋⁋ 5 y 18.

compliance with the Mexican laws, they never had political motivations. There is no evidence either that indicates the PAN administration delayed, under political or unlawful motives, the granting of any permit to E-Games.

397. It is therefore unconceivable that both administrations had political motives to harm the Claimants. It is clear that the Claimants misrepresent the facts. The documents produced during the document production round in this arbitration demonstrate that the Claimants had the intention to submit their claim to arbitration even before the PRI administration commenced. Mr. Burr wrote:

> The first illegal actions took place in August 2011 […]. We have begun to prepare a notice that will be delivered to the Pieria Nieto administration, which took office on December 1, that we intend to submit a claim to arbitration for actions taken by the former government that have adversely affected our investments.[507]

2. There were not political motives hindering the closure of the venues operated by the Claimants

398. Mr. Julio Gutierrez argues that Mexico did not explain the reason why it did not close the venues operated by the Claimants immediately after it declared the Permitholder-BIS Oficio null and void, but until April 24, 2014,[508] and that this demonstrates that the SEGOB's actions were motivated by political reasons. The Claimants' witness seems to be trying to translate the obligation of not to operate a venue without a valid permit to the SEGOB, however, the LFJS is clear regarding the subject who is obligated in such sense:

> No house, or open or closed place, in which games with bets or raffles, of any kind, may be established or operated without permission from the Ministry of the Interior.[509]

399. The people in charge of the functioning of a venue where activities involving gambling or sweepstakes are developed, are the operators and/or the permitholders themselves, not the SEGOB or any other Governmental office. Then, as a direct consequence of declaring the Permitholder-BIS Oficio null and void, it is clear that the Claimants were indeed subject to the obligation of not to keep operating the venues since they did not have a valid permit issued by the SEGOB.

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507 *See* Exhibit R-156, Email from R.S. Brock, of November 13, 2015, p. 4.

508 CWS-62 Fifth Witness Statement of Julio Gutiérrez, ¶ 110.

509 Exhibit R-030, LFJS, Article 4.

However, the Claimants decided to ignore the declaration of void permit and to continue operating as usual.[510]

400. That said, the SEGOB, based on its attributions of supervising and surveillance, ordered to carry out inspections to the Claimants' venues on April 24, 2014. The fact that the SEGOB decided not to carry out an inspection "immediately after" declaring the Permitholder-BIS Oficio null and void, does not indicate the existence of any political reason, since, the LFJS does not state a term for the SEGOB to exercise said attributions. Additionally, the Claimants were subject to comply with the LFJS and should have stopped their operations, immediately after the Permitholder-BIS Oficio was declared null and void, since they no longer had a valid permit. The Claimants cannot then impute the closure of the venues they were operating to the alleged existence of political motives.

3. The seal removal was a consequence of judiciary orders, not of "political motives"

401. The Claimants argue that "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".[511] Once again the Claimants are wrong and intent to mislead the Tribunal making it believe that actions carried out by the SEGOB in strict compliance to law, were actually actions carried out in order to harm the Claimants' interests due to alleged political motives.

402. As explained in previous sections, the owners of the properties where the venues operated by the Claimants were located, initiated their respective trials in order to recuperate the legal possession of said properties. The Claimants had or should have had knowledge of each of the legal actions carried out within said trials, since they were actually respondents therein, therefore they cannot argue they did not have knowledge about it, nor can they argue due process violations.

403. Although each trial was developed in a different manner, the result was basically the same, a resolution whereby the termination of the lease agreement and the return of the properties to the

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510 *See, e.g.* Exhibit C-303, p. 8, where the person who attended the inspection in the Naucalpan Casino Mr. Patricio Gerardo Chávez Nuño, stated "reiterating his protest against the position, and stating that the establishment is operating twenty-four hours a day". [Emphasis added].

511 Reply, ¶ 339.

legal owners was ordered.[512] Based on this and strictly complying with the judicial orders, the SEGOB lift the seals. As it is observed, there was not any kind of political motives or interest from SEGOB in harming the Claimants when it carried out such proceedings.

O. Mexico's arguments regarding the SEGOB's discretionary powers related to gaming and sweepstakes, are not misleading nor do they mistakenly describe the Mexican administrative legal framework

404. The Claimants argue that "Mexico far exceeded the bounds of its discretion",[513] based on facts that allegedly demonstrate so, in order to conclude that the actions carried out by the Respondent were unlawful. However, the Claimants mistakenly interpret the scope of the governmental public officers' discretionary powers and fail to mention that there are regulated powers and discretionary powers, which is a basic aspect of the Mexican Law related to the application of these latter.[514]

405. Mr. Lazcano explains the difference between the regulated and discretionary powers, "[T]he former refers to those acts in which the authority does nothing other than apply the normative assumption as it is given by the legislator, […]. On the other hand, in discretionary powers there is "a certain freedom to choose between one course of action and another, to do one thing or another, or to do it one way or another".[515] Although the regulated powers apply the provisions established within a norm, that is, the SEGOB applies the provisions of the LFJS and its Regulations, in practice, as Mr. Lazcano points out, "not all regulated faculties are exempt from discretion, or that the levels of discretion vary depending on the specific circumstances of each case".[516] This has been recognized by the Mexican courts:

> The division of regulated and discretionary powers is not categorical or pure, but there are strong discretionary powers that confer great freedom to make decisions or create provisions, compared to other weak ones, where that freedom is delimited by certain

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512 *See*, Exhibits R-073, DGJS/DGAAD/106/2017 *Oficio* of September 5, 2017, Judgment of the Forty-first Civil Judge in Mexico City, April 27, 2017, R-077; Judgment of February 17, 2017 issued by the Third Civil and Commercial Court of the First Judicial District, C-409; Judgment of the Fourth Specialized Court for Civil Matters of the Judicial District of Puebla of August 16, 2016, R-083; File 370/2015, R-120 Circumstantiated Certificate of removal of seals of March 19, 2021, pp. 1223-1233.

513 Reply, ¶ 150.

514 RER-5, Second Expert Report of Alfredo Lazcano Sámano, ¶ 86.

515 *Id.*

516 *Id.*, ¶ 87.

> principles or standards, legal concepts undetermined or predetermined assumptions. On the other hand, the regulated faculties can be regulated at different levels, where the norm indicates in detail and specifically what must be done or not done and, in other cases, the use of some indeterminate legal concept or vagueness in the provisions allows and obliges authority to make the best decision. In all cases, there must be a motivation, which must be linked to the achievement of a public interest, carried out in an objective, technical and reasoned manner, excluding any possibility of arbitrariness; hence, the discretionary powers must be framed and constrained to satisfy certain purposes and in accordance with elementary referents.[517]

406. An act that is contrary to the interests of the Claimants cannot be considered, for that simple reason, as an arbitrary act derived from the use of SEGOB's discretionary powers. The Claimants refer to some "examples" of what they consider to qualify as arbitrary measures by SEGOB.[518] The Respondent will address each one of these "examples" next.

407. In the first one, the Claimants refer to Mrs. González Salas' interview of January 2013,[519] arguing that it was "politically-motivated", generating thus "the onslaught of measures that would follow and lead to the total destruction of Claimants' investments."[520] Here, Mrs. González Salas explains that the statements to the media "were motivated solely by the interest that the press had, derived from several notes issued prior to that date by the media, about the permits granted to open casinos during the last hours of the outgoing administration"[521], in other words, that said statements only "due to the impact and media relevance of the subject matter"[522], therefore there Mrs. González Salas' actions were not "politically-motivated" far less exceded der powers.

408. In the second example, the Claimants argue that declaring Permitholder-BIS Oficio void and null, is another of the "arbitrary actions taken against Claimants in excess of its legal discretion"[523]. However, as it was explained in section F, the declaration of void permit was carried

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517 *See* REGULATED AND DISCRETIONARY POWERS. ITS DIFFERENT SHADES. Digital registration: 2008770; Instance: Collegiate Circuit Courts; Tenth Epoch; Subject: Administrative; Thesis: I.1o.A.E.30 A (10a.); Source: Gazette of the Judicial Seminar of the Federation. Book 16, March 2015, Volume III, PAGE 2365; Type: Isolated; Exhibit RER-5, Second Expert Report of Mr. Lazcano, ¶ 87.

518 *See* Reply, ¶ 150.

519 Exhibit C-17. The resolution that awarded two permits to the casinos at the end of Calderón's six-year term is illegal.

520 Reply, ¶ 150.

521 RWS-4, Second Witness Statement of Marcela González Salas, ¶ 8.

522 *Id.*, ¶ 10.

523 Reply, ¶ 150.

out in compliance of a judicial order made by the Sixteenth Court, whereby it ordered that all the actions derived from 2009-BIS Oficio be left without effects.[524] This, besides demonstrating that SEGOB did not have any intention to harm E-Games' interests,[525] demonstrates that, actually, there was not any exercise of discretionary powers by SEGOB in such declaration of void permit, but in any case, the exercise of regulated powers.

409. Likewise, the Claimants argue that before and after the cancellation of the Permitholder-BIS Oficio their right to due process was denied,[526] which is false. E-Games actively participated in the *Amparo* 1668/2011, where it had the opportunity to defend itself by presenting its arguments;[527] and, once the determinations were issued by the Sixteenth Court and the Seventh Collegiate Court, E-Games had the opportunity to challenge them before the appropriate instances.[528] There was no violation of due process and, therefore, no excessive use of the discretionary powers of the judicial authorities as the Claimants falsely point out.

410. In the third example, the Claimants insist that "Mexico's decision to cancel [E-Games] permit and close their Casinos" was for illegitimate and illegal reasons.[529] However, neither of these actions was illegitimate, illegal or emanated from an excess in the exercise of SEGOB's discretionary powers. In the case of the first one [cancellation of the E-Games permit], it was the result of compliance with an order of the Sixteenth Court –as has already been explained. In the case of the second one [closure of the Casinos], it was the result of the SEGOB's power of

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524 *See* Exhibit C-23, Sixteenth Court in Administrative Matter's resolution of August 26, 2013, p.012. On August 26, 2013, the Sixteenth Court concluded: "On the other hand, the judgment cannot be considered as fulfilled with respect to the order DGAJS/SCEV/260/2009-BIS dated May twenty-seven of two thousand nine, rendered ineffective, in which the harmed third party [E-Games], variable capital corporation, is acknowledged as the independent operator of the federal permit related to gaming and lottery number DGAJS/SCEVF/P-06/2005, since the responsible authority must not forget that by ruling said permit as unsubstantiated, it is also obligated to render ineffective all other act or acts that have been issued as its consequence, on the understanding that that it should evaluate if in its records appear various orders based on said permit, and that being the case, proceed to declare their lack of substantiation." [Emphasis added]

525 *See* Counter Memorial on the Merits, ¶ 261. There is just need to bear in mind that the Sixteenth Court's resolution, results from the *Amparo* 1668/2011, which was motivated in E-Mex and E-Games' legal actions, which SEGOB did not initiate.

526 Reply, ¶ 150.

527 *See* Counter Memorial on the Merits, Section II.L.

528 *See Id*., ¶ 279.

529 Reply, ¶ 150.

inspection, control, surveillance and sanction, whose basis is found in the LFJS and its Regulations.[530] The casinos' closure was a consequence of the fact that, even knowing that the permit had been declared null and void, the Claimants continued to operate their casinos, breaching the provisions of the LFJS Article 4. Therefore, it is false that the aforementioned actions have been carried out for illegitimate and illegal reasons.

411. As a fourth example, the Claimants note that they were not provided "any due process in advance"[531]when E-Games' venues were closed and that said proceeding was carried out "in an aggressive" and "with no transparency" manner.[532] SEGOB's actions were always motivated and founded in the appropriate legal framework, then, there was not an exercise of SEGOB's discretionary powers, much less in an excessive manner.

412. In the fifth example, the Claimants argue that another example of the "arbitrary action" was the closure carried out by the Respondent when there was 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".[533] This is incorrect. As explained in the Counter Memorial, "SEGOB was not barred from exercising its inspection powers or from closing the Casinos in the event they had no active permit",[534] since the Motion for Reconsideration filed by E-Games on March 31, 2014, did not suspend any effects on declaring the Permitholder-BIS Oficio null and void, nor the precautionary measure of September 2, 2013 impeded SEGOB to exercise its inspection, controlling and surveillance powers.

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530 Exhibit R-030, LFJS, "ARTICULO 3o.- It corresponds to the Federal Executive, through the Ministry of the Interior, the regulation, authorization, control and surveillance of the games when they mediate bets of any kind; as well as the draws, with the exception of the National Lottery, which will be governed by its own law. ARTICLE 4.- No house, or open or closed place, in which games with bets or raffles of any kind, without permission from the Ministry of the Interior, may be established or operated. This will set in each case the requirements and conditions that must be met. ARTICLE 8.- All open or closed premises in which prohibited games or games with bets and raffles are carried out, which do not have legal authorization, will be closed by the Ministry of the Interior, without prejudice to the application of the sanctions that according to the case correspond. [Emphasis added].

531 Reply, ¶ 150.

532 *See Id*.

533 *Id.*

534 Counter Memorial on the Merits, ¶ 326.

413. In the sixth one, the Claimants note that there was an alleged "direct pressure from the President's personal attorney"[535] and that this allegedly caused the Respondent's "illegal and arbitrary handling of the Closure Administrative Review Proceedings"[536]. *First*, the Federal Executive Legal Counsel is not the President's personal attorney, said public officer can only represent the Head of the Federal Executive in trials where this latter is a party, as well as in proceedings under the CPEUM article 105; neither of these was the Claimants' case. *Second*, there was not any irregularity by the Respondent's part in the proceedings which caused the closure of E-Games' venues. *Third*, the Respondent denies the existence of an alleged influence from Mr. Humberto Castillejos, who was the Federal Executive Legal Counsel at that moment, over the SCJN, which is confirmed by what Mr. Landgrave noted, who stated that he never received "instruction from the Presidential Legal Counsel or from a member of that team, or a request of information of that area in relation to the 1668/2011"[537] therefore it is implausible that, assuming that there was any interest by the Legal Counsel, which is not the case, Mr. Landgrave would have not realized about it, since "the legal areas of the Minitries usually have communication with the Presidential Legal Counsel when there is a matter that is followed up or in which it is participating".[538] Therefore, the Claimants' assertions are false and unfounded.

414. In the seventh example, the Claimants argue that there was an "application of different standards to different permit holders, specifically Petolof and Producciones Móviles"[539]. As demonstrated in the Counter Memorial[540], there are important differences between the Petolof and Producciones Móviles permitholders, for instance, with respect to their permits' origins "the Producciones Moviles permit was not a consequence of the 2009- BIS Oficio"[541], while the "Petolof permit was granted in compliance with a judicial order" [542], thus they were not in like circumstances to E-Games' ones. Due to the existence of the differences elaborately explained in

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535 Reply, ¶ 150.

536 *Id*.

537 RWS-2, First Witness Statement of Juan Raúl Landgrave Fuentes, ¶ 32.

538 *Id.*

539 Reply, ¶ 150.

540 *See* Counter Memorial on the Merits, Section II.R.

541 *Id*., ¶ 421.

542 *Id*., ¶ 820.

Sections L and M, it is irrational that the results in each case were different; however, this does not mean that the Respondent has acted in an illegal or arbitrary manner, since SEGOB's actions depended of the particular circumstances in each case.

415. In the eight example, the Claimants assert that Mexico breached their "legitimate expectations to operate its Casinos as an independent permit holder under the permit granted to it through the November 16, 2012 Resolution."[543] The Claimants are wrong. The Respondent explains in its Counter Memorial that, since the Claimants requested their permit "many years *after* they made their investment",[544] it is clear that said investment "was not based on a commitment from Mexico to grant a permit, to not cancel a permit, or not close the Casinos",[545] therefore, in any way the Respondent breached the Claimants' legitimate expectations.

416. In the ninth example, the Claimants argue that by declaring the Permitholder-BIS Oficio null and void "SEGOB arbitrarily exceed[ed] its compliance"[546], since this was carried out "within 24 hours of having received notice of the judge's decision and, without any legitimate reasoning"[547]. This is not correct. Mr. Landgrave states in his First Witness Statement that the new *Amparo* Law established a harder mechanism to penalize the non-compliance of resolutions, which included the possibility to impose a criminal sanction,[548] and that this situation caused that, in the exercise of his attributions as General Director of Constitutional Proceedings at that moment, he recommended the DGJS to be prepared in the case that the Sixteenth Court ordered to overrule the *Oficio* of May 27, 2009, elaborately reviewing the file and considering the possible scenarios.[549] This is the reason why SEGOB had already traced the different actions that arose from said *Oficio* so it could timely and duly comply with the Sixteenth Court's resolution. What SEGOB did was just to timely and duly comply with an order from the Sixteenth Court which was something to

543 Reply, ¶ 150.

544 Counter Memorial on the Merits, ¶ 583.

545 *Id*.

546 Reply, ¶ 150.

547 *Id*.

548 *See* RWS-2, First Witness Statement of José Raúl Landgrave Fuentes, ¶ 15.

549 *See Id.*, ¶ 22.

expect for since it is a governmental authority and it has said obligation; if it did not comply with the resolution, the consequence would have been SEGOB's public officers to be sanctioned.[550]

417. Finally, the Claimants, in relation to the Respondent's discretionary powers, intend to demonstrate an alleged "misuse and an abuse of power"[551], arguing that Producciones Móviles lingers in the gaming and sweepstakes industry, while E-Games' permit was declared null and void. The Claimants' position in this respect is erroneous. As explained in the Counter Memorial[552], "the Producciones Moviles permit was not a consequence of the 2009- BIS Oficio"[553] and more important yet, "there was no ruling ordering the annulment of the Producciones Moviles permit.."[554] Therefore, it would be incoherent and totally illegal that without the existence of legal justification to cancel or to order the annulment of Producciones Móviles' permit, SEGOB decided to cancel it just because it is in like circumstances that the Claimants.

P. Marketing of Licencies

418. In its Counter Memorial, the Respondent emphasized the content of the RLFJS article 31 of, which states that the permits cannot be transferred and, additionally, that they cannot be subject to any lien, cession, alienation or commercialization.[555] As it was also stated in the Counter Memorial, the RLFJS article 3, section XVII, defines a permit as an "administrative act taken by SEGOB, which allows an individual or legal entity to engage in sweepstakes or gambling during a specific timeframe and limiting its scope to the terms and conditions determined by SEGOB, pursuant to the LFJS, its Regulations, and other applicable provisions"[556]. Such definition, as well as the prohibitions established in the aforementioned article 31, refer to a permit as an indivisible unity, not as an administrative action subject to be segmented in many parts or that it grants rights and obligations independent to the activities therein authorized[557].

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550 *See* Counter Memorial on the Merits, ¶ 262.

551 Reply, ¶ 150.

552 *See* Counter Memorial on the Merits, Section II.R.

553 *Id.*, ¶ 421.

554 *Id.*

555 Counter Memorial on the Merits, ¶ 49.

556 Counter Memorial on the Merits, ¶ 39.

557 In this case, seven venues of remote betting centers and seven number drawing rooms.

419. Additionally, it should be noted that neither the LFJS nor the RLFJS refer to the term "license". Said figure is not regulated in the applicable legislation and is not mentioned in the E-Mex Permit or in the E-Games Permit. This is relevant, since said legal framework and the aforementioned permits constitute the origin and limits of the rights and obligations in favor of the Claimants related to their permit.

420. Notwithstanding that, the Claimants argue in their Reply that "[w]ith 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"[558].

421. Next, the Respondent will address the evidence submitted by the Claimants which demonstrates that they had the intention to commercialize the rights of the permit through the "license" figure. Subsequently, it will be explained that the Huixquilucan casino: a) was operating under the E-Games permit; b) it was property of third parties different from the Claimants; and c) it was not operating under the "operator" figure that is indeed provided for in the RLFJS.

1. Evidence submitted by the Claimants regarding the commercialization of the permit through the misleading figure of "licenses"

422. The evidence submitted by the Claimants demonstrate their misleading understanding of "licenses emerging from E-Games Independent Permit" as independent authorizations of the rights enshrined in the E-Games Permit and that the Claimants are allowed to provide it to third parties to exploit it with commercial purposes. For instance, the language in the Right of First Refusal Agreement between Colorado Cancún, LLC and B-Mex II, LLC, dated April 27, 2011, states as follows:

> B-Mex possesses a [sic] the right to issue a license under the Current Permit and, upon granting of the Application, will possess the right to issue a license under the New Permit to authorize the establishment and operation of a gaming facility in Mexico. For the purpose of this Agreement, a license issued by B-Mex under either the Current Permit or the New Permit shall be referred to as the "License." Currently, B-Mex

[558] Reply, ¶ 540.

> possesses two Licenses, one of which is subject to negotiations for a purchase by Discovery Land Company or Affiliate.[559]
>
> [Énfasis añadido]

423. The Claimants argue that "in June 2011, E-Games' Board directed and authorized Mr. Burr to "take all actions reasonable and necessary to establish the Cancun Company that will purchase a license under the Current Permit or New Permit to capitalize, construct and operate a casino in Cancun""[560] and that "[s]pecifically, with respect to the Cancun project, Colorado Cancun, LLC invested US$ 250,000 towards an option to purchase a gaming license from B-Mex II under our permit"[561].

424. Despite the clear and recurring meaning that the Claimants assign to the "licenses" term, their expert, Mr. González tries to justify the legality of the Claimants' practice asserting that "[i]n conclusion, the term "purchase a license," as described by the Claimants in their Memorial on the Merits, is to be understood as the acquisition of shares or units of a permit holder company, and that this does not imply violating the prohibition of transferring a permit"[562].

425. Since the only "permit holder compan[ies]" in this case are E-Mex, with respect to the permit number DGAJS/SCEVF/P-06/2005, and E-Games, with respect to the permit number DGAJS/SCEVF/P-06/2005-BIS, the conclusion previously referred to of the Claimants' expert would imply that when commercializing "licenses emerging from E-Games Independent Permit" the Claimants were actually selling E-Games' and E-Mex's shares or equity interests. However, there is no evidence in this proceeding that suggests this had actually occurred, such as partner's assembly minutes whereby it was agreed the admission of new partners as the result of "purchas[ing] a license", as well as the modifications to the E-Games partner's special book.

426. The RLFJS article 29, section VII, obliges the permitholders to inform SEGOB about the purchase of shares or equity interests or the modification of the percentage of participation of the partners or shareholders. The Claimants did not notify SEGOB regarding the fulfilment of this obligation.

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559 Exhibit C-88, Right of First Refusal Agreement between Colorado Cancún, LLC and B-Mex II, LLC, ¶ 3.

560 Memorial, ¶ 62.

561 *Id.*, ¶ 65.

562 CER-6, Second Expert Report of Ezequiel González Matus, ¶ 59.

427. Contrary to what their expert argues, the most recent statement of Mr. Burr demonstrates that the Claimants clearly conceived the permits and the "licenses" that allegedly resulted from them, as distinct instruments:

> From a purely economic perspective, becoming a permitholder would allow us to reduce the ongoing royalty fees that we were having to pay to operate our existing locations, generate additional income from license fees and royalties we charged at the new locations, and effectively keep all the revenue we generated in house, as opposed to sharing it with an outside party.[563]

428. If it were true that "the term "purchase a license," […] is to be understood as the acquisition of shares or units of a permit holder Company" as the Claimants' expert asserts, it would not explain why Mr. Burr refers to the prior citation to "license fees" instead of referring to the purchase and sale of E-Games' social shares. It is not explained either why does he consider it an additional source of "income", nor which mechanism would be used to avoid the obligation to share such income with third parties unrelated to the company.

429. Such misleading conceptualization of "licenses" is also reflected in the minute of resolutions adopted by the board of managers of B-Mex II, LLC, Messrs. Burr, Conley and Rudden (who are also Claimants in this proceeding):

> In addition, through the grant of the independent Permit, Exciting Games obtained the right to issue up to seven licenses (the "Licenses"), each of which entitles the holder to conduct all gaming activities permitted by the Permit at its location. Upon the sale of a License, Exciting Games will receive proceeds from such sale which otherwise would be distributable to the owners of Exciting Games who are affiliates of the Company and the Subsidiary.[564]
>
> […]
>
> RESOLVED, that it is in the best interests of the Company for the Company to enter into such agreements (the "Transfer Agreements") with Exciting Games S.D.R.L. de C.V. ("Exciting Games") to cause Exciting Games to take such actions and enter into such agreements as will provide for the transfer by Exciting Games to the Company's Mexican subsidiary(ies) and the subsidiaries of the other two Colorado LLC affiliates of the right to all proceeds received by Exciting Games from the sale or other disposition of any licenses issued by it for the purpose of granting rights to conduct gaming and related activities pursuant to the terms of a certain permit (the "Permit"), number DGAJS/SCEVF/P-06/2005-BIS, the use of which is granted to Exciting Games by

563 CWS-59, Fourth Witness Statement of Gordon Burr, ¶ 8.

564 Exhibit C-494, Consent Resolutions of the Board of Managers of B-Mex II, LLC, ¶ 2.

Secretaria de Gobernacion ("SEGOB"), an agency of the Mexican federal government; and further [565]

430. In conclusion, the Claimants' documentary evidence and statements support the Claimants' illegal sale, transference or commercialization of permits, which is expressly prohibited in the RLFJS article 31.

2. Huixquilucan Casino

431. In the Counter Memorial it was mentioned that, besides the five Casinos owned by Compañías de Juegos, a sixth casino operated under E-Games permit in Huixquilucan, Mexico State, under the commercial name of "Master Tournament". This sixth casino was also closed on April 24, 2014, same date when the closure of the Claimants' Casinos took place. The Claimants stated that the operation of the Huixquilucan Casino would have impeded the Claimants to open two additional casinos since their permit only allowed the operation of seven dual-functioning casinos.

432. In their Reply, the Claimants state that in 2013 and 2014 "also operated a temporary location in Huixquilucan and were working on another temporary location in Veracruz. […] Claimants' plan was always to close the Temporary Locations and deploy the remaining licenses under the E-Games' Independent Permit—which had no geographic restrictions whatsoever—to the Cabo and Cancun Projects once they came into fruition".[566] As the Claimants say, "at the time there was a proposed bill in the Mexican legislature that would have canceled licenses for locations that were not being used".[567] Besides Mr. and Mrs. Burr's witness statement[568], the Claimants have not submitted any evidence about the temporary nature of said locations or the alleged proposed bill that forced them to temporarily open such locations to maintain their rights according to the permit.

433. The Claimants' arguments are incoherent with the facts. Everything seems to indicate that Master Tournament were property of third parties totally unrelated to the Claimants. These third

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565 Exhibit C-494, Consent Resolutions of the Board of Managers of B-Mex II, LLC, ¶ 6, first resolution.

566 Reply, ¶ 540

567 *Id.*, ¶ 451.

568 CWS-60, Fourth Witness Statement of Mrs. Burr, ¶ 45; CWS-50, Third Witness Statement of Mr. Burr, ¶ 87.

parties owning the Huixquilucan casino entered into some kind of agreement (possibly illegal) to operate the casino under the E-Games permit. Some documents submitted with this Rejoinder demonstrate that:

- The lease agreement of the Huixquilucan venue was concluded between Master Tournament S.A. de C.V. (tenant) and Interlomas, S.A. de C.V. (landlord) on August 28, 2011.[569]
- Neither of the Claimants appears at the constitutive act as shareholder of Master Tournament.[570]
- Master Tournament, S.A. de C.V. does not have foreign capital.[571]
- Master Tournament entered into sub-leasing agreements with E-Games, as demonstrated in Exhibit C-31.[572]
- E-Games did not inform SEGOB that the Huixquilucan casino was property of unrelated third parties.[573]

434. Everything seems to indicate that the Claimants in some kind of way commercialized the "license" to operate the Huixquilucan casino and that they were planning to do the same in the Veracruz casino. In the Counter Memorial paragraphs 53 to 57, it was explained that the only figure distinct to the "permitholder" established in the RLFJS is the "operator" one and there is no evidence that Master Tournament, S.A. de C.V. was operator of the E-Games permit. As explained in the Counter Memorial, to be able to operate a permit through a third "operator" it is necessary that: (a) the permitholder and the operator enter into an agreement; and (b) request and obtain the

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569 Exhibit R-127, Master Tournament's Lease Agreement – Interlomas, p. 1.

570 Exhibit R-142, Master Tournament's Constitutive Act, S.A. de C.V. p. 1. Three Partners: Savuti, S.A. de C.V. represented by Mr. Carlos Eduardo Cornejo; Nashi Jean Estrada Hochstrasser; and Christian de León Ángeles, with 33% each one.

571 Exhibit R-141, No. SAJIE.315.20.561 *Oficio* dated October 29, 2020, from the General Directorate of Legal Affairs of the National Commission on Foreign Investments to the General Director Orlando Pérez Gárate.

572 Exhibit C-031, No. DGJS/2742/2012 *Oficio* dated August 15, 2014, from the General Directorate of Games and Raffles to E-Games proxy, p. 17.

573 Exhibit R-128, DGJS/SCEV/1373/2012, November 5, 2012.

corresponding authorization from SEGOB. Neither of these conditions were fulfilled with respect to Master Tournament, S.A. de C.V.

Q. The problematic Black Cube "evidence"

1. Black Cube in context

435. B.C. Strategy UK Ltd. is a firm operating under the name "Black Cube", and describes itself as a "select group of veterans from the Israeli elite intelligence units that specializes in tailored solutions to complex business and litigation challenges."[574] The truth is that Clack Cube has become famous due to its methods for obtaining information regarding negative aspects of the private life of its clients' "objectives" or "targets". The methods used by Black Cube frequently involve the use of fake identities, building websites of alleged business, the disclosure of videos and LinkedIn profiles. With false pretense, Black Cube entices its targets to meet with its operatives, who record the meeting with hidden cameras and/or microphones.[575]

2. Circumvention of attorney ethical obligations

436. An experienced litigation lawyer would immediately recognize the ethical implications of gathering evidence using the methods that Black Cube's unidentified operatives employed to obtain their two *de facto* witness statements tendered in evidence in this case:

i) both interview subjects were enticed by a false pretense – that they would be meeting with wealthy Arabs interested in investing in the Mexican gaming industry – in at least one case flying the subject to New York – apparently with the stated or implied prospect of becoming a paid consultant to the supposed investors;

ii) neither of the interview subjects was informed that the supposed investors were actually gathering evidence for use in this proceeding, let alone that their conversations were being clandestinely recorded for the purposes of creating a transcript for use in this case if useful remarks were made.

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574 *See* Black Cube's website https://www.blackcube.com/

575 Exhibit R-092, Quartz, *Read Israeli spy firm Black Cube's secret pitch to clients*, March 11, 2019. Available in: https://qz.com/1540811/israeli-spy-firm-black-cubes-secret-pitch-to-clients/.

437. If legal counsel had engaged directly in this deception, he or she would be subject to censure, including possible disbarment.[576] Surely it does not relieve counsel of his or her duty of candor to potential witnesses by outsourcing the dirty work to others tasked with using false pretenses to persuade potential witnesses to provide secretly recorded testimony without their knowledge or consent.

438. The purpose of counsel's duty of candor to witnesses includes protecting the witness from any real or imagined retribution, and even the discomfort of unwillingly becoming 'involved' in a proceeding. The identities of the Black Cube operatives who conducted the interviews have been concealed and their voices disguised so as to protect them from retribution. Did counsel consider whether Mr. Avila Mayo or Mr. Rosenburg would have concerns upon learning that they have been named in publicly accessible pleadings describing their discussions with Black Cube operatives? Did counsel consider that they could suffer censure from their employers, or impairment of their future career prospects, or even public opprobrium? Meanwhile, the unidentified operatives carry on in anonymity, maintaining their cover stories and techniques for other unsuspecting targets.

3. Failure to abide by the arbitration rules and requirements of natural justice

439. International arbitration is based on consensus as to both the scope of the agreement to arbitrate and the procedural rules to be applied. There is an expectation that the parties will engage in fair dealing and act in good faith. This is particularly so where one of the parties is a sovereign state, as in the case of investor-state dispute settlement.

440. The presentation of witness testimony in investment treaty disputes normally consists of written statements given voluntarily by deponents who understand that they can be called to appear before the tribunal for cross-examination by the opposing party and by the tribunal itself. Everybody is fully apprised of the purpose of their interviews and the use that will be made of their witness statements.

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[576] Exhibit RL-154, The International Bar Association's *Guidelines on Party Representation*, Article 18 states that "Before seeking any information from a potential Witness or Expert, a Party Representative should identify himself or herself, as well as the Party he or she represents, and the reason for which the information is sought" [emphasis added].

441. When a witness has given a statement and later declines to appear for cross-examination, the usual practice is to remove that witness's testimony from the record. To do otherwise would deprive the opposing party of the opportunity to challenge the evidence tendered against it, a fundamental requirement of natural justice. Black Cube's evidence is presented in a black box, allowing the Respondent absolutely no opportunity to challenge the unnamed operatives responsible for gathering the evidence, let alone the persons that have apparently said the things contained in the quasi transcripts that have been referred to or cited over 150 times in the Claimants' Reply as proof of alleged political favoritism and corruption.

442. On this basis alone the Black Cube evidence should be rejected.

4. The Black Cube evidence is wholly unreliable

443. It is self-evident that the Black Cube witness statements are tainted by the financial self-interest of both the interrogators (and their handlers) and the subjects of their investigation. According to the public available information, Black Cube and its operatives are motivated by the expectation of earning a substantial success if they obtain the "evidence" that the client is looking for. In some cases, the client will provide a "wish list" of data that Black Cube shall try to obtain.[577] And the subjects of the investigation were at least implicitly motivated by the hope of earning consulting fees – or perhaps future employment – with the apparently well-healed Arab investors seeking entry into the Mexican gaming market. Why else would they participate at all?

444. The Black Cube operatives' financial motivation is reflected in the manner that they pose questions that appear in the transcripts: they persistently encourage the subject to say and/or confirm the existence of corruption or political patronage. The Tribunal will be familiar with the rules applicable to the admissibility of statements by the accused in criminal proceedings. Such statements must be untainted by expectation of favor or fear of prejudice. At least in those situations the maker of the statement is aware that he or she is talking to the police. Here the subjects think they are talking to a future client or employer who will be impressed if convinced

[577] *See* Exhibit RL-151, *The Catalyst Capital Group Inc. v. West Face Capital Inc.*, 2021 ONSC 125 (CanLII); and Exhibit RL-152 *The Catalyst Capital Group Inc. v. West Face Capital Inc.*, 2021 ONSC 7957 (CanLII). Exhibit R-129, Black Cube's Standard Letter of engagement, the client's "wish list" and the resulting "success fee" to which they refer in such situations.

that he has unique insight into the regulatory landscape of the gaming industry in Mexico. Such statements are clearly tainted by expectation of favor.

445. Of equal importance on the question of reliability of the Black Cube evidence is the complete lack of rigor in testing the veracity of the responses given by the subjects to the leading questions posed by the operatives. While there is no question that hearsay evidence is admissible in investor-state proceedings, subject to the weight to be accorded to it the Tribunal, what we are dealing with here amounts at a minimum to double hearsay (reported by unnamed operatives) and more likely amounts to triple or even quadruple hearsay if one considers particular responses to particular questions. In many instances, to improve reliability it would have been necessary for the operative to ask:

i) Does the subject know this alleged fact from first-hand knowledge or did he develop this alleged knowledge from what he was told by others and/or surmised on his own?

ii) Was the subject personally present for meetings at which particular decisions were taken or discussed?

iii) If he is relying in whole or in part by what he learned from others did they have first-hand knowledge of the particular facts or circumstances under discussion?

iv) Does the subject have any animus towards any of the persons he has mentioned?

and so on.

446. The Respondent submits that, leaving aside the question of ethics, no court or tribunal could consider evidence of this nature – completely wanting of testing of its veracity – to be reliable proof of any fact, let alone facts that are central to the proffering party's claim.

5. The Black Cube evidence should be rejected as a matter of international public policy

447. Black Cube's "sole director" repeatedly insists that Black Cube operatives adhere to the highest standards of their craft and only conduct their operations where it is legal to secretly record conversations with one party's consent. Whether or not this breaches the law regarding secret recording does not answer the important question, whether it is ethical and appropriate to gather evidence in that manner and/or using false pretenses for use in investor-state proceedings. If asked, the answer from the NAFTA Parties would be a resounding "no".

448. Investor-state dispute settlement is a relatively new form of litigation. It uniquely allows private parties a direct right of action to claim damages against states that have hosted their investments and have allegedly failed to abide by substantive treaty obligations affecting such investments.

449. State Parties under investment treaties are obliged to act in good faith and there is an equal expectation that nationals of the counterparties who invoke the dispute settlement provisions under such treaties will do likewise.

450. Query whether, if a Respondent State were to use its national security agency to engage in the kind of tactics that Black Cube has employed here in order infiltrate a claimant's business and/or to comprise a person related to the claimant to obtain damaging evidence, would the arbitral tribunal admit evidence produced by the state intelligence agency's operatives?

451. Query whether, if it becomes an acceptable practice for claimants under investment treaties to engage investigators produce in evidence the ways and means Black Cube operatives have employed, the requirement for party equality will require the admission of evidence similarly generated by respondents?

452. The Respondent respectfully submits that the acceptance of evidence gathered by intelligence agents using false pretenses, secretly recording of conversations thought to be private, and/or engaging in other clandestine operations would bring the investor-state arbitration system into disrepute and as such would offend international public policy.

453. The Respondent accordingly requests the Tribunal to order as follows:

- that the Black Cube witness statements be stricken from the record;
- that the public versions of the pleadings be redacted to exclude the names of Mr Avila Mayo or Mr. Rosenburg, anything identifying either of them, and all references to anything they are reported to have said to the Black Cube operatives;
- that the Tribunal make a statement disapproving of the kind of evidence adduced by the Claimants through Black Cube and the tactics engaged by its operatives.

6. The Black Cube evidence should be rejected and deleted from this arbitration

454. The Tribunal must not admit the recordings presented by the Claimants since they were obtained through deception and in an unlawful manner.

455. The alleged evidence gathered by Black Cube and that the Claimants have used in this proceeding must be dismissed, since it is evidence obtained by illicit means that cannot be used in this arbitration.

456. In diverse investment arbitration it has been established that there are limitations to the admissibility of this kind of evidence. The *Methanex v. Estados Unidos* tribunal rejected to admit the evidence obtained by a private investigation firm hired by the claimant through intrusive and violating of domestic legislation actions.[578] Citing Professor Reisman, the United States government successfully argued as follows:

> [I]nternational courts have questioned the admissibility of evidence where that evidence "was secured in a manner that the court deemed harmful to public order and that it did not wish to encourage." As recognized by Professor Reisman, "[r]etroactive validation of illegal seizures of evidence . . . could [result in] frustration of the fundamental purposes of international adjudication." Thus, illegally obtained evidence should be deemed inadmissible.[579]

457. The claimant in said case acted under the advisory opinion of a law firm, and as a result, the tribunal concluded that the evidence submitted by the claimant breached the general principle of good faith and it represented an offense to *"the basic principles of justice and fairness required of all parties in every international arbitration."*[580]

458. Obtaining evidence in an illegal manner falls into *"*the unclean hands*"* doctrine, which is an expression of the roman doctrines *nullus commodum capere (potest) de sua injuria propria* (*i.e.*, no one shall take advantage of the alien error) and *ex injuria jus non oritur* (*i.e.*, the illicit

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578 Exhibit CL-27, *Methanex Corporation v. United States of America*, UNCITRAL, Final Award (August 3, 2015) Part II, Ch. I, ¶ 58.

579 Exhibit RL-103, *Methanex Corporation v. United States of America*, UNCITRAL, *Motion of Respondent United States of America to Exclude Certain of Methanex's Evidence* (May 18, 2004) pp. 3-4.

580 Exhibit CL-27, *Methanex Corporation v. United States of America*, UNCITRAL, Final Award (August 3, 2015) Part II, Ch. I, ¶ 59.

actions might never create law).[581] The customary law has also recognized the "unclean hands" doctrine, through its principles, and it has condemned not only the illegal methods used to obtain the evidence, but also"[a]ny willful conduct that is iniquitous, unfair, dishonest, fraudulent, unconscionable, or performed in bad faith."[582]

459. Based on what was concluded in *Methanex*, these principles found their expression in the general requirement of good faith, which is known, both in the domestic law and in international law.[583]

460. Likewise, the *EDF (Services) v. Rumania* tribunal rejected a recording obtained in an uncovered manner, regarding a conversation between one of Rumania's witnesses and the claimant's representative.[584] After considering the IBA Rules on the Taking of Evidence – and particularly Article 9 (2)(g), that refers to "considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling" – the tribunal concluded that the recordings were "contrary to the principles of good faith and fair dealing required in the international arbitration".*[585]*

461. Other resolutions demonstrate that this kind of information may be rejected even if it was legally obtained. For instance, in *Libananco Holdings Co. v. República de Turquí*a, the Turkish State intercepted approximately 1,000 privileged or confidential emails through state surveillance methods and, therefore, the tribunal determined they should be rejected.[586] As explained by the tribunal, the surveillance was not unlawful, it was indeed a legitimate exercise of the State's sovereign right to counteract the crime.[587]

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581 Exhibit RL-104, Grégoire Betrou & Sergey Alekhin, *The Admissibility of Unlawfully Obtained Evidence in International Arbitration: Does the End Justify the Means?* Paris J. of Int'l Arb. 2018-4, p. 53.

582 *Id.*, p. 54.

583 *Id.*, pp. 53, 55 ("[T]he Methanex tribunal appears to have considered acts of trespass by the claimant party to obtain evidence as unlawful under US law, but also characterized the same acts as contrary to the general duty of good faith stemming from international law.").

584 Exhibit RL-105, *EDF (Services) v. Romania*, ICSID Case No. ARB/05/13, Procedural Order No. 3 (August 29, 2008), ¶ 38.

585 *Id.*

586 Exhibit RL-106, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues (June 23, 2008) ¶ 19.

587 *Id.* ¶ 78.

462. Likewise, previous resolutions show that both the State and the investor, are subject to the same rules. Indeed, recently the *OOO Manolium-Processing v. Bielorrusia* tribunal, citing the IBA Rules and *Methanex*, concluded that there is a duty of all parties to do not obtain evidence by improper methods:[588]

> Parties in an investment arbitration have a duty to not obtain evidence through improper means. This is derived from the obligations to arbitrate fairly and in good faith, and the principle of equality of arms implicit in all international arbitrations between a State and a foreign investor [...] Whilst the capacity for a foreign investor to obtain evidence from a State party through improper means is significantly reduced, *the duty not to engage in improper activities applies equally to a foreign investor*.[589]

463. Additionally, in some particular arbitration proceedings which are easily to distinguish the recordings have been admitted as evidence. For instance, in *Ahongalu Fusimalohi v. FIFA*, a journalist from the *Sunday Times*, acting in an uncovered manner, obtained a recording which registers alleged corruption actions.[590] Which makes that case distinct is that the recording was obtained by someone unrelated to the dispute, which meant that the party introducing the recording as evidence in the arbitration had the *hands clean.*

464. Likewise, some tribunals have admitted records obtained from massive leakages of classified, confidential and privileged information under the argument that such information became public.[591]

465. In a similar manner, a resolution of a Canadian court in January 2021, regarding an operation designed by Black Cube to slander a Canadian judge and to obtain confidential information from the counterpart's employees, demonstrates that the jurisdictional authorities are not accepting the Black Cube methods:

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588 Exhibit RL-107, *OOO Manolium-Processing v. Belarus*, PCA Case No. 2018-06, Decision on Claimant's Interim Measures Request, (December 7, 2018), ¶ 154.

589 *Id.*, ¶¶ 159-60.

590 Exhibit RL-108, *Ahongalu Fusimalohi v. FIFA*, CAS 2011/A/2425, Award (March 8, 2012), ¶¶ 21-34.

591 This situation has also been criticized. *See* Exhibit RL-156, Ricardo Calvillo Ortiz, *Admissibility of Hacked Emails as Evidence in Arbitration*, NYU Law, Transnational Notes (*[T]his boundary should be carefully policed, due to the fact that this evidence was unlawfully obtained at some point. [...] What would happen if one of the parties hacks the other parties' emails and* then asks a third entity which is not part of *the dispute to publish this information in order to gain publicity for the purpose of using it in an arbitration procedure (based on the argument public availability destroys the privileged or confidential status of information?*)).

> [364] [I]t must be recognized that confessions generated through Mr. Big investigations [*i.e.*, Agentes encubiertos haciéndose pasar por miembros de una organización criminal] are presumptively inadmissible. Though the Mr. Big technique is not illegal in Canada (as it is in many other jurisdictions including the United States) its use makes courts very uneasy. Confessions that arise in the context of lies, deception and inducements have to be looked at very carefully in terms of their reliability. Moreover, every Mr. Big investigation is subjected to close scrutiny for abusive conduct by state actors.
>
> [365] . . . The court must be wary of protecting abusive conduct, even when not the actions of state agents, lest the administration of justice be brought into disrupte.
>
> [366] . . . The court must distance itself from such conduct in order to maintain its integrity and repute. . . .
>
> [367] Black Cube agents lied to former Justice Newbould. They took him to dinner, bought him drinks, pretended like they wanted to retain him as an arbitrator and then did their best to dupe him into making utterances that might embarrass him. They did so not because there was any credible evidence that he was biased against Jews or Catalyst or anyone else. They did so because they were being paid a very large amount of money to do so by someone who was very unhappy with a decision that he had rendered in his capacity as a Superior Court Justice.
>
> [368] Black Cube agents also deceived a number of employees of West Face, both active and former. They pretended to offer lucrative and interesting employment opportunities. They acted like they thought the targets were unique, accomplished and special. . . .
>
> [369] Black Cube's efforts were designed to, by hook or by crook, obtain confidential information about West Face. . . .
>
> [370] The conduct of Black Cube agents was an affront to justice. It is the type of conduct that the court must distance itself from.[592]

466. The fact that Black Cube is based on an alleged legal counselling did not influence the Canadian court. Indeed, a Black Cube's former client has sued it accusing it of negligence and breach of contract, arguing *inter alia*: "Black Cube assured the Plaintiffs that . . . they had access to the best legal advice available to ensure that their investigative activities would be conducted in a lawful manner, that Black Cube would ensure that the results of its investigative activities would be in accordance with all local laws, and, if successful would result in evidence that would be admissible in court in Ontario."[593]

467. Additionally, in November 2016, a Black Cube's employee pleaded guilty and was condemned by a Rumanian court to be suspended during two years and eight months due to the

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592 Exhibit RL-151, *The Catalyst Capital Group Inc. v. West Face Capital Inc*., 2021 ONSC 125, No. CV-17-587463-00CL, Ruling on Privilege Motions, Jan. 11, 2021.

593 Exhibit RL-152, *The Catalyst Capital Group Inc and Callidus Capital Corp. v. B.C. Strategy Ltd. d/b/a/ Black Cube*, No. CV-21-00655838-0000, Statement of Claim, Mar. 1, 2021, ¶ 10.

methods used in the investigation – as in this case – aiming to "*uncovering evidence of possible corruption*."[594] Black Cube and Mr. Yanus himself more recently signed a "plea deal" with Rumanian authorities admitting criminal violations of the Rumanian law.[595]

7. Black Cube's recordings and witness statement lack evidentiary value due to the existence of an economic interest

468. The Respondent sought to obtain the contract in the document production round, however it could not obtain said document, nevertheless, according to Black Cube's public available agreements of the *Catalyst*[596] and *Alicia Grace*[597] cases, it seems that the contingency fee is a Black Cube's standard component, therefore the Respondent presumes it is the same case in this arbitration.

469. The IBA Guidelines on Party Representation in International Arbitration allows an attorney to cover the following concepts "(a) expenses reasonably incurred by a Witness or Expert in preparing to testify or testifying at a hearing; (b) reasonable compensation for the loss of time incurred by a Witness in testifying and preparing to testify; and (c) reasonable fees for the professional services of a Party-appointed Expert."[598] The IBA Guidelines, however, does not allow to agree on contingency fees or success fees.

470. Other rules are even more explicit. Jeffrey Waincymer explains as follows:

> All would agree that any opinion [experts] present should certainly be honest, objective and independent, even though the relationship itself cannot be described as wholly independent. The opinion of an expert should not be distorted for the benefit of the party appointing. The Chartered Institute of Arbitrators Protocol states that '(a)n expert's opinion shall be impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any party' [...] The CIArb Protocol makes clear that receiving a fee does not in and of itself impact upon independence. Nevertheless, most

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[594] Exhibit R-131, AFP, *Israeli Convicted for Targeting Romania's Anti-Corruption Chief*, Nov. 16, 2016, https://www.timesofisrael.com/israeli-convicted-for-targeting-romanias-anti-corruption-chief.

[595] Exhibit R-130. AFP, 3 *Israelis from Black Cube intel firm given suspended sentence in Romania*, March 21, 2022.

[596] *Id.*

[597] Exhibit R-140, Oro Negro hired an Israeli company to spy on Pemex officials. Available in: https://aristeguinoticias.com/0210/mexico/espionaje-conspiracion-chantaje-y-amenazas-el-caso-oro-negro-contra-pemex/

[598] Exhibit RL-154, IBA, *IBA Guidelines on Party Representation in International Arbitration*, May 25, 2013, Guideline 25.

> would see a contingency fee based on success in the proceedings as being an unacceptable interference with independence.[599]

471. Other authors have stated as follows:

> The fee arrangement is often another area of concern. It is my view that an expert should never be engaged on a lump sum basis and absolutely never on a contingency arrangement. A lump sum fee potentially restricts an expert's ability to assist the Court or tribunal fully because, subconsciously or otherwise, an expert is in danger of curtailing work in line with a lump sum fee, while a contingency fee is clearly inconsistent with the duty of independence. Most, if not all, professional guidelines and protocols state that an expert should be paid at hourly rates on the basis of the time reasonably spent.[600]

472. Even some diverse legislation applicable to companies that provide private investigation services prohibit the contingency fees. For instance, Section 84(1) of the New York General Business Law establishes the following:

> It is unlawful for the holder of a [private detective] license to furnish or perform any services . . . on a contingent or percentage basis or to make or enter into any agreement for furnishing services of any kind or character, by the terms or conditions of which agreement the compensation to be paid for such services to the holder of a license is partially or wholly contingent or based upon a percentage of the amount of money or property recovered or dependent in any way upon the result achieved.[601]

473. As explained in an professional ethical opinion issued by the New York Bar, "[i]t would [...] be unethical for the inquiring attorney to participate in an agreement to compensate the investigator on a contingent fee basis [...] if the investigator is viewed as the attorney's agent, or [...], if the investigator is viewed as the client's agent."[602]

474. Additionally, an agreement that establishes a contingency fee is improper, since the compensation is conditioned to the outcome of the case.[603] For instance, the Rule Model 3.4(3) of the American Bar Association, establishes that it is improper to pay an expert witness a contingent

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599 Exhibit RL-158, Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer 2012), pp. 942-43.

600 Exhibit RL-159, John Molloy, *The Far Reaching Consequences of Expert Evidence*, 17 Asian Dispute Review 150, 152 (2015).

601 Exhibit RL-160, *New York General Business Law*.

602 Exhibit RL-157, Committee Report, *Formal Opinion 1993-2: Contingent fees; will contests; compensation of private investigators*, Dec. 15, 1993, https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-1993-2-contingent-fees-will-contests-compensation-of-private-investigators.

603 *Id.*

fee. Other example to be considered are the California Rules of Professional Conduct which establish that "[a] member shall not […] (B) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case."[604]

475. Even when the provisions previously described apply to judiciary proceedings in the U.S. and not the arbitration proceeding, all these provisions allow to illustrate the generalized disapproval of the "fee" that seek to compensate a witness based in a percentage of the amount recovered by the party that hired him. This fees undermine the witness' credibility, besides to be prohibited in practice. Therefore, even if the recordings obtained by Black Cube which were used by the Claimants in this arbitration were to be considered admissible and were not deleted from the file in this case, the Respondent considers that this Tribunal should not grant it any evidentiary value.

476. As explained in the Canadian court in its resolution with respect to a similar incentive structure, Black Cube conducted an investigation "because they were being paid a very large amount of money to do so by someone".[605] Additionally, the Canadian court concluded as follows:

> [379] I am also somewhat concerned about what inferences the specifics of Black Cube's retainer give rise to. Their base fee was $1.5 million U.S. A bonus structure – the particulars of which I will not elaborate on – provided for maximum fees up to $11 million U.S. Catalyst was the party ultimately paying Black Cube's fees. Even for Catalyst, $11 million is a big number. A natural inference is that the payor of such a significant sum will want to know what it is they are paying for. How else will they know if the fees are reasonable? The alternative is that they do not want to know. Actual knowledge and willful blindness are close cousins.[606]

477. The Tribunal should also conclude that the unlawful financial agreement whereby Black Cube was hired undermines the credibility of the recordings, so as it does the distorting of voices and the hiding of identities of the involved people.

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604 Exhibit RL-162. California's Rules of Professional Conduct, Rule 5-310(b). The Rules of Professional Conduct of Washington, D.C. also state provisions in the same sense: "*(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or knowingly use methods of obtaining evidence that violate the legal rights of such a person*." Rules of Professional Conduct D.C., Rule 4.4(a).

605 RL-151, *The Catalyst Capital Group Inc. v. West Face Capital Inc*., 2021 ONSC 125, No. CV-17-587463-00CL, Ruling on Privilege Motions, Jan. 11, 2021, ¶ 367.

606 *Id.*, ¶ 379.

R. About Mr. Omar Guerrero's credibility and objectivity

478. The IBA Rules on the Taking of Evidence reflect the international practice in Investor-State proceedings. Indeed, this Tribunal has used as support the IBA Rules to substantiate its decision on several occasions, for instance, in the Procedural Order No. 1, No. 9 and No. 13.

479. In accordance to article 5.2, sections (a) and (c), of the IBA Rules, an expert report must contain, "(a) […] a statement regarding his or her present and past relationship (if any) with any of the Parties, their legal advisors and the Arbitral Tribunal […]" and "(c) a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal […]".[607] The Second Expert Report of Mr. Luis Omar Guerrero Rodríguez, Claimants' expert in this arbitration did not comply with the internationally accepted practice of disclosing interest conflicts, as reflected in the IBA Rules article 5.2.

480. Mr. Guerrero Rodríguez, is not only the Claimtants' expert in this arbitration, but is also the Claimants' representative in the *Espíritu Santo Holdings, LP y L1bre Holding, LLC v. Estados Unidos Mexicanos (ICSID Case No. ARB/20/13)* arbitration, registered on May 11, 2020. Mr. Guerrero Rodríguez, in his Second Expert Report did not disclose this fact to the Arbitral Tribunal nor to the Respondent. It is not known whether or not the Claimants were aware that Mr. Guerrero Rodríguez is engaged in the other arbitration proceeding.[608]

481. The Respondent considers that the lack of transparency regarding this interest conflict undermines the credibility and objectivity of the Claimants' witness and, therefore, the evidentiary value of his Expert Report.

S. The Tribunal must dismiss the requests of adverse inferences based in an alleged lack of submission of documents by the Respondent

482. The Respondent notes that the Tribunal instructed in the Procedural Resolution 10 that, "[w]here a requesting party has challenged a representation by the requested party that it has

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607 CL-261. Article 5.2 (a) and (c) of the IBA Rules. Nigel Blackaby and Constantine Partasides QC, Redfern and Hunter on International Arbitration, OUP (6th ed), ¶ 6.141 ("Article 5(2) of the IBA Rules provides a useful summary of the expected content of a party-appointed expert report").

608 Claimants' Representatives: Hogan Lovells US, Miami, FL, U.S.A. and Freshfields Bruckhaus Deringer, New York, NY, U.S.A. https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/20/13

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 prehearing pleadings and at the hearing";[609] however the Claimants have made, requests for adverse inferences to this Tribunal all over their Reply, therefore, the Respondent has necessity to reply, *ad cautelam*, the Claimants' inferences, and reserves its right to modify or elaborate on said reply during the pre-hearing and the hearing, in accordance to Procedural Resolution 10.

483. The Claimants requested in more than 30 occasions that the Tribunal imposes negative inferences against the Respondent, even attaching the Appendix A repeating the requests and negative inference that they consider it should be imposed. All of these requests must be rejected. Each one of them are made under alleged facts such as political motives, corruption or even that the Respondent purposely hid the information.[610] Each one of these accusations are extremely serious and cannot be taken lightly.

484. *First*, the Claimants seek to revert the burden of proof against the Respondent. This cannot be allowed. The burden of proof is based on the principle "*onus probando incumbit actori*", therefore, the Claimants must prove their own accusations. Not only that, when the Claimants made, just like that, accusations of an entire orchestration of the Mexican State, they must demonstrate it with clear, convincing, persuasive and sufficient evidence, which excludes all reasonable doubt. Otherwise, as the Claimants do, the mere inexistence of documents that, according to the Claimants, would support their accusations they would be released of the burden of proof, which would be against the due process and the equality of arms between the parties in the arbitration.

485. *Second*, most of the reasons that the Claimants expose to "do not believe" that the Respondent does not have the documents emerge from a tergiversation of the actions of several offices: SEGOB, SE and even SAT. According to the Claimants, the Mexican authorities should have the analysis of all of its actions.[611] However, this position totally disregards that the Mexican

609 Procedural Resolution No. 10, ¶ 8.

610 Reply, ¶¶ 74-75, 106-113, 139-144, 261-265, 375-376, 392-393, 398-399, 401-405.

611 *Id.*, ¶¶ 12, 61, 264, 376, 393.

authorities based their actions in the *i)* principle of legality (they can only act according to their attributions) and *ii)* the actions that have effect over the rights and obligations of individuals must be substantiated and motivated, i.e., they must contain both the legal provisions that they are basing their decisions in, and the facts, motives or reasons that make applicable those legal provisions.[612] The documents and analysis that the Claimants repeatedly requested are precisely the *oficios* and resolution of the authorities, in many cases some of them are even the outcome of an entire administrative proceeding.

486. The Claimants distort the actions of the offices in the requests number 9, 10, 11, 12, 13 and 14. In each one of these requests the Claimants requested all the documents related, draft or whereby it is reflected an analysis that would demonstrate the existence of a legal bond between the Permitholder Oficio and the Permitholder-BIS Oficio (i.e. the negative inference they are seeking to), because according to the Claimants the Permitholder-BIS Oficio is independent to any other background. Besides, they added to their requests that these documents were not limited to the fact that they were drafted by SEGOB, but also SE and SEGOB jointly.[613]

487. With respect to these requests the Respondent answered that there were no more documents that those already in the file. According to the Claimants this is false. However, reading each one of their requests, it is evident that the Claimants are mistaken.

488. The request 9: documents about the relationship between E-Mex and E-Games. There are already in the file the exhibits related to *i)* the operation agreement between E-Mex and E-Games (C-06), *ii) oficios* that authorize E-Games to be E-Mex's operator (C-08 and C-09), *iii)* the 2009-BIS Oficio (C-11), *iv)* the Permitholder Oficio (C-254), and *v)* the Permitholder-BIS Oficio (C-16). These *oficios* are related to each other, not only because the cite ones and others, depending on the situation; but because their content is such that it results from the own submissions of E-Mex and E-Games.

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612 Exhibit R-091, Political Constitution of the United Mexican States, Article 16, first paragraph, ("No one can be disturbed in his person, family, home, papers or possessions, except by virtue of a written order from the competent authority, which establishes and motivates the legal cause of the procedure. In the trials and procedures followed in the form of a trial in which orality is established as a rule, it will suffice to record them in any medium that gives certainty of their content and compliance with the provisions of this paragraph").

613 *See* Reply, Appendix A, pp. 7-11.

489. Thus, E-Games presented its submission of "acquisition of rights" based on the E-Mex Permit and on the operator authorization of E-Mex (DGAJS/SCEV/0059/2009).[614] Subsequently, E-Games requested to be permitholder asserting it was able to exploit seven casinos of the E-Mex Permit and cited, as support, every authorization that SEGOB had issued, *inter alia* the 2009-BIS Oficio.[615] Finally, when E-Games requested that the General Director of Games and Raffles signed the new Permitholder Oficio or referred to it in order to avoid any kind of nullity, it did so just referring to its former request and to the Permitholder Oficio itself.[616] Consequently, in response to E-Mex and E-Games' submissions, SEGOB issued the *oficios*. The reasons and analysis are stated within the *oficios* themselves, since the Mexican legislation establishes it must be done in such manner. There is no reason for the SE to have been obliged to prepare any analysis of the particular submissions on games and raffles, since it is not the competent authority.

490. The requests 10, 11, 12: documents analyzed in the Permitholder Oficio, Permitholder-BIS Oficio and the 2009-BIS Oficio. Again, the Claimants disregard that the analysis of each of those documents can be read in their own content. And, more important, the analysis and its legal connection can be read, precisely, in SEGOB's compliance *oficio*. Such document lists and describes the *oficios*:[617]

- The DGAJS/SCEV/0232/2011 *oficio*, dated May 11, 2011, whereby SEGOB required E-Games to submit the documents regarding its permit request.
- The DGAJS/SCEV/546/2011 *oficio*, dated November 18, 2011, whereby SEGOB reserved its decision regarding E-Games' legal situation, as permitholder, until E-Mex's bankruptcy proceedings were resolved.
- The Permitholder Oficio which determined the ownership of the acquired rights on the E-Mex Permit use and exploitation.

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614 Exhibit R-045, E-Games submission of May 18, 2009, p.1.; C-252, DGAJS/SCEV/0059/2009 *Oficio*, of February 13, 2009; Counter Memorial on the Merits, ¶ 127.

615 Exhibit C-14, E-Games request of permit, of February 22, 2011, p.16; Counter Memorial on the Merits, ¶ 157.

616 *See* Exhibit R-047, E-Games' submission of November 7, 2012 ("…of the [Official Permit Holder] it is observed that said official intends to support his competence... said official omitted... to duly substantiate his competence... I request of you... correct it and make it your own"), pp. 2-3.

617 Exhibit C-289, Oficio of resolution compliance, of August 28, 2013, pp. 13-15.

- The DGAJS/SCEV/1373/2012 *oficio*, dated November 5, 2012, whereby SEGOB authorized the opening of one venue.
- The DGAJS/SCEV/1374/2012 *oficio*, dated November 5, 2012, whereby SEGOB authorized the E-Mex Permit exploitation, in accordance to the Permitholder Oficio.
- The Permitholder-BIS Oficio, whereby the independent permit was determined.
- The DGAJS/SCEV/PT-06/2012 *oficio*, dated November 23, 2012, whereby SEGOB authorized the installation of slot machines.

491. Thus, since each one of the documents referred to the authorization, requirements and acknowledgement of E-Games as permitholder from the acquired rights SEGOB concluded:[618]

> Documents each and every one that are concatenated with the [2009-BIS Oficio] which was left unsubstantiated … since they have their exegesis in the unnamed legal notion of acquired rights that was ignored by the judicial authority …, since they a direct or indirect, mediated or immediate consequence of the rights acquired and ignored by the judicial authority.
>
> Thus, since [2009-BIS Oficio], which created rights and therefore generate obligations to the company [E-Games] does not survive in the legal and factual world, the acts that were born in the light of the same cannot survive … such as in the resolutions DGAJS/SCEV/0232/2011; DGAJS/SCEV/546/2011, requested various documentation, so that in the resolutions [Permitholder Oficio]; DGJS/SCEV/1373/2012; DGJS/SCEV/1374/2012; [Permitholder-BIS Oficio] and DGJS/SCEV/PT-06/2012, materialize the legal notion of acquired rights that legally does not exist.

492. The aforementioned demonstrates that the Respondent never failed to provide any document and that the documents the Claimants search for, are already in the arbitration file. The request for negative inferences the Claimants are making, is actually they wishing the facts would be different. According to the Claimants there should exist in some way the documents that demonstrate the lack of legal bond between the E-Mex Permit and the Permitholder-BIS Oficio; however, the documents demonstrating a clear legal bond between both permits indeed exist.

493. The Respondent insists that this characterization results from E-Games' requests, which could only be submitted since it was E-Mex's operator. The Claimants are clearly in contradiction, in one hand, they say that being operator was not relevant since they had allegedly acquired their

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618 Exhibit C-289, Oficio of resolution compliance, of August 28, 2013, pp. 15.-17.

own rights over E-Mex Permit; however, E-Games used its position as operator to request the alleged permit independent from E-Mex.

494. Similarly, requests 13 and 14, refer to the analysis on the Permitholder-BIS Oficio duration and its alleged renewals. Again, the Claimants search for documents that are in exact contradiction with what the *oficio* and applicable laws state. Additionally, the Respondent did not find any documents about it, the documents that are already in the file are clear with respect to this. As explained in the section validity and renewal, *supra*, both the Permitholder-BIS Oficio and the Permitholder Oficio concluded "recognized rights are naturally limited … to [E-Mex Permit]" and "that the [E-Mex Permit]… and any amendments thereto or extensions, which are constituted as the origin and limit of rights and obligations for [E-Games]".[619]

495. In the same sense, the Claimants allege that requests 1, 2 and 3 create the inference against the Respondent that the figure of "independent operator" was sufficient legal basis for their permit, and therefore it was illegal will declare the Resolution of Permit Holder-BIS insubstantial. This, because the Respondent did not identify documents with the analysis or opinions of SEGOB or of SEGOB and the SE regarding Resolution 2009-BIS and the figure of "independent operator".[620] Again, the Respondent reaffirms that there are no documents that meet the Claimants' criteria. In addition to this, it is necessary to emphasize that the conclusion sought by the Claimants is a misrepresentation of how the figure of independent operator was declared illegal.

496. The Resolution 2009-BIS established that "In this order of ideas, it is vitally important to highlight, for the purposes of the criteria that are now set, that this authority has recognized through different administrative acts the quality and the rights acquired by the company [E-Games]… to operate on their own. and acquired rights to the aforementioned permit in (7) seven establishments […]."[621] Therefore, i) it is clear that the criterion that benefited E-Games originated from its request, ii) the analysis is precisely in the official letter and iii) there is no other document in the SEGOB and much less in the SE on this figure—is not the competent authority. The SEGOB did not eliminate the criterion that it set in 2009 motu proprio, as has already been seen in the

619 Exhibits C-16. Permitholder-BIS Oficio, of November 16, 2012, p. 5; C-254. Permitholder Oficio, of August 15, 2012, p. 6.

620 *See* Appendix A of the Reply, pp. 2-4.

621 Exhibit C-11, SEGOB Resolution No. DGAJS/SCEV/0260/2009-BIS (May 27, 2009), p. 5.

arbitration.[622] Inclusively, SEGOB had to declare the Resolution of Permit Holder-BIS insubstantial through judicial proceedings.[623]

497. Notwithstanding the foregoing, the only reason that the Claimants allege to sustain their request for negative inferences is that SEGOB complied with Amparo 1668/2011 in 24 hours, which happened because SEGOB was obliged to comply promptly.[624] Respondent finds no logic in Claimant's conclusion. The Claimants do not even attempt to explain why SEGOB's Second Compliance letters were not effects of the BIS-2009 Letter. And worse, just because the Amparo 1668/2011 was adverse to them, they ignore the importance of the amparo trial: a means of defense of the Mexican system that seeks to restore the fundamental rights of the complainants.[625] Why should the restitution of these rights be slow?

498. In the same order of ideas, the Claimants requested, through requests 4 and 5, the opinion or analysis on the concept of acquired rights, and the comparison between Petolof and E-Games, and the resolutions of October 28, 2008 and from May 27, 2009; that the SEGOB or the SE have carried out. According to the Claimants, the inference that the Tribunal must establish against the Respondent is that Mexico applied different standards in similar cases, which demonstrates discriminatory treatment against E-Games. The Respondent insists that these opinions and analyzes stem from the SEGOB resolution of October 28, 2008 (Petolof) and from E-Games Resolution 2009-BIS.[626]

499. The Respondent did not find documents with the criteria requested by the Claimants. There are no grounds for concluding that SEGOB, much less the SE, should have issued any comparative analysis or even had to build any type of criteria on the theory of acquired rights between Petolof and E-Games. Again, the SEGOB acted in each one, attending to the requests and facts of each case. In fact, the differences between each one are clear. As seen above, in the section "Petolof and E-Games were not in similar circumstances", the origin of the resolution of October 28, 2008

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622 *See* C-272, SEGOB First Resolution (July 19, 2013), pp. 1-2.

623 Counter-Memorial on the Merits, ¶¶ 281-282.

624 Counter-Memorial on the Merits, ¶¶ 285-286. Second Witness Statement of Mr. José Raúl Landgrave Fuentes, RWS-5, ¶ 21.

625 RER-1, First Expert Report of Mr. Javier Mijangos, ¶¶ 88-89. RER-4, Second Expert Report of Mr. Javier Mijangos, ¶74.

626 Exhibit C-351, SEGOB Resolution, September 20, 2008; C-11, SEGOB Resolution 2009-BIS.

of the SEGOB has evident differences with E-Games, among them: i) the applicable legal framework, ii) the contractual terms between Petolof and EDN, iii) Petolof filed the lawsuit of amparo 176/2005 to challenge the revocation of EDN's permit, and iv) Petolof filed a contentious-administrative lawsuit in 2016 to obtain its permit. E-Games, on the other hand, obtained the Resolution 2009-BIS from SEGOB, then the Resolution of Permit Holder and the Resolution of Permit Holder-BIS, and SEGOB declared them invalid in compliance with Amparo 1668/2012, filed by E-Mex. E-Games and Petolof do not have similar circumstances, much less the acts of SEGOB imply discrimination.

500. Regarding Request 61, which refers to the tax credit that the SAT determined for the 2009 fiscal year of E-Games, the Claimants request that the Tribunal determine that the failure to present related documents demonstrates that it was a measure of retaliation and harassment.[627] However, as the Respondent established in the objection against this request, Exhibit R-88, in this arbitration, established the reasons for the tax credit.[628] In addition, as in this arbitration, Exhibit R-87, which has 262 sheets of legal reasons, also indicates that it originates from a verification home visit and was attended by E-Games personnel, therefore that evidently E-Games knew that the tax credit originated from inspection acts of the competent authority.[629] The Claimants have no basis to draw negative inferences against Respondent.

501. *Third*, in a generic and unsupported way, the Claimants resort to their allegations of political motivations on three aspects: i) their accusations against Ms. González Salas, and ii) their accusations against the procedural sequel to Amparo 1668/2011 and iii) the alleged improper reasons for the closures of the E-Games Casinos. Thus, the Claimants request that the Tribunal determine: *i)* "that the attacks on the E-Games permit were due to political motivations and the revocation was politically motivated, improper, illegal and without justification",[630] and that *ii)* "Mexico deliberately initiated the casino closures in an illegal and orchestrated manner."[631]

627 Reply, ¶¶ 404-406.

628 Procedural Order 10, Annex I, p. 196.

629 Exhibit R-087, SAT Resolution number 104-02-00-00-00-2020-418, October 13, 2020, pp. 1-2.

630 *See* Appendix A of the Reply, pp. 13, 14, 15, 16.

631 *See* Appendix A of the Reply, pp. 17, 18, 28.

502. The Respondent has denied the story of political motivations that the Claimants have presented in their two memorials on the merits.[632] Also, as seen in the above sections *i*) The non-subsistence of the Resolution of Permit Holder-BIS was correctly analyzed in the amparo proceedings in which E-Games participated, ii) Mexico did not initiate unfounded and punitive investigations against the Claimants, and iii) There was no political campaign against E-Games or the Claimants, the Claimants' story does not stand up.

503. The SEGOB, the Sixteenth Court, the Seventh Collegiate Court acted within the framework of their powers and in accordance with the law. The root and beginning of the fate of E-Games began with its commercial partner, an individual: E-Mex, not the Mexican State. E-Mex, as permit holder, was the one who sought to end its relationship with E-Games,[633] E-Mex was the one who challenged the benefits of the Resolution 2009-BIS, the Resolution of Permit Holder and the Resolution of Permit Holder-BIS. Despite the fact that the Claimants' business with E-Mex showed serious *red flags*, the Claimants continued with them.[634] The Claimants ignore any type of *mea culpa* in their relationship with E-Mex and base their story on an alleged political interest of the Federal Public Administration, both PAN and PRI governments. Not only that, they also accuse the judiciary of colluding with them. It is evident that the evidence in the arbitration supports the actions of the authorities, in compliance with their powers, and therefore, in the absence of arbitrariness and discrimination, the Claimants resort to the fabricated argument of "political persecution."

504. Reading each document request reinforces Claimants' fabrications. Requests 16, 17, 21, 22 and 56, refer to *i*) the analysis and opinions of the federal administration of former President Enrique Peña Nieto to Resolution 2009-BIS and the Resolution of Permit Holder-BIS; *ii*) the

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632 *See* Counter-Memorial on the Merits, sections J, K, M, N and O.

633 Exhibit R-115, Letter from E-Mex of May 2012, ("It is clear that with the official letter, the then Deputy General Director of Games and Raffles intended to grant undue advantages, outside the law, to [E-Games] to the detriment of the rights that my client has as a federal permit holder in matters of games and raffles, which is in violation of guarantees."), p.1

634 Counter-Memorial on the Merits, ¶¶ 96-107; Exhibit R-114, Letter from E-Games dated April 26, 2012 ("As regards the various DGAJS/019/2012 and DGAJS/020/2012, both dated March 1, 2012, this complaining party estimates, as well as the [SEGOB], that the contractual relationship that unites my represented with [E-Mex], still persists because there is no determination by the competent authority, which guarantees the contrary."), p. 1.

instructions that Ms. González Salas received regarding E-Games, E-Mex, Producciones Móviles; *iii*) the statements of Ms. González Salas, regarding the special care with the authorizations to the Rojas Cardona family and their statements of January 2013 in La Jornada; and *iv*) Mexico's analysis of the general review of casinos in 2011.

505. It is reaffirmed that the Respondent did not find documents that met the Claimants' criteria, and it is reiterated that the authorities' analysis or "opinion" can be found in their Resolutions.[635] The perfect example is the Second Compliance of the SEGOB (Resolution DGJS/DGAJ/DPA/10201/2013) in which the analysis of the Resolution-2009 and the Resolution Permisionario-BIS is read.[636] It is also reaffirmed that Ms. González Salas confirms that she did not receive instructions about E-Games, E-Mex or Producciones Móviles, also as General Director of Games and Raffles she exercised her powers of review and organization of the games and raffles sector.[637] The Claimants decontextualize the words of Ms. González Salas: at that time the operation of the casinos was of public interest, the media also followed E-Mex and mentioned E-Games and Producciones Móviles. At the beginning of 2013, it was one of the first topics she came across and the media were already branding them as illegal or irregular.[638] This interest was fully founded and the Claimants also know that in August, 2011, 52 people died in the Casino Royale fire.[639]

506. This led to the revision of the permits by the SEGOB, two months later the SEGOB presented the "Report on the general situation of gaming and raffle permit holders, and the Casino Royale case, Monterrey, N.L.", in which you can read that 73 inspections were carried out and resulted in three closures and imposition of fines.[640] The Respondent indicated that it did not identify documents other than those it had already submitted and the Claimants know that this is correct. In Amparo 356/2011, E-Games, precisely filed the amparo claim against:

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635 Procedural Order 10, p. 53.

636 *See* Exhibit C-289, SEGOB Second Resolution (Aug. 28, 2013).

637 RWS-4, Second Witness Statement of Mrs. Marcela González Salas y Petriciolli, ¶¶ 8-14.

638 RWS-4, Second Witness Statement of Mrs. Marcela González Salas y Petriciolli, ¶ 10.

639 Counter-Memorial on the Merits, ¶¶ 193-194.

640 *See* Exhibit R-053, Informe sobre la situación general de permisionarios de juegos y sorteos, y el caso Casino Royale, Monterrey, N.L., p. 8.

> … They are demanded the issuance and execution of the*: "Program of Administrative Proceedings and Normalization of Files"...*
>
> The failure to require my client, directly or indirectly, to present the documentation tending to prove the legal and proper operation of seven remote betting centers and number drawing rooms, in accordance with the *"Program of Administrative Procedures and Normalization of files*".[641]

507. In response, since March 12, 2012, replied, "I inform you that the program in question is not reflected in any document since it only comes from the exercise of the powers granted by the [LFJS] and its Regulations to the Deputy General Directorate of Games and Raffles".[642]

508. Also, it is worth remembering that the Claimants allege to confirm their story from Exhibit C-261 –internal memorandum of the SE– and, now, according to the Claimants with the content of Exhibit C-401, which are notes from the internal memory of Ms. Rayo of February 2013[643]. In this regard, it should be remembered that, as has been seen in the procedural sequel to Amparo 1668/2012, it had already been in process for more than a year and the sentence against the 2009 Resolution had been issued in January 2013. [644] So, in effect, everything was in court.[645] Again, the Claimants unfoundedly exaggerate notes that in no way change the decisions of the Sixteenth Court and the Seventh Collegiate Court and that do not contain any type of political connotation. The production of documents, especially of request 23, shows the good faith of the Respondent, just as it happened in the jurisdiction stage, the Respondent's representatives have exhaustively explained and searched the Claimants' requests. Also, they are emphatic that it was not thanks to Claimants' own investigations that they became aware of the metadata in Exhibit C-401. On May 11, 2021, the Respondent's representative sent said annex again because the Claimants accused Mr. Aristeo Lopez of having created it in February 2021, which was not correct.[646]

509. Related to this type of requests, the Claimants also refer that the Respondent did not present any document "on the most important aspects of the cancellation of the independent permission of

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641 Exhibit C-277, E-Games' Request for *amparo* in the *Amparo* 356/2012 proceeding (Feb. 10, 2012) p. 2.

642 Exhibit R-154, SEGOB Resolution of March 16, 2012, in the Amparo proceeding 356/2012, p. 2.

643 Reply, ¶¶ 118, 135-137.

644 See Exhibit R-133, Flowchart.

645 Exhibit C-401, Notes.

646 Exhibit R-149, Official letter of response to the Claimants regarding Exhibit C-401, dated May 11, 2021.

E-Games", since they are documents or analysis of the supposed independent permission of E-Games and the instructions that Ms. Salas should have received.[647] The Respondent conducted a search in good faith and put its best efforts into the search, but failed to find the Claimants' requirements, and so informed the Claimants in April 2021.[648]

510. It is important to point out that the Claimants also request this type of inference with respect to request 53, for which they requested documents that reflect the analysis of SEGOB, or of the SE, regarding the meeting between Ms. González Salas, Mr. and Mrs. Burr[649] However, contrary to what the Claimants allege, there is no basis to think that SEGOB or any other government entity should have kept files in this regard.

511. The Claimants argued that the Respondent should have all the information required by the Claimants in accordance with their internal regulations. The Claimants cited the right to public information and underlined that there could be no excuse in the protection of information because the LFJS must archive "several types of information from permit holders" and, according to the Federal Archives Law (LFA), these must be kept for at least 30 years.[650] In this regard, it should be specified that the allegations are imprecise and the Claimants' requests do not fit the assumptions of the LFJS, nor that of the LFA.

- The SEGOB, as presented by the Parties in this arbitration, has safeguarded, for example, the permits and their modifications, the sanctions it imposes, the identity of the permit holders and operators, the name and photograph of the SEGOB inspectors, statistical data, financial statements, and sanctioning procedures, as provided by the LFJS, which the Claimants cite.
- The 30-year preservation of archives must first be determined for <u>permanent preservation based on their historical value.</u> There are no grounds to consider that the alleged analyses, opinions, "instructions" on the Resolution of Permit Holder-BIS alleged by the Claimants;

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647 Reply, ¶ 832.

648 Exhibit R-145. Official letter with the information on the delivery of documents dated April 19, 2021, p.1. In this regard, the letters received by the SEGOB on the exhaustive search they carried out are also attached. R-150, Official letters of response to the search for SEGOB documents

649 *See* Appendix A of the Reply, p. 30.

650 Procedural Order 10, Annex I, pp. 8-9.

one, they exist – as has been explained – and *two*, they could be considered to have historical value.[651]

512. Therefore, there is no basis to think that the alleged analyses, opinions, "instructions" on the Resolution of Permit Holder-BIS have been generated in the way in which the Claimants allege and, much less, that they could be qualified as relevant or of historical value so that the SEGOB – neither the SE– should even have them, much less protect them.

513. Similarly, Claimants' requests 28, 29, 30, 32, 33, 34, 35, 36, 37, 38, and 39, in which they requested documents regarding alleged interference by the Mexico´s executive in the procedural aftermath of the Amparo 1668, they have no support. [652] In addition, the Claimants without further ground claim that the Court reject all the annexes that themselves and the Respondent have presented regarding the procedural sequel to Amparo 1668/2011 and conclude that if there was interference from the Mexico´s executive, E-Games did not have the due process and therefore E-Games lost the permit.[653] Clearly, the adverse inferences Claimants request are out of proportion to the facts of the case that even they present. In addition, the Respondent highlights that, of all these requests, the Tribunal only partially granted requests 28, 37, 38 and requested that the Respondent indicate that it carried out a reasonable search in this regard, which the Respondent did.[654] SEGOB, the Legal Counsel of the Federal Executive, and the Sixteenth Court carried out exhaustive searches in good faith and did not find documents such as those requested by the Claimants.[655]

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651 R-146, Federal Archives Law ("Article 27.- The information classified as confidential based on the Federal Law of Transparency and Access to Public Government Information, regarding which its permanent conservation has been determined due to its historical value, will retain such character for a period of 30 years from the date of creation of the document that contains it, or 70 years in the case of personal data that affect the most intimate sphere of its owner or whose improper use may give rise to discrimination or entail a serious risk for it. These documents will be identified as confidential historical").

652 *See* Appendix A of the Reply, pp. 19-20, 21-26. Reply, ¶¶ 261-262.

653 Reply, ¶ 265.

654 *See* Exhibit R-145, Official letter with the document delivery information of April 19, 2021.

655 Exhibit R-53 Official letter of the Deputy Ministry of Constitutional Control and Litigation. Exhibit R-150, Official documents in response to the search for SEGOB documents. Exhibit R-148, Official letter of response from the SEGOB Legal Affairs Unit. Exhibit R-152 Official letter of response from the Sixteenth Court.

514. In fact, contrary to what the Claimants allege, one of the Magistrates of the Seventh Collegiate Court, Mr. José Luis Caballero Rodríguez, feared for his job because the E-Games case "had a powerful political charge",[656] is false The Plenary of the Federal Judiciary Council determined that due to adjustments to the attention of matters and in attention to the judicial career, Mr. José Luis Caballero Rodríguez should return to the Seventh Collegiate Court. And Mr. Naranjo also due to vacancies is that he was provisionally in charge of the Seventh Collegiate Court.[657]

515. In relation to requests 24, 25, 41, 42 and 57 for which the Claimants requested documents on *i*) the notification of suspension of the E-Games permit on the SEGOB website, in February 2013, *ii*) the SEGOB's determination that the Casinos were operating without a valid permit, and *iii*) documents related to the presence of the Federal Police at the April 24, 2014 inspection; the Claimants request that it be concluded without further ado that the Respondent arbitrarily closed its casinos.[658] As can be seen from the disparity in the subject matter of each of these requests, it is not possible to reach the Claimants' conclusion.

- *First*, the updating of the SEGOB website, was duly explained by Ms. González Salas in her first witness statement: the update, (not the suspension as the Claimants say), was done for the purpose of managing and maintaining the information day. In fact, E-Games claimed the failure to update the SEGOB website through an amparo lawsuit.[659]

- *Second*, the Respondent exhibited the documents of request 41 and none were cited by the Claimants.[660] For example, the resolution DGJS/DGAJ/DPA/0855/2014, is a resolution from May 2014, which relates the reasons for the closure of the Casino in Puebla:

  > As stated in article 8 of the [LFJS], the foregoing derived from the resolution of Amparo Trial 1668/2011… and taking into consideration that, from the date of notification of said resolution, on August twenty-eight, two thousand and thirteen , said moral person, does not have the legal authorization to operate the establishment.

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656 Reply, ¶¶ 767.

657 *See* Exhibit R-147, Official letter of December 9, 2014, of the Judicial Career Commission of the Federal Judiciary Council. See also Exhibit R-143, Agreement of December 3, 2014 of the Plenary Session of the Council of the Judiciary.

658 Reply, ¶¶ 300-303.

659 RWS-1, Witness statement of Mrs. Marcela González Salas, ¶ 10. Counter-Memorial on the Merits, ¶¶ 206-207.

660 *See* Exhibit R-145, Official Letter with the document delivery information of April 19, 2021, p. 1.

> In addition, it is indicated that according to the report submitted by the Director of Inspection and Surveillance of the [DGJS], said establishment as of April 21 of the current year, was operating open to the public.
>
> …
>
> Derived from the Verification Act, because the establishment called "KASH" did not present the documentation required for the operation of the establishment, consisting of the permit duly issued by the [SEGOB]... the immediate suspension of activities was ordered, for so the establishment was declared closed […].
>
> That even though the permit holder has extensive knowledge of the present matter... he repeatedly continued with the operation of the establishment […].[661]

- *Third*, the Respondent confirms that it found no documents regarding the request for escort from the federal police during the April inspections. The Respondent has clarified above that the presence of the federal police is duly based on the powers of SEGOB and was necessary to safeguard the integrity of the officials. In addition to the fact that at no time was force used as the Claimants try to imply.

516. Lastly, the Respondent clarifies that it did not submit documents of request 57 because the Tribunal's decision so established. The Claimants requested *i*) any document with the analysis of the insurance of machines or suspension of activities of the Mexico City Casino in 2013, and *ii*) as well as communications between the SAT, the Secretariat of Civil Protection of Mexico City between 2011 and 2013. The Respondent objected. The information they requested is in the control of the Claimants, since they are aware of the SAT order CCE8300179/11 and the Claimants had already confirmed that they obtained a court order for the opening of the Mexico City Casino in 2013. The Court granted the request "save for the case files of the proceeding in which Claimants overturned the seizures of their gaming machines and the temporary closure of E-Game's Mexico City casino". Therefore, the Respondent did not have to show anything in this regard.[662]

517. *Fifth*, the Claimants request that the negative inference be established that the Respondent provided more favorable treatment to Producciones Móviles than to E-Games.663 Because the Respondent did not submit any documents regarding its request 44, for which it requested

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661 Exhibit R-151, Official Letter dated May 7, 2014, from the department head of the SEGOB Administrative Procedures Department, pp. 7-9.

662 Procedural Order 10, p. 179.

663 Reply, Appendix A, p. 29. Replica, ¶ 399.

documents prepared regarding the "decision to keep the Producciones Móviles casinos open". The Tribunal must reject this request entirely—as well as all the ones proposed by the Claimants.

518. The Respondent replied that no documents requested by the Claimants could be identified. As has been explained, the analyzes and opinions of the authorities are found in the administrative acts/official documents. Although the Claimants focus on request 44, the Claimants, too, in their request 20 requested the documents showing the administrative proceedings that SEGOB initiated against Producciones Móviles. Respondent complied with this request .664 Thus, as the Respondent has explained, the status of the Producciones Móviles casinos depends on its own circumstances and conduct. The Respondent produced the documents at the start and end of the administrative proceedings as requested by the Tribunal.

519. The Claimants again completely failed to refer to at least one of the documents exhibited by the Respondent. However, in them it can be read that the SEGOB initiated the procedures as follows: [665]

> …the company "[Producciones Móviles]" has the same activities that were authorized to the company [E-Mex]…
>
> However, it is also required to submit a report of the income generated
>
> It should be noted that [Producciones Móviles] has refrained from complying with the conditions … of the [E-Mex Permit]
>
> […]
>
> From what was transcribed above, the commission of behaviors presumably constituting infractions can be seen […].
>
> […]
>
> THIRD. - Start the administrative procedure against the company [Producciones Móviles]...

520. After the procedure, the SEGOB determined the total and definitive closure of the "Sparks" establishment of Producciones Móviles.[666] Currently SEGOB, as of April 18, 2022, shows that this establishment is closed. Also, the "Carnaval" establishment has been closed by SEGOB. On the

664 *See* Exhibit R-145, Official Letter with the document delivery information of April 19, 2021, p. 1.

665 *See* Exhibit R-144, Initiation and resolution of procedure AJP/0088/2013, pp. 1-3.

666 *See* Exhibit R-144, Initiation and resolution of procedure AJP/0088/2013, p. 44.

other hand, in other administrative procedures against Producciones Móviles, they did not produce these results, so around 15 establishments continue to operate.[667]

521. Finally, the Claimants requested that it be established that the Respondent interfered with their efforts to sell the casinos, because the Respondent did not identify documents that responded to requests 54 and 55.[668] As explained in the section The Respondent did not interfere in the Claimants' efforts to sell their Casino assets, the Claimants voluntarily withdrew from their negotiations.

522. Each of the requests for negative inferences against the Respondent lacks factual basis and would be an unjust punishment. The Respondent has at all times conducted itself under the principle of good faith in the arbitration and has always made its best efforts to produce the documents requested by the Claimants. Therefore, the Respondent respectfully requests the Tribunal to disregard all the adverse inferences alleged by the Claimants. Claimants would be unduly relieved of their evidentiary burden, because its sole purpose is to function as a "*gap filler*" and a substitute for Claimants' evidentiary burden.[669]

667 *See* Exhibit R-155, Segob website as of April 18, 2022.

668 Reply, Appendix A, pp. 31-32.

669 Exhibit RL-164. O'Malley, Nathan D, *Rules of Evidence in International Arbitration. An Annotated Guide* (Rutledge 2012), p. 38 ("[…] the presumption in arbitration is that a party will establish its case based largely (if not entirely) on the documents within its own possession. Thus, a wide-ranging discovery process that allows a party to substantiate a case by "discovering" the primary evidence to support its arguments is not compatible with this threshold concept.").

III. LEGAL SUBMISSIONS

A. The Respondent´s objection to jurisdiction should be upheld

523. The Claimants argue in their Reply that Mexico's objection to jurisdiction regarding the Expansion Projects must fail for three reasons: (i) it is untimely because Mexico failed to raise it in the jurisdictional phase; (ii) the Expansion Projects are covered by other investments such as the Claimants' investment in local companies and their permit to carry out gaming activities, and; (iii) the Expansion Projects would qualify on their own as an investment under the NAFTA.[670]

524. As will be elaborated upon in the following subsections, none of these arguments pass muster and should be dismissed by this Tribunal, but before addressing those submissions the Respondent will make two preliminary remarks.

525. *First*, the Claimants did not identify in their Memorial what investments, if any, were allegedly expropriated in relation to the Cabo, Cancun and Online casino projects. The claim for damages, however, includes the alleged fair market value of those prospective casinos. The implication is that those casino projects are covered investments in their own right. They are not. Article 1139 of the NAFTA does not extend protection to projects or plans to make an investment. Thus, in order to submit a claim for the expropriation of a casino and request compensation equivalent to its fair market value, the Claimants needed to prove the existence of an investment capable of being construed as a casino. They have not.

526. *Second*, the Claimants are attempting to cloud the issue underlying the Respondent's objection. The issue is not whether the Claimants were exploring the possibility of opening casinos in Cabo, Cancun or online (they were), but whether those plans materialized into a covered investment. Therefore, Mexico will not address all the evidence submitted with the Reply to prove the existence of the Claimants' plans to establish the additional casinos. It will focus instead on the status of those projects as of 24 April 2014 (i.e. the Date of Expropriation) and whether an investment in a casino existed at that time.

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670 Réplica, ¶ 531.

1. The objection is timely and could not have been raised during the jurisdictional phase

527. Mexico's objection to jurisdiction is timely and could not have been raised during the jurisdictional phase because it is based on the Claimants' case as submitted in their Memorial on the Merits. In particular, it is based on their attempt to present the Expansion Projects as covered investments in order to claim damages based on their alleged stream of future profits.

528. It is useful to begin the analysis by examining how the Claimants originally described their claims and investments, particularly in the RFA and the Amended NOI, as these were the last submissions made prior to the filing of Mexico's Memorial on Jurisdiction.

529. The Claimants initially alleged in the RFA that they had "formed B-Cabo, LLC to purse the opening of a gaming and hotel facility in Cabo San Lucas, Mexico, and Colorado Cancun, LLC to pursue the opening of a gaming and hotel facility in Cancun, Mexico".[671] They also generally identified the following investments in connection with those two projects: "loans made to the Mexican Companies, including without limitation loans made for the development of the B-Cabo project that were not fully repaid", "capital expended for purchase of the permits for the Casinos and the B-Cabo and Colorado Cancun projects", and "non-capital resources expended to [...] develop new projects B-Cabo and Colorado Cancun".[672] There was no claim that the projects constituted protected investments or that Mexico expropriated what the Claimants now identify as the Expansion Projects.

530. In their Amended NOI, the Claimants indicated that "B-Cabo, LLC and Colorado Cancún, LLC, both owned and controlled by Mr. Gordon Burr and Ms. Erin Burr, where in the process of making substantial investments in two additional casinos and hospitality projects before the State's actions destroyed the U.S. investors' investments in Mexico."[673] They did not claim to have invested in those casinos but rather, that they were "in the process of doing so" when the Respondent "destroyed" their actual investments in Mexico. It is also worth noting that the Amended NOI says nothing about the online casino project.

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671 RFA, ¶ 8.

672 RFA, ¶ 110.

673 Amended Notice of Intent, p. 4. Emphasis added.

531. In their Counter-Memorial on Jurisdiction –i.e., after the filing of Mexico's original objection to jurisdiction–, the Claimants asserted that B-Cabo, LLC and Colorado Cancún, LLC had standing to bring claims under NAFTA Article 1116 because they had made various investments including: "loans not fully repaid, option payments and related investments, capital expenditures for the purchase of permits and down payments on property in relation to the Cabo and Cancun projects."[674]

532. Based on the foregoing, the Respondent anticipated that B-Cabo and Colorado Cancun would bring a claim under Article 1116 alleging the expropriation of those investments. What it did not, and could not have anticipated, is that the Claimants would treat the projects as covered investments and claim damages based on the alleged fair market value of the intended casinos. There is no question that this is what the Claimants are attempting to do because the claim for damages includes the purported fair market value of the Cabo, Cancun, and Online casinos for a combined total of USD $154.9 million,[675] as opposed to the fair market value of the loans, option payments and the other investments they allegedly made.

533. Since this is an expropriation claim and compensation in this type of cases is typically based on the FMV value of the expropriated investment, the Respondent submits that another way to look at this is to ask what is being valued and then examine whether that constitutes an investment. In this case, the Claimants are seeking compensation based on the fair market value of eight casinos. Five of those casinos existed and three did not.

534. Each of the five existing casinos were owned by a domestic company specifically set up and capitalized to build and own the casino and its assets (i.e., the Juegos Companies). The Juegos Companies are "enterprises" within the meaning of Article 1139 and thus, protected investments. These are the investments that serve as the basis for the claim for damages concerning the existing casinos.

535. There is abundant evidence that the Claimants intended to follow a similar approach for the would-be casinos. They intended to raise capital in the United States through U.S. companies (e.g., Colorado Cancun and B-Cabo) and those funds would be used to capitalize a domestic entity

674 Claimants' Counter-Memorial on Jurisdiction, ¶ 270.

675 Reply, ¶ 1127.

similar to the Juegos Companies that would build and own those casinos. The Consent to Action in Lieu of Organizational Meeting of the Members of Colorado Cancun, LLC filed as Exhibit C-492 to the Reply demonstrates that this was indeed the plan:

> 14. Establishment, Capitalization and Operation of Mexican Affiliate.
>
> **RESOLVED**, that Managers are authorized and directed to take all actions, perform all due diligence, execute all documents, retain all agents and experts, including counsel and accountants in Mexico, and expend all funds and incur all obligations they deem reasonable and necessary to establish a company in Mexico, to be organized as a S de R.L de C.V., grant powers of attorney, including those in favor of attorneys, designate a surveillance committee, negotiate and execute agreements, including a machine lease agreement, with Exciting Games, S de R.L de C.V, and its affiliates, lease real property, obtain permits and other authorizations, hire employees, obtain equipment and otherwise establish an entertainment facility able to conduct video gaming, bingo and sports wagering in a site in Cancun, Quintana Roo, Mexico.[676]
>
> [Emphasis added]

536. Identical language (*mutatis mutandi*) was used in an analogous document from B-Cabo that was obtained through document production.[677]

537. These companies that were supposed to own the casinos were never formed or funded. Thus, there was no "owner" of the future casinos, no assets for a casino and no agreements with E-Games to operate the future casinos under its Permit. There is nothing related to the Expansion Projects that can be construed as casinos and valued accordingly. What the Claimants had were plans or projects for future casinos, but "projects" are not investments within the meaning of Article 1139. The intention to make an investment is not an investment.

538. The Claimants have attempted to circumvent this obvious problem by claiming to have made investments in connection with those projects (e.g., the loan to Medano Beach Hotel). However, this does not enable a claim for the expropriation of a casino. At best, it could give rise to a claim for expropriation of that particular investment, and compensation consistent with the fair market value of that investment.

539. The disconnect between the investments that were initially identified in relation to the Expansion Projects and the claim for damages as presented in the Memorial and its implications –

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676 Exhibit C-492, p. 5.

677 Exhibit R-111, Consent to Action in Lieu of Organizational Meeting the Members of B-Cabo, LLC dated 11 January 2013, p. 5. See also, C-65, "Investment/Loan Agreement" and C-466, "Subscription Agreement".

i.e., that the Expansion Projects are the covered investments– is what prompted this jurisdictional objection and the reason why it could not have been submitted earlier. The Respondent raised its objection at the first opportunity it had, as required under Article 45(2) of the ICSID Arbitration Rules that govern these proceedings. The Respondent submits that tt is therefore timely and should be accepted by this Tribunal.

2. The definition of investment under the NAFTA

540. The Claimants do not dispute that the Tribunal's jurisdiction over an expropriation claim concerning casinos in Cabo, Cancun and Online depends on the existence of an investment. Neither do they dispute that Article 1139 NAFTA defines what constitutes an investment in a closed list, or that projects or plans to make an investment are not included in that list. Instead, they ask this Tribunal to expand the Treaty's coverage by adopting the reasoning of other international tribunals deciding disputes under different treaties with a different and broader definition of investment. This is unacceptable.

541. The Claimants claim, for example, that the reasoning in *Lemire v Ukraine* (a non-NAFTA case) is particularly instructive because "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."[678]

542. What the Claimants leave out from their analysis is that Ukraine's failure to issue the broadcasting licenses to the claimant was found to be within the scope of the Ukraine-United States BIT because "the BIT expressly extended protection to '*associated activities*' which include 'access to … licenses, permits and other approvals (see Articles I.1(e) and II.11(b) of the BIT)".[679]

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678 Reply, ¶ 554.

679 Exhibit CL-166, *Joseph Charles Lemire v. Ukraine*, "Decision on Jurisdiction and Liability", ICSID Case No. ARB/06/18 ¶ 91. See also, Article 1(e) of the Ukraine-United States BIT which defines "associated activities", and Article II.11(b), which further clarifies: "The Parties acknowledge and agree that 'associated activities' include without limitation, such activities as: [...] (b) access to registrations, licenses, permits and other approvals (which shall in any event be issued expeditiously)".

The NAFTA neither recognizes nor protects "associated activities" as investments. The reasoning in *Lemire* is simply not applicable to this NAFTA case in view of this significant difference.

543. The Claimants also cite *PSEG v Turkey* for its finding 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."[680] However, the Claimants again make this assertion without examining the definition of investment in the underlying treaty, which is significantly broader than the one contained in the NAFTA –i.e., "Investment means every kind of investment in the territory of one Party owned or controlled, directly or indirectly, by nationals or companies of the other Party..."[681] The Claimants also ignore the fact that the passage cited was made in the context of the tribunal analysis on damages, not jurisdiction, and that, in the end, the tribunal rejected the claim for damages in relation to productive assets as well as the Claimants' FMV and lost profits valuations.[682]

544. The Claimants cite *Deutsche Telekom v. India* as an example of a case in which the tribunal found that it had jurisdiction even though the investment had not obtained the necessary governmental approvals.[683] The respondent in that case objected to the tribunal's jurisdiction claiming that the investment had been established and the treaty in question did not protect "pre-establishment" activities[684]. However, the tribunal rejected the objection after concluding that Deutsche Telekom had shares in a local company that executed a valid and binding agreement with a state-owned enterprise for the lease of the electromagnetic spectrum and that the claimant had contributed substantial financial resources to obtain its shareholding in the local company.[685] This situation is not analogous to the one we face in this case because the Claimants never

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680 Reply, ¶ 544.

681 Exhibit CL-278, *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, 4 June 2004, ¶ 66.

682 Exhibit CL-277, *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 Jan. 2007, ¶¶ 308-309, 315, 337.

683 Reply, ¶ 546.

684 Exhibit CL-279, *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10, "Interim Award", 13 December 2017, ¶¶ 158-159.

685 Exhibit CL-279, *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10, Interim Award, 13 December 2017, ¶¶ 178 and 181.

incorporated or funded the domestic companies that would own the Cabo, Cancun, or Online casinos. Consequently, no assets were purchased, and no agreements were made with E-Games. The Claimants have not even produced an agreement with their intended business partners for any of those ventures.

545. The Claimants also relies on *Grand River v. The United States* for the proposition that "the NAFTA tribunal in [that case] 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.'"[686] The Respondent agrees with this finding and submits that there is no "enterprise" or "interest in an enterprise…" or "real estate or other property…" or "interest arising from the commitment of capital…" that can, either individually or collectively, be construed as a casino in Cancún, or Cabo or online.

546. Finally, the Claimants take issue with Mexico's reliance on *Generation Ukraine v. Ukraine*. They argue that "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".[687] The Claimants appear to have not realized the point.

547. The Respondent cited that case as an example of a claim where the damages sought did not bear any relationship with the investment as it existed at the time of the alleged expropriation. As indicated in the passage quoted in the Counter-Memorial, the tribunal in that case concluded that the claimant's legal interest in the Parkview Project had materialized through an Order on Land Allocation (which the tribunal found to be an investment under Article I(1)(a)(v)[688]); Lease Agreements (found to be investments under Article I(1)(a)[689]); a Foundation Agreement (an investment under Article I(1)(a)[690]), and; a Construction Permit (an investment under Article

686 Reply, ¶ 553.

687 *Id*, ¶ 548.

688 Exhibit CL-93, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, "Award", September 16, 2003, ¶ 18.22.

689 Exhibit CL-93, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, "Award", September 16, 2003, ¶ 18.29.

690 Exhibit CL-93, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, "Award", September 16, 2003, ¶ 18.29.

I(1)(a)(v)[691]). In addition, the claimant had established a local investment vehicle for the project (Heneratsiya Ltd.), which both parties acknowledged constituted an investment under the U.S.-Ukrainian BIT.

548. Despite the fact that all of these investments were found to have been made in relation to the Parkview Project, the tribunal concluded that the Claimant did not have "a vested right to a commercial return on a completed office building" because the "materialization of the Claimant´s legal interests translate not to a right to a commercial return, but simply to proceed with the construction of the Parkview Office building on land over which Heneratsiya had a 49-year leasehold interest."[692]

3. The Expansion Projects are not covered by other investments

549. The Claimants argue that Mexico's jurisdictional objection is based on the erroneous premise that the Claimants have not provided any evidence of a protected investment in relation with the Expansion Projects.[693] They go on to identify three investments that, in their view, "cover" these projects: E-Games Permit, E-Games and their shares in E-Games.[694] The Respondent will address these investments next.

a. E-Games Permit

550. The first investment claimed to have been made in relation to the Expansion Projects is E-Games' Permit. The Claimants argue that that the Permit and its attendant rights are property rights of real value and fall within the ambit of "investments" under the NAFTA. In particular, they claim that such rights fall within Article 1139(h) –i.e., "interest arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory"– and Article 1139(g) –i.e., "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes."[695]

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691 Exhibit CL-93, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, "Award", September 16, 2003, ¶ 18.46.

692 Exhibit CL-93, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, "Award", September 16, 2003, ¶ 20.7. [Emphasis added]

693 Reply, ¶ 538.

694 Reply, ¶¶ 538-549.

695 Reply, ¶ 539.

551. The Claimants are attempting to equate two very different things: the right to open additional casinos and the additional casinos themselves. They are also conflating the value of that right with the value of the would-be casinos in an attempt to boost their claim for damages. Indeed, the Claimants allege that in 2006 they "made an investment of USD 2.5 million to acquire the right to open two additional locations from JVE Monterrey".[696] However, this is not what they are requesting in terms of compensation for the alleged expropriation of that right. They are requesting USD $120 million based on the fair market value of the Cancun and Cabo casinos as if they were a reality.[697] If E-Games' Permit is indeed an investment and this Tribunal finds that it was expropriated, the Claimants would be entitled to the fair market value of the Permit, but this is not what they are claiming.

552. The Respondent submits that, although a permit is required to legally operate a casino in Mexico, it cannot be the basis for an expropriation claim of casinos that had not even commenced construction on the Date of Expropriation. For such a claim to proceed, the Claimants needed to demonstrate the existence of an investment in a casino, such as the establishment and funding of the domestic entities they were planning to incorporate, the execution of leases for the facilities, the purchase of gaming equipment and other casino assets and executed agreements with their intended business partners. The Claimants have failed on this front.

553. A second problem with the Claimants' new argument is that the so-called "licenses" for the two additional casinos under E-Games' Permit were already assigned to the existing Huixquilucan casino and a casino project in the state of Veracruz.[698] The Claimants allege that these two casinos were "temporary" and that the plan was to close them and deploy the remaining licenses to the Cabo and Cancun Casinos once they "came into fruition".[699] They further explain

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696 Reply, ¶ 568.

697 *See* BRG First Report, Table 1: "Summary of Damages for Claimants' Casinos…", p. 10. Further evidence of the difference between the value of a "license" and the value of a casino was tendered by the Claimants in support of its expropriation claim of the online casino. The table reproduced at ¶ 537 of the Counter-Memorial on Merits shows that E-Games apparently intended to illegally sell the "license" to operate the online casino to undisclosed investors in USD $1.5 million. In contrast, the Claimants are seeking USD $36 million as compensation for the alleged expropriation of an online casino that never existed.

698 Counter-Memorial on the Merits, ¶ 904.

699 Reply, ¶ 540.

that the reason for opening those temporary locations was that, at the time, there was a proposed bill in the Mexican legislature that would have canceled licenses for locations that were not being used. 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."[700]

554. Other than the testimony of Mr. and Mrs. Burr, the Claimants have offered no evidence whatsoever about the alleged temporary nature of the new locations or the bill in the Mexican legislature that allegedly forced them to temporarily open these locations to preserve their rights under the Permit. The burden to prove these facts rested with the Claimants, and they have failed to discharge their burden.

555. The Claimants' explanation is also inconsistent with the facts because the establishment of the Huixquilucan casino predates their so-called independent permit. Indeed, E-Games notified SEGOB about their intentions to commence operations at the Huixquilucan facility on 3 October 2012, however, the so-called "E-Games Independent Permit" was issued more than a month later, on 16 November 2012.[701] Therefore, it cannot be the case that the 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".[702]

556. It also strains credulity to suggest that, as late as 2014, when the Claimants requested a permit for the Veracruz facility,[703] the Claimants were willing to go through the trouble and expense of setting up a new casino in Veracruz, only to shut it down shortly thereafter. A more logical explanation is that, the Cabo deal with Medano Beach Hotel and the Cancun deal with the Marcos family were dead by the time the Permit was revoked. As discussed below, the evidence shows that these projects failed on their own; not because of the alleged violations.

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700 *Id*, ¶ 541.

701 Exhibit R-128, Oficio DGJS/SCEV/1373/2012 dated 5 November 2012, p. 1.

702 Reply ¶ 541. *See* also, R-127, Lease Agreement Between Mater Tournament S.A. de C.V. and Interlomas, S.A. de C.V. dated 26 August 2011.

703 Exhibit C-33, p. 11.

557. Additional evidence filed with the Reply also suggests that E-Games intended to use one of the "licences" to open the online casino. The "Consent Resolutions of the Board of Managers of B-MexII, LLC" dated 25 July 2013 (Exhibit C-494) states:

> Currently, Exciting Games is contemplating issuing or otherwise using a License for interne gaming and live poker in satellite facilities in Mexico (the "Internet Gaming Businesses"). Those proposed activities would not have been contemplated by the Company in its establishment of the Subsidiary(ies) and would not have been corporate opportunities and should be considered in a manner different from the other sale and disposition of Licenses.[704]

b. E-Games and E-Games shares

558. The Claimants further allege that "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 undoubtedly qualifies as 'enterprises' [sic] under NAFTA Article 1139(a); and (ii) *shares in E-Games*, which amply fall within the definition of 'investment' as 'an equity security of an enterprise' under Article 1139(b)."[705]

559. The Respondent does not dispute that E-Games qualifies as an investment under Article 1139(a). It also does not dispute that the Claimants' shares in E-Games qualify as investments under Article 1139(b). However, those investments were not investments in new casinos in Cabo, Cancun or Online. In fact, as per the Claimants' own submissions, E-Games did not own any casinos; the Juegos Companies did.[706] E-Games simply operated them under the auspices of its permit and was remunerated for its services through various agreements (e.g., the Machine Lease Agreements and Management Agreement).[707]

560. As explained earlier, there is plenty of evidence that the Claimants intended to follow the same approach they used to set up the existing casinos. They intended to set up and capitalize a domestic entity that would acquire the casino assets, obtain a lease for the facilities, and then enter into a series of agreements with E-Games to operate the casino under its permit. This is confirmed

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704 Exhibit C-494, p. 1 (bottom of the page).

705 Reply, ¶ 543.

706 Memorial on the Merits, ¶ 5. Gordon Burr First Witness Statement, ¶ 13 stating that "Each of the Casinos, and their assets, is owned by and through a Mexican corporate entity".

707 *Id*, ¶ 87. Gordon Burr First Witness Statement, ¶ 24 stating "On November 1, 2008, [...] E-Games began its role as the legal operator of the Casinos."

in a "draft subscription agreement" filed with the Reply which explains that "Exciting Games will operate the Facility [i.e., the Cabo Casino], pursuant to the Permit and the Management Agreement and a machine lease agreement with the Mexican Subsidiary."[708]

561. However, as of the expropriation date, the Mexican Subsidiaries had not been incorporated and consequently no agreements had been executed between the Mexican Subsidiaries and E-Games. This is not surprising given that the hotels that would host the future casinos had not even begun construction as of the expropriation date.

562. It is clear from the foregoing that E-Games did not own, nor did it intend to own any casinos. E-Games was set up and functioned as the operator of casinos owned by third parties (the Juegos Companies). Therefore, neither E-Games nor its shares can be viewed as an investment in a casino in Cabo or Cancun or online. Insofar as it concerns the Expansion Projects, the cancellation of the Permit at most deprived E-Games of the opportunity to operate the new casinos, and the profits it would have earned as the operator of those facilities. The Claimants, however, have not made that claim and have not quantified those damages.

4. The Expansion Projects are not investments in their own right under Article 1139

563. Claimants also argue that "[t]o 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.'"[709]

564. The Claimants further claim that "[t]his 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".[710] Mexico will address these alleged investments in the following subsections.

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708 Exhibit C-466, p. 17.

709 Reply, ¶ 552.

710 Reply, ¶ 552.

a. The alleged USD 2.5 million investment to acquire the right to open two additional locations

565. According to the Claimants, in 2006 B-Mex II "made an investment of USD 2.5 million to acquire the right to open two additional locations from JVE Monterrey"[711] and "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, qualifies as an investment under NAFTA Articles 1139(g) and (h)".[712]

566. *First*, there is no discussion whatsoever in the Memorial about the acquisition of "licenses" from JVE Monterrey in 2006 for USD $2.5 million to establish two additional facilities in Cabo and Cancun, which explains why "[t]ellingly, Mexico says nothing about this USD 2.5 million investment".[713] In fact, in their Memorial, the Claimants stated that "as a first step, Mr. and Ms. Burr formed and capitalized B-Cabo, LLC and Colorado Cancun, LLC to develop these projects."[714] The alleged USD $2.5 million investment was not identified as the "first step" despite predating the incorporation of B-Cabo and Colorado Cancun by at least five years.

567. *Second,* back in 2006, when the Claimants allege to have acquired the right to open two additional locations from JVE Monterrey, neither the Claimants nor JVE Monterrey had a gaming permit and thus, they were not authorized to operate casinos. The Tribunal will recall that, at the time, the Claimants operated under the Monterrey Resolution, which JVE Monterrey obtained by representing to Mexican authorities that the machines in its facilities (and, by extension, the machines in the Claimants' facilities) *did not involve games of chance or gambling in any form.*[715] Therefore, JVE Monterrey could not have sold, and the Claimants could not have acquired rights to operate, casinos in 2006.

568. *Third*, as explained in section III.3 above, the right to open additional facilities under a gaming permit cannot be equated with the existence of specific casinos or casino projects. Even if the Claimants did in fact pay USD $2.5 million for the right to open new casinos (*quod non*), that

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711 Reply, ¶ 568.

712 Reply, ¶ 568.

713 Reply ¶ 568. The only reference to this alleged investment is located in Mr. Burr's third witness statement.

714 Memorial on the Merits, ¶ 62. Emphasis added by the Respondent.

715 Memorial on the Merits, ¶¶ 32-33. Reply, ¶¶ 21-23.

right could not possibly justify their USD $120 million claim based on the future revenues of the planned casinos. At most, it would give rise to a claim with respect to that investment, and damages consistent with its value.

569. *Finally*, the Claimants once again appear to be resorting to pretexts and excuses in an attempt to lay blame at Mexico's feet for their inability to prove their case. They claim, as they did before, that all the relevant documents were destroyed in the Naucalpan fire.[716] They no longer blame the alleged ransacking of the offices of their corporate lawyer, but they do offer a novel explanation for their inability to adduce email communications: they can no longer access their corporate email account because "it became unfeasible for Claimants to continue paying for the email servers where all corporate emails were stored".[717] It simply defies credulity that no backups of these important business records were ever made and kept or transmitted to third parties, such as their intended business partners, accountants and lawyers, among others – or moreover, in anticipation of a NAFTA claim. Query whether the emails or lack thereof were unhelpful to the Claimants? Backup systems are inexpensive and a standard fundamental component of any legitimate business.

b. Colorado Cancún, LLC, y B-Cabo, LLC, are not investments for the purposes of this claim

570. The Claimants also refer in their Reply to Colorado Cancun, LLC and B-Cabo, LLC and falsely claim that Mexico contended in its Counter-Memorial that there was no proof that these companies were incorporated or funded. México made no such argument in relation to B-Cabo or Colorado Cancun since those are U.S. companies and claimant parties in these proceedings, not investments in Mexico.

571. The passage from the Counter-Memorial cited in the Reply[718] discusses the "Cancun Company", that is, the Mexican subsidiary that the Claimants intended to establish in Mexico for the purpose of building, owning, and operating the Cancun Casino; just as they did in the case of

716 Reply, ¶ 563.

717 Reply, ¶¶ 563-564, 569.

718 Counter-Memorial on the Merits, ¶ 519.

their five existing casinos.[719] Mexico explained in that passage that there was no evidence that the Cancun Company was incorporated or funded and maintains that position.[720]

572. The same applies to the "Casino Company" referenced in the Investment/Loan Agreement that the Claimants intended to establish as an investment vehicle for the Cabo Casino[721], and the potential "structure" for the Online Casino, which included, *inter alia*, the possibility of establishing a Mexican subsidiary jointly owned by Rational Group and Kash.[722]

c. The Cabo Project

573. In its Counter-Memorial, the Respondent explained that the Claimants had failed to identify a concrete investment in the Cabo Casino. Mexico then proceeded to discuss the little evidence submitted by the Claimants in support of this part of their claim. The Respondent referred to:

- The Medano Beach Brochure as evidence that the original project by Messrs. Ferdosi and Erikson was to build a luxury hotel in Cabo, not a "hotel/casino" as Mr. Burr falsely claimed;[723]
- The Letter of Intent submitted as BRG-033 as evidence that Mr. Burr's intention was to make two separate investments: one in a loan to fund the construction of the hotel, and a second investment to build a casino within the hotel;[724]
- The Investment/Loan Agreement (Exhibit C-65) as further evidence that the project comprised to separate investments: (i) a loan of up to USD $4 million for the acquisition of certain plots of land for the construction of the hotel, and (ii) the formation of a Casino Company in Mexico that would build and own the casino in the hotel;[725]
- A communication between Messrs. Burr and Ferdosi in May 2013 evidencing Mr. Burr's intention to lend USD $500,000 to purchase a company that owned the land in which the hotel was to be constructed,[726] and;

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719 Exhibit C-492, p. 5.

720 Counter-Memorial on the Merits, ¶ 519.

721 Exhibit R-111, Consent to Action in Lieu of Organizational Meeting the Members of B-Cabo, LLC dated 11 January 2013, p. 5. *See also* C-65, Investment/Loan Agreement pp. 1, 12.

722 Counter-Memorial, ¶ 541.

723 *Id*, ¶¶ 497-498.

724 *Id*,, ¶¶ 499-502

725 *Id*., , ¶ 503-508

726 *Id.*, ¶¶ 509-512

- A draft investment agreement of October 2013 (BRG-032) as evidence that the project, as described therein, did not involve a casino.

574. Unfortunately, the Claimants' Reply includes mischaracterizations of Mexico's submissions and irrelevant discussions on whether the project involved the construction of a casino.[727] Mexico will not encumber the Tribunal with responses to these submissions because, despite their efforts, the Claimants have been unable to refute: (i) that the Cabo Project comprised two different investments in a hotel and a casino respectively, and (ii) that the only investment made in connection with the project were two loans totaling USD $600,000 to Medano Beach Hotel for the acquisition of land *for the construction of the hotel* which, by the way, were almost fully repaid *before* the Date of Expropriation. (

1) The Loans

575. The Claimants have now clarified that they made two loans to Medano Beach Hotel. The first one was for USD $100,000 and was made on 25 January 2013, while the second was for USD $500,000 and was granted on 17 May of the same year (hereinafter the "Loans").

576. The Respondent had initially assumed that the Loans were made pursuant to the Investment/Loan Agreement filed as Exhibit C-65, which was executed on 5 April 2013. However, it has now become clear that Loans were made in advance of another agreement that was under negotiation and was never completed.

577. On 21 January 2014, B-Cabo filed a lawsuit before the District Court in Colorado against Messrs. Ferdosi, Brasel and Stanhope –*i.e.*, the Claimants' partners for the Cabo Project–. The complaint, submitted as Exhibit CRT-24 to Mr. Taylor's Reply (the "Complaint"), explains the project and the first loan in the following terms:

> 9. Beginning 2012, Brasel approached Mr. Burr to propose that Mr. Burr assist him, Ferdosi and Stanhope in a project to construct a luxury hotel (the "Hotel") and related facilities in Cabo San Lucas, Mexico (the "Project").
>
> [...]

[727] For example: at ¶ 597 of the Reply, the Claimants accuses Mexico of "*[ignoring] 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 [...]*". The Respondent devoted an entire section of the Counter-Memorial to the Investment/Loan Agreement filed as Exhibit C-65 (¶¶ 503-508) which, by the way, was signed by Mr. Burr on Behalf of B-Cabo and Mr. Ferdosi on behalf of Medano Beach Hotel.

12. The parties engaged in extensive negotiations over the terms of an agreement ("Investment Agreement") to govern the relationship of the parties and the terms on which B-Cabo would raise funds to invest in and lend funds to Medano Beach.

13. Negotiations for the Investment Agreement were extensive, and numerous drafts were exchanged with no final agreement being signed. As the proposed structure of the transaction continued to change, Defendants became concerned that, unless funds were provided, opportunities for construction, the use of construction permits and other matters required to undertake the Project may be lost or delayed to the detriment of Defendants and Medano Beach."

14. As such, Ferdosi and Brasel proposed that B-Cabo advance funds to Medano Beach in anticipation of execution of the Investment Agreement, so that the Project could proceed.

15. Mr. Burr, on behalf of B-Cabo, responded that B-Cabo would not lend any funds without repayment being guaranteed by Defendants, in the event that an Investment Agreement was not finalized and B-Cabo did not proceed with the Project.

16. Defendants expressly agreed that they would guarantee repayment of any advance made by B-Cabo in the event that an Investment Agreement was not finalized and B-Cabo did not proceed with the Project.

17. In reliance on Defendants' agreement and promise, on January 25, 2013, B-Cabo lent Medano Beach USD $100,000.[728]

[Emphasis added]

578. The Complaint explains the second loan for USD $500,000 as follows:

19. After the initial loan from B-Cabo, the patties continued to negotiate an Investment Agreement but could not reach agreement. During that time, on several occasions, one or more of the Defendants informed B-Cabo that additional funds were necessary to advance the Project.

20. B-Cabo responded that it was unwilling to advance more funds or invest in Medano Beach until the te1ms of the Project were finalized and an Investment Agreement executed.

21. Nonetheless, Defendants requested that B-Cabo advance $500,000 to Medano Beach because of an urgent need for capital for the Project. In particular, in order for the project to proceed, Medano Beach had to purchase all of the ownership interests in Inversiones Medano S, de. R.L. de C.V ("Inversiones"), a Mexican company that owned land on which the Hotel would be constructed. Without purchasing Inversiones, Medano Beach and Defendants could not proceed with the Project.

[...]

24. Pursuant to and in compliance with the Guarantee Agreement, B-Cabo lent Medano Beach $500,000 on May 17, 2013.[729]

728 Exhibit CRT-24, ¶¶ 19-21, 24.

729 Exhibit CRT-24, ¶¶ 19-21, 24.

[Emphasis added]

579. The Complaint further explains that after several extensions of time and opportunities to finalize a contract, on 26 July 2013 B-Cabo advised the Cabo Partners that "the transaction was terminated". This, of course, predates the revocation of E-Games Permit in August 2013 and the closure of the existing Casinos in April of 2014. Mexico will address this point as a causation issue in the damages section further below.

580. After a couple of subsequent failed attempts to complete the intended agreement, on 3 October 2013, Mr. Burr terminated all negotiations and enforced B-Cabo's right under the Guarantee Agreement. The Complaint explains that the transaction was terminated because "Defendants [Messrs. Ferdosi, Brasel and Stanhope] responded with pretextual concerns that could have been asserted at any time during the months of previous negotiations".[730] In contrast, in his email dated 3 October 2013, which was submitted as Exhibit C-467 to the Reply, Mr. Burr blames the "Respondent's recent actions and the threatened suspension of our permit", but importantly, acknowledges that *the project did not involve a casino at that stage*:

> Due to recent actions taken by the Mexican government and the threatened suspension of our permit, we regret we will be unable to move forward with your project at this time. Even though the Cabo project does not currently contemplate the construction of a casino, the unfounded and improper actions of the Mexican government and impact of certain influence on the government causes us to be far more tentative raising funds for any business in Mexico and creates a taint on our business that will make it difficult if not impossible to proceed.
>
> [...]
>
> In the event we are able to quickly prevail in combating the current and threatened allegations and actions, we would be interested in moving forward with the project. We certainly appreciate your efforts and wish you every success going forward. At this time, we ask that you return our money to us immediately.[731]
>
> [Emphasis added]

581. All of this, of course, is contrary to the Claimants' submissions that they had made significant progress towards an agreement with their Cabo Partners when Mexico closed the existing casinos in April 2014. It also refutes the idea that the USD $600,000 in loans constitute an investment in a casino.

730 Exhibit CRT-24, ¶ 33. *See also* ¶¶ 28-32 for more context.

731 Exhibit, C-467.

2) The subscription agreement (Exhibit C-466)

582. Mexico's Counter-Memorial addressed in detail the contents of the LOI (Exhibit BRG-033) and the Investment/Loan Agreement (Exhibit C-65) and how those documents identified two separate investments in a hotel and a casino, respectively. To avoid repeating those submissions here, the Respondent directs the Tribunal to paragraphs 499 to 502 and 503 to 508 of the Counter-Memorial.

583. Although the LOI and the Investment/Loan Agreement documents are compelling evidence of the dual nature of the Cabo Project, a "Subscription Agreement" filed as Exhibit C-466 to the Reply dispels any doubts that may remain around this issue. The document distinguishes two different projects which are described in detail under subheadings: "Hotel Project" and "Casino Project".[732] The document also contains three separate sections discussing "Factors Applicable to Both Hotel and Casino Projects",[733] "Factors Applicable to the Hotel Project"[734] and "Factors Applicable to the Casino Project".[735] And if this were not enough, item 4.2 warns that "the Hotel and Casino projects must be analyzed and considered separately" and "[f]or reasons set forth in the risk factors, it is possible that the Casino may not be built, and the sole investment will be in the Hotel project".[736] This is consistent with the excerpt from the Investment/Loan Agreement quoted in the Counter-Memorial indicating that "in the event that the Casino is not built for any reason, there will be no effect on the Investors Loan or the repayment [of the] terms thereof".[737]

584. The subscription agreement is also significant in that it outlines the steps that the parties to the project envisioned to establish the casino.

585. The "Offering" section explains that B-Cabo intended to raise up to USD $10 million in capital by offering "units of membership interest in the Company [i.e., B-Cabo]" and use the proceeds to: (i) make a Loan of up to USD $4 million to Medano Beach for the construction of the

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732 Exhibit C-466. The "Hotel Project" starts at p. 4 and the "Casino Project" section starts at p. 14.

733 *Id*., p. 20

734 *Id.,* p.25

735 *Id.,* p.29

736 Exhibit C-466, p. 19 (item 4.2).

737 Counter-Memorial on the Mertis, ¶ 504, citing to Exhibit C-65, p. 1.

hotel and; (ii) "*capitalize a Mexican Subsidiary with funds it will use to construct and own the Casino in the Hotel*".[738] Construction of the casino was expected to commence "four to five months before the opening of the Hotel".[739]

586. The subscription agreement further explains that the casino would be operated by E-Games and that "using proceeds of this Offering, *the Mexican subsidiary will purchase the license* (the "License") for the operation of the Casino from B-Mex II, LLC, a Colorado limited liability company managed by the principals of the Company and Exciting Games, for $1.5 million USD".[740]

587. In addition, E-Games would operate the intended casino pursuant to the E-Games' Permit and two agreements to be executed between the Mexican Subsidiary and E-Games, namely: a management agreement and a machine lease agreement.[741]

588. In sum, according to the subscription agreement, the successful establishment of a casino in Los Cabos depended on: (i) B-Cabo conducting a successful offering to raise up to USD $10 million to fund the construction of the hotel and the Mexican Subsidiary;[742] (ii) lending up to USD 4 million to Medano Beach Hotel for the construction of the hotel;[743] (iii) incorporating the Mexican Subsidiary that would own the casino and its assets[744] and; (iv) executing a machine lease agreement and a management agreement between the Mexican Subsidiary and E-Games once the former was established.[745]

589. As of the expropriation date, there is no evidence that B-Cabo raised the intended funds through the offering, no evidence that the hotel commenced construction and no evidence that the Mexican Subsidiary was formed or capitalized. Consequently, the Mexican Subsidiary never purchased a "licence" or gaming equipment or entered into agreements with E-Games to operate

738 Exhibit C-446, pp. 1, 14.
739 *Id.*, , p. 15.
740 *Id.*, , p. 15.
741 *Id.*, , p. 17.
742 *Id.*,, p. 1.
743 *Id.*,, p. 1.
744 *Id.*,, p. 14.
745 *Id.*,, p. 17.

a casino. In fact, as indicated *supra*, the Claimants had not even executed an Investment Agreement with their Cabo Partners in order to make these plans a reality.

590. All that existed at the time were two loans for USD $600,000 made in connection with the hotel, of which USD $500,000 were repaid to B-Cabo *before* the Claimants' Casinos were legally shuttered by Mexico on 24 April 2014 (i.e., the alleged expropriation date) because they were open and operating without a permit.

d. The Cancún Project

591. The claim around the Cancun Project is in many ways more extreme than the one concerning the Cabo Project because the Claimants did not even submit evidence on their alleged negotiations with the Marcos Family. As noted in the Counter-Memorial, the entire claim rested on the unsupported witness statements of Mr. and Ms. Burr, a render of the casino and an excel file with purported financial projections.

592. In their Reply, the Claimants allude to an option to purchase a gaming licence from B-Mex II and provide additional evidence regarding their communications with the Marcos Family. Mexico will address this evidence below, but it will note at the outset that the issue is not whether the Claimants entered into negotiations with the Marcos Family, but whether they had an investment in a casino in Cancun and whether such an investment justifies a claim for USD $42 million in damages.

1) The option to purchase a gaming license from B-Mex-II

593. The Claimants claim to have acquired an option to purchase a gaming licence from B-Mex II for USD $250,000 and appear to suggest that this instrument constitutes a covered investment.[746]

594. Mexico reiterates that Article 31 of the Gaming Regulations prohibits, *inter alia*, the sale, transfer and commercialization of a permit or the rights thereunder. Moreover, there is no such thing as a "gaming licence"; this is an imaginary construct developed by the Claimants to circumvent the law. The fact that a permit allows the holder to open a certain number of facilities does not imply that the permit can be broken up into "licenses" that can then be sold or otherwise

[746] Reply, ¶ 569-570

transferred or commercialized. This would make a mockery out of the restriction established in the Regulations and would render Article 31 meaningless.[747]

595. Hence, to the extent that E-Games sold or transferred rights under its permit to B-Mex II, that sale or transfer was illegal. Any attempt by B-Mex II to sell those alleged rights to Colorado Cancun or any third party would be equally illegal and therefore, would have zero value.

596. The Claimants, perhaps aware of this problem, attempt to draw a distinction by arguing that Mexico's contention about the illegal nature of the transfer is wrong because "E-Games Independent 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…"[748] The Claimants' effort are unavailing and must fail.

597. To the extent that the argument suggests that the transaction is not illegal because the option does not involve the permit itself but rather the possibility of acquiring rights conferred under the permit that were somehow transferred to B-Mex II, then Mexico will take the position that the right to acquire a right under the Permit is not an "investment of investors of another Party <u>in the territory of the Party</u>" and therefore, it would not be covered under Chapter Eleven of the NAFTA.[749] Even if the right existed (*quod non*) and was legally owned by B-Mex II (*quod non*), an option on that right would be a U.S. asset (akin to a derivative) that was created by a U.S. company (B-Mex II) which was then sold to another U.S. Company (Colorado Cancun) in the United States.

598. Lastly, the Claimants argue that Mexico's allegation that there is no proof that the USD $250,000 purchase price was paid has now been debunked by evidence filed with the Reply.[750] This only confirms that Mexico's original allegation was correct: there was no proof of any such

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747 RER-5, Second Expert Report of Mr. Alfredo Lazcano Sámano, ¶¶ 90-93.

748 Reply, ¶ 571.

749 Article 1101 of the NAFTA states: "This Chapter applies to measures adopted or maintained by a Party relating to: [...] (b) investments of investors of another Party in the territory of the Party; [...]"

750 Reply, ¶ 570

purchase filed with the Memorial, and that the Claimants inappropriately decided to submit with their Reply evidence that could and should have been submitted with their Memorial.

2) The business plan and presentation

599. The Counter-Memorial explains that a business plan is not a protected investment under the NAFTA nor evidence of a protected investment.[751] Nothing in the Reply even attempts to dispute this point.

600. The Claimants also take issue with Mexico's contention that the so-called Business Plan was prepared in April 2011 and no progress appeared to have been made since.[752] They then point to a presentation dated 15 April 2013 (Exhibit C-335) 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."[753]

601. It is unclear to the Respondent how a subsequent presentation can be interpreted as an indication of progress towards realizing the project of building a casino in Cancun. It is equally unclear how, either in isolation or in conjunction with the Business Plan, the presentation would constitute or demonstrate the existence of an investment. It simply does not.

3) Communications with the Marcos Family

602. The Claimants also take issue with Mexico's allegation that there was no evidence of communications with the Marcos Family. They claim that most of the discussions with the Marcos Family took place through face-to-face meetings but nevertheless, submitted a few emails evidencing their contacts with the Marcos family with their Reply.[754] According to the Claimants, "[t]hese 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."[755]

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751 Counter-Memorial on Merits, ¶ 520

752 Counter-Memorial on Merits, ¶ 518

753 Reply, ¶ 575.

754 Reply, ¶ 576.

755 Reply, ¶ 577.

603. The point, however, is not whether there is proof of negotiations between the Claimants and the Marcos family, but whether the Claimants made an investment in a casino in Cancun. Negotiations with potential business partners do not constitute an investment.

604. The Claimants go on to explain that their lack of progress prior to 2013 was due to their "[need] to prioritize obtaining the E-Games' Independent Permit over expanding their business into resort communities."[756] The Claimants are of course entitled to prioritize whatever they want, but that does not relieve them of the obligation to prove the existence of an actual investment to support a claim for the expropriation of that investment and damages in excess of USD $42 million. The Claimants, at best, have submitted evidence of unmaterialized plans to build a casino in Cancun, which do not constitute an investment.

e. The Online Casino Project

605. The same applies to the Online Casino Project. Although the plans to open the online casino seem to have been more advanced than the plans for the Cancun or Cabo casinos, they were still only that: plans. The Claimants have not provided any evidence of executed agreements with Bally or Pokerstars[757], or evidence of the acquisition of the assets identified in Exhibit C-338 (e.g., the servers[758]), or evidence that the would-be partners in the online casino (E-Games and Rational Group) had decided on the "structure for the transaction" or that they had incorporated the corresponding companies.[759] There is also no evidence that they had complied with Article 85 of the Regulations which requires any permit holder that wishes to offer online games to obtain SEGOB's authorization and file a request with supporting documentation describing the intended procedures to guarantee the integrity of the games and preclude their manipulation.[760]

606. The Claimants do not contest any of this, yet they claim that "all that remained for Claimants to do to have their online gaming site up and running was to set up and install servers

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756 Reply, ¶ 578.

757 Counter-Memorial on the Merits, ¶ 534.

758 Counter-Memorial on the Merits, ¶ 538.

759 Counter-Memorial on the Merits, ¶ 541.

760 Counter-Memorial on the Merits, ¶ 531.

in Queretaro, after which Claimants would have used Bally's platform".[761] They also insist that they were two months away from opening this online casino.[762] This is simply untenable.

607. The Claimants then resort to the same tactic of providing evidence (that could and should have been submitted earlier) of pre-investment activities such as: of biweekly meetings with Bally, the "Exciting Games Project Plan", a "preliminary budget plan" for the servers, their alleged "extensive due diligence" (Exhibit C-338), follow up emails (C-559, C-560, C-561), a presentation to TelePlay in February 2014, and a witness statement by Mr. Miguel Romero Cano. However, none of this is evidence of an actual investment.

608. The Claimants also continue to take liberties with the characterization of their evidence. A good example is Mr. Moreno's claim that the "Exciting Games Project Plan" (Exhibit C-477), which identifies the various tasks that the parties needed to accomplish in order to roll out the project by mid-July 2014, "fails to reflect all material progress that the parties made afterwards".[763] Indeed, the document identifies five different "Phases" and only shows progress with a few tasks from Phase 1. Phases 2 through 5, which include: "Design & Business Operations", "Development", "QA/Testitng & Training", and "Go Live and Transition to Support" show *zero* progress:

Phase 2 - Design & Business Operations	0%
Build Initial Mock ups	0% Feliciana
Initial mock ups review	0% Feliciana,Customer
Provide development and content schedule based on mock ups	0%
Review and finalise development project plan	0%
Present customer with mock ups	0%
Mock ups Sign off by Customer	0%
Define Business Ops-Workflows-Training	0%
Schedule training & Controls write up	0%

761 Reply, ¶ 617.

762 Reply, ¶ 617.

763 Reply, ¶ 620, second bullet.

Phase 3 - Development		0%
Write content		0%
Content production		0%
Create White label		0%
Set up domain names and configurations		0%
Create website group		0%
DNS propagation		0%
Creating hosts and Virtual hosts		0%
Create PHP Templates (header, layout, footer)		0%
HTML Development		0%
Content integration (create game lobby and new web group)		0%
Custom content integrations (if required)		0%
Feature development (if required)		0%
3rd Party Integrations (if required)		0%
- Payment		0%
- KYC		0%
- Geolocation		0%
- CRM Tool		0%
- Affiliate Platform		0%
- Customer support Tool		0%
		0%
Phase 4 - QA/Testing & Training		0%
Deploy on staging		0%
Unit Testing		0%
QA		0%
Operator staff Training		0%
Handover Internal controls write up		0%
Set up Support Services (if needed)		0%
Train internal support services (if Needed)		0%
UAT (soft launch)		0%
Modifications (based on UAT feedback)		0%
Customer Sign off		0%
Phase 5 - Go Live and Transition to Support		0%
Gather Promotions and campaigns requirements		0%
Create campaigns requirement document		0%
Campaigns content production		0%
Build artwork for campaigns		0%
Schedule online campaigns		0%
Coordianate online and land based campaigns schedule		0%
GO LIVE!!!!	Tue 7/1/14	0%
Online campaigns Blasts		0%
Transition to Support		0%

609. The Claimants also submit an opinion of Mr. Ezequiel González in an attempt to respond to the Respondent's observation that the online casino required SEGOB's authorization and a plan detailing the mechanisms that would be put in place to guarantee the integrity of the online games. According to Mr. González, "the Claimants, as valid permit holder, did not have to request a new permit to SEGOB in order to launch its online business", and only required "(1) a gaming permit

(which EGames already had); (2) a system of control for internet transactions (which would be covered by Bally1632); and (3) SEGOB's technical approval of the bet-taking technology (which would be covered by Bally, 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."[764] Notably, the Claimants do not contest that the requirements identified in the Counter-Memorial existed and they had not yet complied with them two months prior to the alleged launch date of the online casino.[765]

610. As for the alleged USD $2.5 million dollar investment, the Claimants simply state that "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."[766] No proof of any incurred expenses was adduced and obviously a "planned" expense cannot possibly be construed as an investment.

5. México did not argue that NAFTA bars pre-investment activity

611. The Claimants posit that "even assuming that certain of the business and investments activities undertaken by Claimants in further of the Expansion Projects were to be regarded as 'pre-investment activities' as alleged by Mexico (*quod non*), Mexico has failed to establish that the NAFTA does indeed bar claims relating to pre-investment activity".[767]

612. Mexico never argued that the NAFTA bars pre-investment activity. It argued that the NAFTA only covers the investments listed in Article 1139. The Claimants have been unwilling or

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764 Reply, ¶ 623.

765 Counter-Memorial on the Merits, ¶ 531. Article 85 of the Regulations states:

"ARTICLE 85.- Establishments may take bets via Internet, telephone or electronically. For this, they must establish an internal control system for the transactions carried out through these channels, preparing in writing the description of the procedures and rules that ensure the inviolability and prevent the manipulation of the betting systems. In said system it must be registered, at least:

I. The account number and identity of the bettor, and

II. The date, time, transaction number, amount wagered and requested selection. The mechanics of capturing bets must be previously approved by the Secretariat."

I.

766 Reply, ¶ 627.

767 Reply, ¶ 558.

unable to explain which of their alleged pre-investment activities related to the Expansion Projects qualifies as an investment and how that investment would give rise to a claim for damages consistent with the FMV of an existing casino. The Respondent maintains that neither the Claimants' negotiations with their alleged partners in Cabo, Cancun and Online, nor the preparation of financial projections, nor Mr. Burr's "sweat equity", constitute investments within the meaning of Article 1139.

613. The Claimants also complain that, while Mexico 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", it "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 the scope of NAFTA Article 1139."[768]

614. *First*, when Mexico argued that "NAFTA does not extend Chapter 11 protection to just any "commitment of capital", Mexico was clearly referring to NAFTA Article 1139(h) because this is the only sub-element of NAFTA Article 1139 that contains the words "commitment of capital". Article 1139(h) provides two examples in subitems (i) and (ii) of the kind of interests arising from the commitment of capital that are recognized as covered investments:

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

615. The scope and interpretation of that provision has been the subject of recent awards. In *LMC v. Mexico* the tribunal reasoned that:

> [t]he ordinary meaning of a term in a treaty must be read in its context, as Art. 31.1 VCLT mandates. And in this case the context provided by sub-paragraphs (h.i) and (h.ii) shows that 'commitments of capital' to be protected under paragraph (h) must show some additional, defining feature, which simple short-term fixed-interest loans lack."[769]

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768 Reply, ¶ 560.

769 Exhibit RL-043, *Lion Mexico Consolidated L.P. c. Mexico*, Caso CIADI No. ARB(AF)/15/2, Decision en Jurisdicción, 30 julio 2018, ¶ 207 [*LMC*, Decision on Jurisdiction, 207.]

616. Based on the foregoing, it concluded that "it is safe to conclude that a minimum requirement of 'commitments of capital protected by paragraph (h) is to be formalized as contracts."[770]

617. *Second*, the Claimants have it precisely backwards: Mexico does not need to demonstrate that pre-investment activities *ipso facto* fall outside the scope of NAFTA Article 1139. It is the Claimants who bear the burden of proving that their pre-investment activities constitute a protected investment under Article 1139 in order to establish the Tribunal's jurisdiction. As succinctly put by the Grand River tribunal: "Claimants must nonetheless establish an investment that falls within one or more of the categories established by [Article 1139]."[771]

6. México did not argue that the Expansion Projects were not investments because they were not going concerns

618. Claimants attack another strawman by arguing that "Mexico appears to believe that investment projects that were not going concerns somehow fall outside the scope of the Tribunal's jurisdiction", and concluding that "the fact that the Expansion Projects never became operational due to Mexico's breaches is no defense to jurisdiction".[772] Mexico made no such argument.

619. In fact, with the exception of "an enterprise" (i.e., Article 1139(a)[773]), none of the investment categories in Article 1139 is capable of becoming a going concern,[774] and the fact is that the Claimants did not establish "an enterprise" in relation to any of the Expansion Projects. So, the problem is not that their "investment projects" were not going concerns, but rather that those projects are not investments within the meaning of Article 1139.

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770 *Id*., ¶ 205.

771 Exhibit CL-213, *Grand River Enterprises Six Nations v United States of America*, Award (12 January 2011) UNCITRAL, ¶ 122.

772 Reply, ¶ 556.

773 The term "enterprise" is defined in Article 201 as: "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association"

774 Investopedia defines "going concern" as "an accounting term for a company that has the resources needed to continue operating indefinitely until it provides evidence to the contrary. This term also refers to a company's ability to make enough money to stay afloat or to avoid bankruptcy."

B. The Respondent has not Breached NAFTA article 1110 (Expropiation)

620. The Claimants base their allegations of expropriation on unsubstantiated allegations that SEGOB and "political figures" were invovolved in the alleged expropriation of the Claimants' investment. As set out above, such allegations are entirely baseless. What the evidenentiary record clearly establishes is that the permit revocation was the direct consequence of a judicial order.

621. The Claimants argue that the Respondent's actions are a "classic case of indirect expropriation",[775] and that "expropriation can occur through judicial measures". [776] The Respondent has already addressed "judicial expropriation" and "indirect expropriation" in paragraphs 742-799 of the Counter-Memorial. The Respondent will not unnecessarily repeat that legal argument. However, it is important to emphasize that Mexico did not expropriate – whether through indirect expropriation or judicial expropriation - the Claimants' investments.

622. As set out above, the facts established by the evidentiary record demonstrate that no expropriation has occurred. Specifically, as mentioned in section N of this Rejoinder, it is reiterated that the revocation of E-Games' permit was not the result of a politically motivated conspiracy against the Claimants, as they argue. It was the consequence of a court order issued in an amparo proceeding initiated by E-Mex. SEGOB not only did not act on its own, but also had no alternative but to comply with the order of the Sixteenth Court that resolved Amparo 1668/2011.

623. Moreover, in section G above, the Respondent has provided arguments forcertify that SEGOB acted correctly and adhered to the regulatory framework when closing theE-Games Casinos as a consequence of the violation of the legislation by the Claimants, who continued to operate their Casinos without a permit. The decision to continue operating their Casinos without a valid permit, with knowledge of the consequences that said action could entail, is attributable exclusively to the Claimants.

624. In relation to the allegedly illegal lifting of the closure seals placed in Claimants' establishments, Section H above describes that SEGOB lifted said seals in compliance with orders

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775 QE Reply, ¶ 682.

776 *Id.,* ¶ 683.

of various judges as a result of actions lawsuits initiated by the owners of the real estate where the Casinos were located.

625. Finally, in section I of this writing it was explained that the requests for new permits for the Claimants' Casinos were denied, among other reasons, because they were they were closed. The closure of the Casinos was the result of operating them without a permit in force, which is a clear violation of the LFJS.

1. The Claimants Legal Submissions on "Expropriation" are Flawed

a. Under NAFTA, a court's decision can only rise to the level of expropriation if a denial of justice occurred

626. As the Respondent has previously argued before this Tribunal, the decisions of a state's municipal courts only rise to an expropriation if a denial of justice occurs. This is consistent with repeated NAFTA States Parties' 1128 submissions that confirm "judicial takings" are excluded from NAFTA expropriation claims, as well as numerous NAFTA tribunals that have repeatedly held that judicial expropriations do not exist.[777]

1) NAFTA States Parties 1128 submissions indicate "judicial takings" are excluded from NAFTA expropriation claims

627. The Claimants argue that the Respondent's reliance on 1128 submissions submitted by NAFTA parties during previous tribunals are "misleading" and "are of no assistance to this Tribunal's task: to interpret NAFTA Article 1101(1)."[778] Such a position should be expressly rejected by this Tribunal.

628. NAFTA 1128 submissions qualify as an interpretive aid of the NAFTA treaty pursuant to the *Vienna Convention on the Law of Treaties* ("***VCLT***") Article 31(3)(b) under which "(3) There shall be taken into account, together with the context: (b) any subsequent practice in the application of the treaty regarding the interpretation of the treaty or the application of its provisions."[779] The Claimants' statement is incorrect.The Respondent submits that the Claimants ought to have known

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777 *See* Counter-Memorial on the Merits, ¶¶ 750-764.

778 Reply, ¶ 755.

779 Exhibit CL-41, VCLT 31(3)(b).

VCLT Article 31(3)(b) was applicable, having cited Articles 31(1) and 31(2). This is a significant omission on the part of the Claimants.

629. Moreover, the Claimants argue that a "parties' *ex ante* views of any treaty provision are only relevant … where the textual approach 'leaves the meaning ambiguous or obscure'[780] or 'leads to a result which is manifestly absurd or unreasonable'[781] which Mexico" cannot claim about Article 1110.[782] This is a manifestly and objectively incorrect reading of the *VCLT*. Due to the importance of this point of treaty interpretation and the severity of the Claimants incorrect reading of *VCLT* Article 32, the entire article is reproduced below:

> Article 32 – Supplementary means of interpretation
>
> Resources may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.[783]

630. It is immediately clear that the Claimants have omitted reference to how *VCLT* Article 32 may be used to confirm a meaning discerned from Article 31, even where this meaning is not obscure or manifestly absurd.

631. Furthermore, the Claimants' citation to *VCLT* Article 31(2)(a) arguing that the Respondent's "*ex post* interpretation may be relevant only where made by "agreement relating to the treaty"[784] also ignores *VCLT* Article 31(3)(b). The Claimants position that NAFTA 1128 submission are not "subsequent practice in the application of the treaty" is simply untenable.[785]

632. It is incumbent upon this Tribunal to properly and purposively interpret "in good faith and 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."[786] The States Parties to the NAFTA, through their Article 1128 submissions, have confirmed that judicial takings are excluded from Article 1110. These

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780 Exhibit CL-41, VCLT 32(a).

781 Exhibit CL-41, VCLT 32(b).

782 Reply 758.

783 Exhibit CL-41, VCLT Article 32 [emphasis added].

784 *Id.*,

785 Reply 758.

786 Exhibit CL-41, VCLT 31(1).

Article 1128 submissions qualify as "subsequent practice in the application of the treaty". Within this context, there is no doubt that judicial takings are excluded from Article 1110.

2) NAFTA tribunals consistently find that judicial expropiations do not exist

633. The Claimants argue in paragraph 751 of their Reply that "[n]umerous tribunals have found that Article 1110 (and provisions like it) cover judicial expropriations."[787] To be clear, this Tribunal is not tasked with interpreting a provision "like" NAFTA 1110. This Tribunal must interpret NAFTA Article 1110, and *only* that article. Non-NAFTA legal standards which are not tied to the same international legal standards are not helpful in determining the content of NAFTA standards.

634. Throughout their Reply, the Claimants cite a number of cases for the proposition that judicial takings are recognized under NAFTA, however, the cases they cite do not in fact stand for this proposition.

635. The Claimants cite *Azinian v Mexico* to argue that "some judicial decisions could engage the responsibility of the State under NAFTA."[788] However, the Claimants' ignore the limitations on liability for judicial decisions that the Tribunal's subsequently set out: "[t]he possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions… *What must be shown is that the court decision itself constitutes a violation of the treaty* … the Claimants must show either a denial of justice, or a pretense of form to achieve an internationally unlawful end."[789]

636. Similarly, the Claimants cites the *Eli Lilly* tribunal to argue that "NAFTA *does* recognize the notion of 'judicial expropriation' ".[790] However the *Ely Lilly* tribunal very specifically *did not* make a finding on this issue noting that "the Tribunal does not need to reach a decision on the Parties' submission on these issues, and judicial economy dictates that it should not do so."[791] Read

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787 Reply ¶ 751.

788 Exhibit CL-192, *Robert Azinian, Kenneth Davitian & Ellen Baca v The United Mexican States*, ICSID Case No ARB(AF)/97/2, Award (November 1, 1999), ¶ 98.

789 Exhibit CL-192, *Robert Azinian* ¶ 99 (emphasis in original).

790 Reply 684 (emphasis in original).

791 Exhibit CL-112, *Eli Lilly & Co v Government of Canada*, ICSID Case No UNCT/12/2, Final Award (Mar. 16, 2017) ¶ 220.

in its entire context, the tribunal's comments that "it is possible to contemplate circumstances in which a judicial act (or omission) may engage questions of expropriation" are nothing more than idle contemplation taken by the tribunal on a legal matter they had indicated immediately prior they would not rule on.

637. At paragraph 760 of their Reply, the Claimants argue that the Respondent "missed the point" when Mexico argued that the Claimants had quoted *obiter dictum* which "does not belong to the binding decision of the tribunal"[792] because "[a]s a general matter, the *Eli Lily* decision does not bind this Tribunal and thus any distinction between *obiter dictum* and *ratio decidendi* is irrelevant."[793] This statement betrays a fundamental understanding of the distinction between *obiter dictum* and *ratio decidendi*.

638. Aside from any implications the legal concept has in relation to common law and precedent, *ratio decidendi*, literally "the rationale for the decision" refers to the legal reasoning that can be extracted from a decision whereas *obiter dictum*, literally "other things said" comprises anything said in passing by the decision-maker. The *ratio decidendi* of prior arbitral decisions therefore constitutes the portion of those decisions where the tribunal has firmly turned their mind to a particular legal issue whereas this careful examination of issues is not present in *obiter dictum*. In fact, the *Eli Lilly* tribunal itself acknowledged that it did not consider the parties' arguments or the arguments of non-disputing Parties before expressing its opinion on judicial expropriations. Thus, far apart from any meaning they possess in common law legal systems, in the context of international investment arbitrations, *ratio decidendi* of prior decisions is more persuasive for this Tribunal than *obiter dictum*.

639. Additionally, non-NAFTA cases relied upon by the Claimants to establish "judicial expropriation" should be given no weight. Moreover, even if this Tribunal were to consider the non-NAFTA cases relied upon by the Claimants, they rarely stand for the proposition cited. As set out below, these cases would not make a difference even *if they were* NAFTA cases.

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792 Reply, ¶760, quoting *Ely Lilly*, Final Award, ¶758.

793 Reply, ¶760.

640. For example, the Claimants cite the non-NAFTA case of *Stans Energy*[794] where the tribunal stated that "the decisions of state bodies by which the licenses are directly or indirectly withdrawn and the permits are cancelled … shall be considered as expropriation."[795] However, the applicable legal standard in that case was Article 6 sub-paragraph 1 of Kyrgyzstan's "Law on Investments" which stated that "expropriation … [included] actions or omissions by the state bodies of the Kyrgrz Republic which have resulted in forced withdrawal of investors' funds."[796] In such a context, the tribunal's quote is nothing more than a recitation of the applicable legal standard in that case. That case does not establish a free-standing entitlement to judicial expropriation.

641. In paragraph 722 of their Reply, the Claimants cite *Crystallex v Venezuela* wherein Venezuela's denial of an environmental permit for mining activities in conjunction with statements of government officials (which the Claimants argue is akin to Ms. González Salas' statements in this case) was an expropriation. First, *Crystallex* is a non-NAFTA case, and the *Crystallex* tribunal's finding that an expropriation was affected by a judge's actions are not relevant to this NAFTA tribunal determining whether judicial takings can exist under NAFTA without a finding of denial of justice. Second, the statements of government officials in the *Crystallex* case could not be more different than the statements of Ms. González Salas.

642. In *Crystallex*, the statements under examination were roughly half a dozen statements made personally by the then President of Venezuela, Hugo Chavez, or senior government ministers. Moreover, in that case the tribunal determined that "a decision at the highest level of the Venezuelan state had been taken to oust Crystallex from Las Cristinas."[797] In *Crystallex*, the statements of Hugo Chavez were indicative of an expropriation, not because they were targeting the claimant's investment, but because the "statements effected an incremental encroachment of the Claimant's contractual rights and resulted in a gradual yet significant decrease of the value of

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794 QEU&S say para 442 but the document has no paragraphs, only page numbers.

795 Exhibit CL-291, *Stans Energy Corp and Kutisay Mining LLC v Kyrgyz Republic (I)*, MCCI Case No A-2013/29, Award (30 June 2014).

796 Exhibit RL-126 The Kyrgyz Republic, "Law On Investments" (2003) Article 6(1).

797 Exhibit CL-95, *Crystallex International Corporation v Bolivarian Republic of Venezuela*, Award ICSID Case No ARB(AF)/11/2 (4 April 2016) at ¶ 683.

the Claimant's investment",[798] something Ms. González Salas' statement did not do. Therefore, the reasoning of *Crystallex* does not assist the Claimants in this arbitration.

643. The Claimants also cite the case of *Casinos Austria v Argentina* as "a telling example of how the revocation of a gaming permit can breach a State's international obligations."[799] In that case, however, the Argentinian gaming regulator had applied penalties against the Claimant's investment in a manner that was arbitrary and disproportionate in relation to the Claimant's misconduct. In the *Casinos Austria* tribunal's view, although the Claimant's casinos had broken Argentinian gaming regulation, the gaming regulator acted arbitrarily when it punished the casinos in a manner disproportionate to their illegal conduct. Again, not only is *Casinos Austria* a non-NAFTA case, but it addressed the arbitrariness and proportionality of penalties. It is therefore not relevant to this Tribunal's determination of whether judicial takings exist under NAFTA.

644. Moreover, the Claimants argue Argentina's actions are unlike Mexico's because the *Casinos Austria* "tribunal found there was no evidence of [Argentinian] political influence [whereas] the political influence of the highest levels of the Mexican government is evident in this case."[800] The Claimants have not provided any evidence of "political influence of the highest levels of the Mexican government. This remains an unsubstantiated claim that the Claimants repeatedly assert without any evidence. The Claimants have failed to prove that "Mexico's actions went far beyond the actions of the Argentinian state regulator …. Where the tribunal found there was no evidence of political influence." Like in the *Casinos* Austria case, the Claimants allege the existence of corruption based upon inuendo and circumstantial evidence. This is the type of evidence that the tribunal in *Casinos Austria* held was "circumstantial evidence" from which "an intention to exclude [the investors] … form the gaming sector … cannot be established."[801]

645. The Claimants also argue at paragraphs 725-726 that Mexico expropriated their casinos when it "shut down the Casinos, prevented the Claimants from accessing them, and permitted the looting of casino hardware."[802] This is a disingenuous recollection of events. The Claimants were

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798 Exhibit CL-95, *Crystallex* at ¶ 683.

799 Reply at 723.

800 *Id.*, ¶ 724.

801 Exhibit CL-292, *Casinos Austria International v Argentine Republic*, Award, ICSID Case No ARB/14/32 (5 November 2021) at 386.

802 Reply ¶¶ 725-726.

operating their casinos without a licence and were legally shut down by Mexican authorities. After the closure, the Claimants ceased paying rent to their landlords, who subsequently repossessed the buildings. The Claimants' loss of physical access to their casinos was a consequence of their own illegal actions and failure to pay rent, and in no scenario can rise to the level of an expropriation.

646. Moreover, the Respondent notes that at ¶¶ 42 and 68 of the Reply filed by Randall Taylor, John Conley and Daniel Rudden are accused of illegally stealing equipment after the casinos closed. This further supports a finding that the Respondent was not involved in or responsible for the alleged theft of Casino property.

647. To this end, the Claimants rely upon *Wena Hotels* and *Abou Lahoud* for the proposition that looting by a third party unrelated to a host state constitutes expropriation. In both of those cases, however, the tribunals expressly found that a relationship existed between the "looters" and the government. To be clear, in those cases there was sufficient proximity between the "looters" and the government such that direct attribution was established. No such direct attribution has established, or even alleged, by the Claimants in the current case before this Tribunal.

648. At paragraph 725 of their Reply, the Claimants' write that *Wena Hotels* held Egypt "deprived [the investor, a hotel company] of its 'fundamental rights of ownership' by allowing [a third party] forcibly to seize the hotels."[803] The Claimants' cite paragraph 99 of *Wena Hotels* to support this assertion. However, the actual quotation reads: "Egypt deprived Wena of its 'fundamental rights of ownership' by allowing EHC forcibly to seize the hotels."[804] This is significant because the tribunal in *Wena Hotels* had already determined that the actions of EHC were attributable to Egypt and therefore, it was not "a third party" who forcibly seized the hotels.[805] Similarly, the Claimants also cite *Abou Lahoud* for the same argument, but in that case the actions complained about by the investor were all attributable to the DRC.[806]

649. It is important to reiterate that unlike the *Wena Hotels* and the *Abou Lahoud* cases, the Claimants in this case have not provided any evidence of the identity of the third party that

803 Reply paragraph 725, citing CL—293, *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/499, Award (December 8, 2000), ¶ 99.

804 Exhibit CL—293, *Wena Hotels* ¶ 99, emphasis added.

805 Exhibit CL—293, *Wena Hotels* ¶ 65-69.

806 Exhibit CL-294, Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v Democratic Republic of the Congo, ICSID Case No ARB/10/4, Award (February 7, 2014), ¶ 386.

allegedly stole equipment from the Casino. The Claimants have not submitted evidence to support a finding that the Mexican government, or a third party acting on the direction of the government, took any of the casino equipment. To the contrary, Mr. Taylor has provided evidence that it was orchestrated by John Conley and Daniel Rudden – who were clearly not acting on behalf of the Mexican government.

650. The absurdity of the Claimant's suggestion that the Respondent is responsible for all theft that occurred after the Casinos were closed, even where there is no attribution to the Respondent, is highlighted by the fact that if Mr. Conley and Mr. Rudden did in fact steal that equipment, according to the legal argument that the Claimants ask this Tribunal to accept, the Respondent would be liable for that theft.

651. Claimants next cited *Tecmed*[807] which held Mexico's refusal to grant environmental permits to an investor could not be considered a good faith exercise of the host state's regulatory powers because they were arbitrary, non-transparent, politically motivated, discriminatory, and disproportionate. In this case, however, the Claimant has failed to provide evidence that the Respondent has undertaken an arbitrary, non-transparent, politically motivated, discriminatory and disproportionate exercise of its regulatory powers. Mere allegations cannot meet the high evidentiary threshold required to establish arbitrary, non-transparent, politically motivated, discriminatory and disproportionate exercise of a host states legitimate regulatory powers. Moreover, the fact that the Respondent was implementing a judicial order contradicts such baseless allegations.

652. The Claimants also cite *Pope & Talbot* to argue that NAFTA protects against regulatory expropriation.[808] However, *Pope & Talbot* did not make any findings on whether an expropriation could be affected by a judicial action, confining its analysis to regulations.

653. Similarly, the Claimants' cite *SD Myers* and *CME* for the propositions that expropriation can occur absent the loss of property rights and that expropriations occur when an investor suffers a substantial deprivation, even if only temporary.[809] In this case, the Claimants are not alleging

807 Reply, ¶ 726.

808 Reply, ¶ 727.

809 Reply, ¶ 727.

that the "substantial deprivation" was temporary. Thus, *SD Myers* and *CME* have no applicability to this case.

654. The Claimants also reference the *Rumeli, Sistem,* and *Saipem* decisions in a further attempt to provide jurisprudential support that judicial expropriations exist.[810] These are all non-NAFTA decisions that should be given no weight by this Tribunal.

655. In *Rumeli*, the tribunal found "that the court process which resulted in the expropriation of the Claimants' shares was brought about through improper collusion". [811] This was a finding of judicial expropriation based upon a "denial of justice". The Claimants have not provided any evidence that supports a finding of denial of justice. The Respondent submits that the reason that the Claimant is attempting to argue judicial expropriation without the necessity of denial of justice is because it is obvious that there has been no denial of justice. If the evidence supported a denial of justice, then the Claimants would not need to ask this Tribunal to make a novel finding of judicial expropriation without denial of justice.

656. The Claimants also misconstrue a quotation from Christopher Greenwood QC.[812] The Respondent highlighted in its Counter-Memorial 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."[813] The context of this quotation makes it clear that Greenwood is referring to legal disputes before a judiciary, and therefore the Claimants' argument that Greenwood must be incorrect because the FPS standard obliges protecting investors from physical violence committed by third parties is completely inapplicable and has no bearing on Greenwood's text. The full passage from Greenwood makes this clear:

> "[...] the original cause of harm is not imputable to the respondent State and cannot, therefore, constitute a case of action against that State in international law. If there is to be a cause of action at all it can only be denial of justice, arising either because the respondent State denies the alien access to the courts or because those courts behave in

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810 Reply, ¶ 761.

811 Exhibit CL-113, Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. vs. the Republic of Kazakhstan, ICSID Case No. ARB/05/16, "Award", July 29, 2008, ¶ 707.

812 Reply, ¶ 766.

813 Counter-Memorial on the Merits, ¶ 766.

> a way which is discriminatory or manifestly contrary to international standards of behavior.[814] [Emphasis added]

657. Similarly, the Claimants cite *Lion v Mexico* to argue that NAFTA recognizes judicial expropriation. However, in *Lion*, "the Tribunal observe[ed] that liability for expropriation under Art. 1110 arising from the decisions of domestic courts requires a finding of a denial of justice… [but that] an exception to the general rule [exists and a judicial taking will occur] whenever it can be proved that the courts were not neutral and independent, especially from the other branches of power of the host State."[815]

658. The Respondent submits that this is not an exception to the general rule that judicial takings require a finding of denial of justice but rather as a corollary to this general rule. This is because, a situation where a host state's courts were not independent or neutral would qualify as "egregious" or "notoriously unjust" judicial conduct that would "offend a sense of judicial propriety" and thus, constitutes a denial of justice.

659. Expropriation in the customary sense only speaks to the executive, legislative, military and police actions.[816] More importantly, the Claimant failed to establish that customary international law recognizes that a taking can result from a court's decision as independent arbiter of a dispute between private parties.

660. The rationale of the Respondent's position is simple and straightforward: domestic courts are impartial arbiters that settle disputes between parties. The judiciary's function is to administer justice. It is impossible for courts to "take away" any party's property, let alone an alien's property. Whatever mistakes a court makes in the process of administration of justice, it amounts to either a wrongful application of national law or denial of justice when the system collectively fails an alien. It cannot be expropriation.

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814 Exhibit RL-062, Christopher Greenwood QC, "State Responsibility for the Decisions of National Courts" in M Fitzmaurice and D Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart Publishing, 2004): p 59-60.

815 Exhibit CL-295, *Lion Mexico Consolidated v United Mexican States*, Award, ICSID Case No. ARB(AF)/15/2 (20 September 2021) ¶ 189 and 192

816 G.C., Christie, *What Constitutes a Taking of Property under International Law*, (1962) 38 BYIL 307; *Case Concerning Certain German Interests in Polish Upper Silesia (The Merits)*, Judgment (25 May 1926), P.C.I.J. Series A. No. 7; *Case Concerning the Factory at Chorzów (Claim for Indemnity)* (Merits), Judgement (13 September 1928) p.5.

661. It is submitted that the Claimant has failed to distinguish its claim of judicial appropriation from its claim of denial of justice. What the Claimants must prove then, for their judicial expropriation claim to succeed, is that a denial of justice has occurred. The Respondent submits that the non-existent customary international law standard of "judicial expropriation" adds nothing to an investor's denial of justice claim under the NAFTA. This position is supported by the *Loewen* Tribunal:

> Claimants' reliance on Article 1110 adds nothing to the claim based on Article 1105. In the circumstances of this case, a claim alleging an appropriation in violation of Article 1110 can succeed only if Loewen establishes a denial of justice under Article 1105.[817]

662. However, and regardless how one approaches the legal analysis, a judicial taking did not occur in this case, because Mexico's judiciary was neutral and independent and the Claimants have failed to prove otherwise.

663. The Claimants argue in their Reply that Mexico expropriated their investments for purely political and illegitimate reasons and that the Mexican judiciary was not neutral or independent.[818] The Claimants argue this based on:

- Ms. González Salas' comments that E-Games' Permit was illegal which the Claimants rely upon to suggest (with zero evidence) that Ms. González Salas was "instructed to give … [and was] politically motivated."[819]
- Alleged judicial irregularities before the Colligate Tribunal and the Mexican Supreme Court evidencing politically motivated judicial decision making.[820]
- The cancellation of E-Games' Permit and the closure of the Claimants' casinos for alleged "underlying illegitimate and illegal reasons, including political paybacks to the Hank family and vendettas against PAN supporters."[821]

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817 Exhibit RL-041, *Loewen Group, Inc. and Raymond L. Loewen v. United States of Americ*a, Caso CIADI No. ARB(AF)/98/3, "Award", 26 de junio de 2003, ¶ 141.

818 Reply, ¶ 676.

819 Reply, ¶ 114.

820 Reply, ¶¶ 191, 201 230-245.

821 Reply, ¶ 5.

- An internal memorandum from the Secretary of Economy, allegedly created by Ms. Cindy Rayo Zapata.[822]
- The testimony of Mr. Luc Pelchat and Mr. Benjamin Chow regarding meetings held with Ms. González Salas and Mr. Cangas[823].
- Black Cube's alleged evidence.

664. These allegations are not supported by material and probative evidence. They are extraordinary claims of institutionalized corruption that the Claimants ask this Tribunal to accept on nothing more than inference and innuendo.

665. The Claimants, as the party alleging that Mexican administrative and judicial institutions were corruptly controlled by the Mexican President, bears the burden of proving such allegations according to the maxim *actori incumbit onus probandi*.[824] In this regard, international tribunals use a heightened burden of proof regarding corruption. For example, in *Siag v Egypt*, the tribunal used the "clear and convincing evidence" standard which it held was higher than the preponderance of evidence standard, which is used by default, but lower than the beyond a reasonable doubt standard used in criminal/penal proceedings.

666. This flexibility reflects the sentiment of Dame Roselyn Higgins' separate opinion of the International Court of Justice's *Oil Platforms Case*,[825] itself picked up on by the *Rompetrol* tribunal, which declared that "[t]here may well be situations in which, given the nature of an allegation of wrongful conduct, and in the light of the position of the person concerned, an adjudicator would be reluctant to find the allegation proved in the absence of a sufficient weight

822 Reply, ¶¶ 130-134.

823 Reply, ¶¶ 138.

824 Literally "the burden of proof is on the plaintiff", stands for the proposition that whatever party alleges a fact bears the burden of proving that fact; Chittharajan F Amerasinghe, *Evidence in International Litigation* (Boston: Martinus Nijhoff Publishers, 2005), 70.

825 Exhibit RL-113, *Concerning Oil Platforms Case (Islamic Republic of Iran v USA)* (Separate Opinion) [2003] ICJ Rep 225, 234; see also Rosalyn Higgins, "Speech to the Sixth Committee of the General Assembly of the United Nations" (2 November 2007) 4 (contending that the "prime objective as to standard of proof appears to [be] to retain freedom in evaluating the evidence, relying on the facts and circumstances of each case", and that "[p]art of this reluctance to be specific is caused by the gap between the explicit standard-setting approach of the common law and the '*intime conviction du judge'* familiar under civil law.")

of positive evidence – as opposed to pure probabilities of circumstantial inferences."[826] And as the tribunal in *Libananco Holdings v Republic of Turkey* held, "the graver the charge, the more confidence there must be in the evidence relied on."[827] The Claimants have simply failed to prove their allegations of corruption and/or political motivation in SEGOB's decision making.

667. Additionally, the Claimants cite the *Petrobart* decision to argue that "Government intervention in judicial proceeding is not in conformity with the rule of law in a democratic society."[828] Mexico completely agrees with the proposition but denies that it intervened in any judicial proceeding and would also stress that the *Petrobart* decision actually stands for the stringently high standard required to show a "government intervention."

668. In the *Petrobart* case, the investor obtained a judgement executable against a state-run entity, but when the investor attempted to execute the judgement, the Vice Prime Minister wrote a letter to the court, requesting postponement of the execution.[829] The court granted the motion for postponement and even cited the Vice Prime Minister's letter in their decision.[830] The *Petrobart* tribunal noted that the court under question had "a wide discretion in deciding whether or not to suspend execution. However, the fact that the Court, in its decision, specifically referred to the Government's intervention indicates that the Court attached some weight" to the Vice Prime Minister's letter and therefore, the tribunal found governmental intervention.[831] This high standard has not nearly been met in the case before this Tribunal.

669. Considering that the Claimants are attempting to prove the very head of Mexico's executive government, the-then President Peña Nieto, is responsible for a multi-institutional campaign of corruption, following the reason in *Licabanco* and *Petrobart*, the Claimants need better evidence, capable of proving, rather than merely alleging, corruption. Therefore, because the Claimants were

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826 Exhibit RL-124, *The Rompetrol Group N.V. v. Romania*, Caso CIADI No. ARB/06/3, "Award", 6 de mayo de 2013, ¶ 182.

827 Exhibit RL-106, *Libananco Holdings Co. Limited v. Republic of Turkey*, Caso CIADI No. ARB/06/8, "Award", 2 de septiembre de 2011, ¶ 117(a).

828 Reply, 912, quoting CL-202, *Petrobart Ltd v The Kyrgz Republic*, Arbitral Award (29 March 2005), SCC Case No 126-2003, 414.

829 CL-202, *Petrobart*, page 75. CL-202, *Petrobart Limited v. The Kyrgyz Republic*, SCC Caso No. 126/2003, "Arbitral Award", 29 de marzo de 2005, p. 75.

830 . *Id.*

831 *Id.*

not able to produce anything more than documents that allege or insinuate the judicial corruption they allegedly suffered in Mexico, they have not succeeded in proving that Mexico's judiciary was non-neutral or non-independent.

C. The Respondent did not breach NAFTA Article 1105(1)

670. Pursuant to NAFTA Article 1105(1), "Each Party shall accord to investments of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."[832] Under NAFTA this provision obliges host states to afford investors fair and equitable treatment and full protection and security as circumscribed by the minimum standard of treatment under customary international law.

671. In the Counter-Memorial, the Respondent provided detailed legal submissions on Article 1105. The duty to provide fair and equitable treatment was addressed at ¶¶ 546 to 616; the minimum standard of treatment and denial of justice was addressed at ¶¶ 620 to 741; and national treatment was addressed at ¶¶ 802 to 840. The Respondent will not repeat those detailed submissions, but instead, will highlight the key issues and also address a number of incorrect legal propositions made by the Claimants.

1. The Respondent Mexico afforded the Claimants fair and equitable treatment as circumscribed by the minimum standard of treatment at customary international law

672. NAFTA Article 1105(1), unlike most references to FET in international investment agreements, specifically postulates that the substantive protections of "fair and equitable treatment" are "in accordance with international law." As detailed in paragraph 548 of the Counter-Memorial, the NAFTA Free Trade Commission has issued a Note of Interpretation on the minimum standard of treatment in accordance with international law. That binding interpretation confirms that the FET standard is a sub-element of the MST standard.

673. The FET obligation under NAFTA Article 1105(1) *is not the same thing* as an autonomous FET obligation unburdened by reference to the MST under customary international law. The standard for finding governmental behavior that is incompatible with the minimum level of treatment is high. The tribunal in *Waste Management v. Mexico II* explained as follows:

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832 NAFTA Article 1105(1).

> Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to Claimants if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes Claimants to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.[833]

674. The tribunal in *Cargill* went on to further explain as follows:

> As outlined in the Waste Management II award quoted above, the violation may arise in many forms. It may relate to a lack of due process, discrimination, a lack of transparency, a denial of justice, or an unfair outcome. But in all of these various forms, the "lack" or "denial" of a quality or right is sufficiently at the margin of acceptable conduct and thus we find . . . that the lack or denial must be "gross," "manifest," "complete," or such as to "offend judicial propriety"".[834]
>
> ***
>
> To determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety.[835]

675. Most recently, the Tribunal in *Vento v. Mexico* confirmed the legal standard applicable to Article 1105 as follows:

> As already indicated above, the Parties have endorsed the formulation of the minimum standard in Waste Management II. The Claimant even "recommends" that the Tribunal apply the formulation in this case. The Respondent has noted that the standard set by Waste Management II is high and has referred to Cargill, which it considers an amplification of Waste Management II. The Cargill tribunal observed that the words used to describe conduct in breach of the minimum standard, although imprecise, are significantly narrower than the standard present in the Tecmed award. On the other hand, the Claimant refers to Waste Management II as a point of departure to expand the content of the minimum standard by relying on principles of good faith and due process and drawing wide ranging conclusions for which the Claimant finds support in Tecmed. The Parties' argument for a standard higher or lower do not detract from Waste Management

[833] CL-17 *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, Apr. 30, 2004, ¶ 98.

[834] CL-192 *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, Sept. 18, 2009, ¶ 285.

[835] Id., ¶ 296

> II, which, in the view of the Tribunal, reflects a proper understanding of the minimum standard of treatment.[836] [footnotes omitted]

676. Instead of trying to meet this high threshold, the Claimants urge this Tribunal to lower the well-established legal standard. Contrary to the submissions of the Claimants, the MST has not evolved to reflect the autonomous principle of FET as interpreted by non-NAFTA tribunals. This is addressed below.

a. The MST standard has not evolved to reflect the autonomous principle of FET as interpreted by non-NAFTA tribunals

677. In paragraphs 776-788 of their Reply, the Claimants argue that the protections granted by NAFTA's MST have evolved over time to converge with the protections offered by the autonomous principle of FET as interpreted by non-NAFTA tribunals. The Claimants attempt to buttress their argument by pointing to the *ADF v United States of America* case where, according to them, "Mexico [along with Canada and the United States of America] 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.' "[837] Just because the *ADF* tribunal indicated the MST standard is capable of evolution, does not mean that the MST has evolved. The burden remains on the Claimants to prove that the MST standard *has actually evolved*, and if so, *how it has evolved*. It is for the Claimants to demonstrate that it has developed into a specific standard of protection, and they have not.

678. The Claimants argue that there is no material or substantive difference between "the minimum standard of treatment and any autonomous [FET] standard of treatment."[838] This was expressly addressed in ¶¶ 562 to 572 of the Counter-Memorial.

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[836] RL-128 *Vento Motorcycles Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/17/3, Award, July 6, 2020, ¶ 283

[837] QEU&S Reply at 778, quoting *ADF Group Inc v United States of America*, ICSID Case No ARB(AF)/00/1, Award (9 January 2003) at para 179 [emphasis in Reply].

[838] Reply at 786; citing *Rusoro Mining Ltd v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/12/5, Award (22 August 2016) at para 520; *Rumeli Telekom AS and Telsim Mobil v Republic of Kazakhstan*, ICSD Case No ARB/05/16, Award (29 July 2008) at para 611; *Biwater Gauf (Tanzania) Ltd v United Republic of Tanzania*, ICSD Case No ARB/05/22, Award (24 July 2008) at para 592; *Azurix*, Award at 361; *Duke Energy Electroquil Partners v Republic of Ecuador*, ICSID Case No ARB/04/19, Award (18 August 2008) at paras 335-337; *Saluka Investments BV (The Netherlands) v Czech Republic*, UNCITRAL, Partial Award (17 March 2006) at para 291; *Waste Management II*, Award at 98; *Merrill*, Award at 211; *Cargill*, Award at 283; *Methanex Corp v United States of America*,

679. The Claimants go on to allege that "even the decisions on which Mexico relies [to argue a difference between FET and MST] confirm that the minimum standard of treatment is 'indistinguishable' from or materially identical to that of the fair and equitable treatment standard fund in other treaties."[839] This is contradicted by the *Cargill* decision, which is relied upon by all parties in this arbitration.

680. In *Cargill*, when referring to the FET standard as addressed in the *Tecmed* decision, the tribunal confirmed that "[t]he award and statement of the *Tecmed* tribunal thus do not bear on the customary international law minimum standard of treatment, but rather reflect an autonomous standard based on an interpretation of the text."[840] Thus, the *Cargill* tribunal clarified that the mass of non-NAFTA cases with autonomous FET standards cited by the Claimants are of no interpretive aid when examining the MST standard under NAFTA.[841] As confirmed by Patrick Dumberry: "Article 1105 must be analyzed under very specific parameters that do not exist under most of other [autonomous] FET clauses."[842]

681. The Claimants also relied upon the following quote from *Merrill & Ring v Canada*: "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."[843] A careful review of that case demonstrates that the tribunal was not declaring that the autonomous FET and MST standards have converged. The tribunal in *Merrill & Ring* conducted a legal analysis on NAFTA 1105(1) whereby it assessed the form of the FET protection by considering where the legal protections lay on a spectrum ranging "from the understanding that it is a free-standing

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UNCITRAL, Final Award on Jurisdiction and Merits (3 August 2005), Part IV, Chapter C, para 12, Chapter D, para 8; *GAMI*, Final Award at para 95; *Mobil Investments Canada Inc and Murphy Oil Corp v Government of Canada*, Decision on Liability and on Principles of Quantum at para 141; *Siemens AG v Argentine Republic*, ICSID Case No ARB/02/8, Award (17 January 2007); *CMS Gas v Argentina*, Award at para 284.

839 Reply, ¶ 787

840 Annex RL-016, Cargill Incorporated v. Mexico, ICSID Case No. ARB(AF)/05/2, Award, september 18, 2009, ¶ 280

841 *Id.*. RL-016, *Cargill, Incorporated c. México*, Caso CIADI No. ARB(AF)/05/2, Laudo, 18 de septiembre de 2009, ¶ 280.

842 Annex RL-045, Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (The Netherlands: Kluwer Law International, 2013), p. 45 -46.

843 CL-124, *Merrill & Ring Forestry L. P. v. Government of Canad*a, ICSID Case No. UNCT/07/1, ICSID Administrated, "Award", 31 de marzo de 2010, ¶ 211.

obligation under intentional law to the belief that the standard is subsumed in customary international law."[844]

682. Additionally, immediately prior to stating that "the Tribunal is satisfied that fair and equitable treatment has become a part of customary law" the *Merrill & Ring* tribunal commented that "[i]n the context of the FTC Interpretation, the Tribunal accepts that it cannot be said that fair and equitable treatment is a free-standing obligation under international law and, as concluded in *Loewen*, its application will be related to a finding that the obligation is part of customary law."[845]

683. The *Merrill & Ring* tribunal merely recognized that the FET standard exists under customary international law. The tribunal felt that because NAFTA Article 1105(1) required "treatment in accordance with international law", it was necessary to determine the scope of FET under international law. The *Merrill & Ring* tribunal then concluded that the obligation to provide FET did exist under the MST, and that although the MST circumscribes the FET obligation, the MST has developed *beyond* the MST as it existed during the *Neer* decision. Importantly, the *Merrill & Ring* tribunal absolutely did not make a finding that the MST had developed into the equivalent of an autonomous FET standard.

684. The Respondent reiterates that the Claimants have misinterpreted the relationship between the MST and the FET standards according to Article 1105(1). Under the NAFTA, the FET standard is a sub-element of the MST standard, in accordance with customary international law. It is not an autonomous standard. The FET standard established by Article 1105 is no different from the MST under customary international law. Within this context, the fact that measures relied upon by the Claimants are judicial in nature is central to this arbitration. The only cause of action available toi the Claimants is the denial of justice element of the MST standard.

1) The Respondent's tax audits and criminal investigations were not arbitrary, discriminatory, or a denial of the Claimants' due process rights

844 *Id.*, , ¶ 182.

845 *Id*, ¶ 211.

685. The Claimants argue at paragraph 854 of their Reply that the Respondent's tax measures and criminal investigations were an arbitrary, discriminatory, and bad faith campaign of harassment.[846]

686. NAFTA Article 2103(1) provides that "nothing in this [NAFTA] Agreement shall apply to [genuine, good faith] taxation measures." The Respondent reaffirms that at all times the tax audits and criminal investigations were adopted in good faith. disagree on whether or not the tax measures at issue were applied in good faith.

687. The Claimants have failed to establish that the Respondent's taxation measures were in carried out in bad faith. The Claimants merely allege that NAFTA's carve-out for taxation measures does not apply to bad faith tax measures.

688. It is incumbent upon tribunals to presume that a host state's tax measures are *bona fide* regulation unless there is strong evidence of the contrary. Importantly for this case, the investor bears the burden to prove bad faith. Bad faith cannot be established where, as in this case, the Claimants make unsubstantiated allegations. For this Tribunal to conclude that the Respondent's tax measures were applied in bad faith, it must have a fulsome and compelling evidentiary record. Inuendo and speculation cannot ever be sufficient to meet the high evidentiary threshold applicable to proving bad faith.

689. In this context, the Claimants argue that their taxes could not be incorrect for the 2009 tax year because their "tax reporting measures that were allegedly in breach of Mexican law reporting obligations was [sic] actually confirmed as valid and accurate by its [Mexico's] taxing authority, SAT, who confirmed during the prior PAN administration that Claimants' methodology for calculating its taxable income complied with Mexican law reporting obligations."[847]

690. This however, is not a fair reading of what did in fact occur. In 2012, the Claimants' 2011 tax returns were audited, and SAT determined that E-Games was in compliance with all applicable tax legislation. Then, in 2014, the Claimants' 2009 tax returns were audited, and SAT ordered the Claimants to pay over $12.7M in back taxes owed to the Respondent. There is nothing about an audit performed by the Respondent in any given calendar year that precludes the Respondent from

846 Reply, ¶ 806.

847 Reply, ¶854.

reaching a different conclusion on the legality *of a different* calendar year. This is explaining in the section K of this Rejoinder.

691. Similarly, the Claimants argue that *after* they sent their Notice of Intent to arbitrate this case, the Respondent, then "embarked on a campaign of vindictive criminal investigations … against E-Games representatives."[848] Mexico has addressed this baseless allegation at ¶¶ 604 to 616 of the Counter-Memorial. To this end, it is important for this Tribunal to recall that the Claimants were operating their casinos without a permit from 13 August 2013 to 24 April 2014, and SEGOB filed a criminal complaint because the casino was shut down for operating without a permit.[849] This is explaining supra.

b. The Claimants have Failed to Establish Any Legitimate Expectations Protected Under NAFTA Article 1105

692. At ¶¶ 576 to 594 of the Counter-Memorial, the Respondent addressed the Claimants' position on legitimate expectations. The Respondent reiterates that "legitimate expectations" are not protected by the MST according to customary international law as provided for by Article 1105.

693. Under established NAFTA jurisprudence, it is the Claimant who bears the burden of proof to establish that customary international law recognizes judicial expropriation. To establish the existence of a rule of customary international law, the Claimant must identify *general* and *consistent* State practice and *opinio juris*. As indicated by the International Court of Justice ("ICJ") in the *North Sea Continental Shelf* case, for a rule of customary international law to emerge:

> State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform… — and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.[850]

694. In the *Eli Lilly* case, the United States summarized the NAFTA Parties' collective position on the investor's burden of proof for an allegation against a State's violation of customary international law per Article 1105(1) as follows:

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848 Reply, ¶851.

849 Counter-Memorial on the Merits, ¶ 612.

850 Exhibit RL-120, *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, p. 3, ¶ 74*

> Thus, the NAFTA Parties expressly intended Article 1105(1) to afford the minimum standard of treatment to covered investments, as that standard has crystallized into customary international law through general and consistent State practice and *opinio juris*. A claimant must demonstrate that alleged standards that are not specified in the treaty have crystallized into an obligation under customary international law.
>
> To do so, **as all three NAFTA Parties agree, the burden is on the claimant** to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*. "The Party which relies on a custom," therefore, "must prove that this custom is established in such a manner that it has become binding on the other Party." Tribunals applying Article 1105 have confirmed that the party seeking to rely on a rule of customary international law must establish its existence. The tribunal in *Cargill Inc. v. Mexico*, for example, acknowledged that
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> "the proof of change in a custom is not an easy matter to establish. However the burden of doing so falls clearly on Claimant. If the Claimant does not provide the Tribunal with proof of such evolution, **it is not the place of the Tribunal to assume this task**. Rather, the Tribunal, in such an instance, should hold that Claimant fails to establish particular standard asserted."[851]
>
> [Emphasis added]

695. The *Glamis Gold* Tribunal has also held that the Claimant bears the burden to establish the rule of customary international law that it claimed:

> If, as Claimant argues, the customary international law minimum standard of treatment has indeed moved to require something less than the "egregious," "outrageous," or "shocking" standards as elucidated in *Neer*, then the burden of proof of establishing what the standard now requires is upon Claimant.[852]
>
> [Emphasis added]

696. The Respondent emphasizes two points the Tribunal must consider regarding the Claimant's burden of proof for its legitimate expectations case in light of the NAFTA Parties' position and the established NAFTA jurisprudence:

- First, the Claimant bears the burden to establish the existence of a relevant rule of customary international law on judicial expropriation through the identification of a *general* and *consistent* State practice and *opinio juris*; and
- Second, the burden of proof is high, and it solely lies with the Claimant.

[851] Exhibit RL-055, *Eli Lilly and Company and Government of Canada*, UNCITRAL, Case No. UNCT/14/2, Submission of the United States of America, 18 March 2016, ¶¶ 16-17.

[852] Exhibit RL-051, *Glamis Gold, Ltd. v. United States*, UNCITRAL, Award, 8 June 2009, ¶ 601.

697. Identifying a rule of customary international law requires both elements of State practice and opinio juris.[853] In other words, ascertaining whether a rule of customary international law exists is a search for "a practice, which … has gained so much acceptance among States that it may now be considered a requirement under general international law."[854]

698. It is submitted that the Claimants failed to establish the existence of a State practice and/or of *opinio juris* that the MST according to customary international law incorporated into Article 1105 provides protection of an investor's legitimate expectations under NAFTA. The Claimants' have failed to meet this evidentiary burden.

699. That said, even if this Tribunal were to find that legitimate expectations can give rise to claims pursuant to Article 1105, the evidence in this case does not establish legitimate expectations.

700. Non-NAFTA awards have confirmed that legitimate expectations must be based on specific formal guarantees given by the host State to induce investments. Therefore, "a legitimate expectation can be created only by *specific promises or commitments made by the* State".[855]

701. At paragraph 802 of their Reply, the Claimants rely upon *Tecmed v Mexico* as establishing the standard imposed by the doctrine of legitimate expectations. The *Tecmed* decision has, however, been the subject of harsh criticism. For instance, Krista Nadakavukaren Shefer writes as follows:

> This particularly strong language has been modified somewhat by tribunals who look not just to what the particular investor expected, but what the investor could legitimately have been expected. Under current views of FET, the legitimacy of expectations is determined by balancing the host's explicit or implicit promises made to the particular investor with its right to regulate. As a result, scrutinizing the legitimacy of the expectations may result (but does not always result) in a finding favor of the host.[856]

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[853] Wood, Michael Special Rapporteur, *Second Report on Identification of Customary International Law*, International Law Commission, Sixty-sixth Session, Geneva, 5 May – 6 June and 7 July – 8 August 2014, A/CN.4/672, ¶ 28

[854] *Id.*, ¶ 30 citing Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, p. 14, ¶ 204.

[855] *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*,ICSID Case No. ARB/12/13, "Decision on Liability and the Principles of Quantum", 30 December 2016, No. 531.

[856] Krista Nadakavukaren Shefer "International Investment Law. Text, Cases and Materials", Edward Elgar Publishing, 2nd edition, 2016, pp. 407 and 408.

702. Similarly, in the procedure followed by the Committee on Annulment in the *MTD Equity v. Chile* case, the Committee referred to the two experts (Mr. Jan Paulsson and Sir Arthur Watts) on the dictum in the Tecmed case, and noted as follows:

> 67. The Committee may see some aspects of these criticisms. For example, at TECMED, the Court's apparent confidence in expectations of the foreign investor as the source of the obligations of the receiving State (such as the obligation to compensate for expropriation) is questionable. In principle, the obligations of the receiving State to foreign investors derive from the terms of the applicable investment treaty and not from any particular expectations that investors may have or claim. A court seeking to deduce from these expectations a set of rights other than those contained in, or which may be enforced under, the BIT may well exceed its powers and, if the difference is substantial, it could manifestly exceed them.[857]
>
> [Emphasis Added]

703. The extremely onerous standard set out in *Tecmed* has been described by other tribunals as a standard that "would impose on host States' obligations which would be inappropriate and unrealistic."[858] Moreover, this onerous standard has only been applied by non-NAFTA tribunals and most NAFTA tribunals now consider that "the host state's failure to respect an investor's legitimate expectations does not constitute a breach of the FET standard, but is rather a 'factor' to be taken into account when assessing whether or not *other* well-established elements of the standard have been breached."[859]

704. Although NAFTA's preamble states that the NAFTA treaty was meant to "ensure a predictable commercial framework for business planning and development", the Claimants are incorrect in extrapolating this to mean that "NAFTA's FET standard undeniable protects an investor's legitimate expectations that a host State will respect the contractual obligations that it

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[857] *MTD Equity Sdn. Bhd. And MTD Chile S.A.v. Republic of Chile*,ICSID Case No. ARB/01/7, Decision of the Ad Hoc Committee on Cancellation, 21 March 2007, No. 67. See also Annex RL-0024, *LESI S.p.A. and Astaldi S.p.A. vs. People's Democratic Republic of Algeria* case ICSID no. ARB/05/3, Award, 1November 2, 2008, No. 151.

[858] CL-128, *Saluka*, ¶ 304; See also RL-105, *EDF (Services) v Romania*, Award, ICSID Case No ARB/05/13 (8 October 2009) at para 217; CL-162, *Parkerings v Lithuania*, Award, ICSID Case No ARB/05/08, (11 September 2007), ¶ 332; Meg Kinnear, "The Continuing Development of the Fair and Equitable Treatment Standard" in Andrea K Bjorklund, Ian A Laird & Sergey Ripinksy, eds, Investment Treaty Law: Current Issues III, Remedies in International Investment Law, Emerging Jurisprudence of International Investment Law (London: British Institute of International and Comparative Law, 2008), ¶ 233.

[859] Patrick Dumberry, "The Protection of Investors' Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105" Journal of International Arbitration 31, no 1 (2014): 47-74, ¶ 72.

has entered into with the investor in a sovereign capacity."[860] Legitimate expectations flow only from specific representations or conduct by the host state; specific assurances do not flow from the FET obligation writ large.[861]

705. For their part, the authors McLachlan, Shore and Weiniger have observed that the protection of legitimate expectations, "within certain carefully defined limits", is a general principle of law anchored in several of the world's most developed legal systems and is linked to the principle of good faith under public international law.[862] 235 These distinguished authors point out that international courts generally focus on three elements in order to determine the existence of legitimate expectations:

> The existence of a promise or assurance attributable to a competent organ or representative of the State, which may be explicit or implicit;
>
> Reliance by the claimant as a matter of fact; and
>
> Reasonableness of the reliance –this cannot be separated from in particular where the promise is not contained in a contract or otherwise stated explicitly.[863]

706. The case of *UAB E Energija v. Latvia* is an example of the above. The court in that case rejected the claim based upon legitimate expectations on the basis of the following legal examination:

> 835. [...] The Tribunal considers, in line with the views expressed by various other tribunals, that for the investor's expectations to be protected by the standard of fair and equitable treatment:
>
> (i) the investor's expectations must be "legitimate"; indeed "reasonable and legitimate";
>
> (ii) more is required than a "basic expectation", as has been referred to in various cases, including Biwater Gauff;
>
> (iii) there must have been reliance by the investor with respect to making the investment; and
>
> (iv) that reliance must be reasonable.[864]

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[860] Reply, ¶ 801.

[861] *Duke Energy*, ¶ 340.

[862] McLachlan, Shore & Weiniger, "International Investment Arbitration: Substantive Principles", Second Edition, Oxford University Press, 2017, pp. 315-316.

[863] McLachlan, Shore & Weiniger, "International Investment Arbitration: Substantive Principles", Second Edition, Oxford University Press, 2017, p. 316

[864] *UAB E Energija (Lithuania) v. Republic of Latvia*,ICSID Case No. ARB/12/33, Award, 22 December 2017, No. 835.

707. As the Claimants themselves argue in their citations to *Thunderbird*, legitimate expectations require four elements:[865]

- Conduct or representations made by the host state specifically to the investor with the intention by the host state to adduce the investment,
- The reliance by the Claimants on such conduct/representations and that they were adduced to make their investment,
- The reliance by the Claimant on these representations was objectively reasonable in the context and circumstances, and,
- The host state's subsequent repudiation of these representations therefore causing damage to the investor.

708. The Claimants argue at paragraph 803 of their Reply claim that *Duke Energy and Frontier Petroleum* "says the opposite of what Mexico seeks to argue." Paragraph 340 of the *Duke Energy Award*, which Mexico quoted in its entirety in its Counter-Memorial, says exactly what Mexico is attempting to argue.

709. The Claimants' interpretation of *Duke Energy* omit part of the quotation. In this regard, the Claimants cite Duke Energy for the proposition that " [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".[866] However, the Claimants have omitted one important sentence from the end of the paragraph they quote, which reads as follows: "In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest."[867]

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865 *Thunderbird*, *Metalclad*, *Waste Management II*, *Mobil Investments*, Patrick Dumberry, "The Protection of Investors' Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105" Journal of International Arbitration 31, no 1 (2014): 47-74 at 50; Patrick Dumberry, "The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105 (Wolters Kluwer, 2013): 127-274

866 Reply ¶ 803

867 Annex RL-097, *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID case, No. ARB/04/19, "Award", August 18, 2008 ¶ 340.

710. This important last sentence makes it clear that all legitimate expectations must flow from a host state's representations or conduct and can never simply arise in the abstract. This is important in the context of the case before this Tribunal because Mexico did not make representations to, or conducted themselves in such a way with, the Claimants so as to give rise to legitimate expectations.

711. At paragraphs 799-802 and 864-865 of their Reply, the Claimants assert that they were entitled to the following legitimate expectations protected under Article 1105:

- Mexico would respect the contractual obligations that it has entered into with the investor in a sovereign capacity,
- Mexico would create and maintain a stable and predictable commercial framework based on the rule of law and not subject to political whims.
- Mexico would follow its laws in how it treated the Claimants and the Claimants' investment,
- Mexico would have an independent judiciary free from political pressure and undue influence,
- Mexico would not subject the Claimants' investments to arbitrary and discriminatory treatment for political motives,
- Mexico's 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, and
- E-Games would continue as a gaming permit holder for 25 years and beyond.

712. These broad-based "expectations" do not meet the requisite legal test to establish that they are protected "legitimate expectations". The Claimants do not even allege that Mexico made these promises of commitments. At most, these were assumptions made by the Claimants.

713. Investors must prove that they, as a fact, that they relied on representations made by a host state to make the decision to invest in that host state. The reliance and therefore representations or conduct must take place temporally *before* the investor makes the decision to invest. The Claimants

have notably failed to indicate specific representations or conduct that gave rise to specific legitimate expectations on the part of the Claimants.

714. At paragraph 866 of their Reply, the Claimants argue that they "derived" legitimate expectations from assurances made by SEGOB in the August 15, 2012 and November 16, 2012 resolutions. Importantly, however, these specific assurances came long after the Claimants decided to invest in Mexico. In fact, when the Claimants decided to invest in Mexico the gaming laws and regulations required a permit to legally operate a casino in Mexico, which neither them nor JVE Monterrey had. From 2005-2008 they operated under the Monterrey Resolution which is not a casino permit, as they now admit in their Reply.

715. A similar issue was before the tribunal in *Thunderbird*, where the investors in that case (also casino-operators in Mexico) argued they had a legitimate expectation based on certain assurances given to them by an administrative body (also SEGOB). The *Thunderbird* tribunal held the investor had not in fact relied on the assurance from SEGOB because the investor's casinos were already operational prior to receiving any assurance.[868] Similar to *Thunderbird*, the Claimants, by their own admission, had been operating since 2005.[869]

716. As indicated by the *Thunderbird* and *Chemtura* tribunals, an investor must do more than rely on representations or conduct which are *subjectively reasonable according to the investor*, but rather, an investor's reliance must be *objectively reasonable as determined by the tribunal*.[870] Mexico, as a fact, did not make any representations and therefore there was no reliance on the part of the Claimants, either subjectively or objectively.

717. The final element required for legitimate expectations is the repudiation by a host state of the prior representations it made to an investor. This step of the test is easily met because Mexico has already proved above that Mexico did not make any representations to the Claimants, and therefore, there were not any representations to repudiate.

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868 Exhibit CL-07, *International Thunderbird Gaming Corporation c. México*, UNCITRAL, Award, January 26, 2006, ¶ 167.

869 Claimants' Memorial on the Merits, ¶¶ 1, 23.

870 Exhibit CL-07, *International Thunderbird Gaming Corporation c. México*, UNCITRAL, Laudo, 26 de enero de 2006, ¶ 151-159; CL-17, *Chemtura v Canada*, ¶ 179.

718. In summary, the Claimants do not have any legitimate expectations because **(a)** the Respondent did not make representations to the Claimants specifically with the intention of inducing the Claimants to invest in Mexico, **(b)** the Claimants did not rely upon any representations of the Mexican government when the Claimants decided to invest in Mexico, **(c)** any reliance on the part of the Claimants would not have been objectively reasonable, and, **(d)** the Respondent did not subsequently repudiate any prior representations and cause damage to the Claimants. There is a complete absence of evidence to establish any of these legal requirements.

c. There has no been no denial of justice

719. The Respondent addressed denial of justice in ¶¶ 620 to 741 of the Counter-Memorial. The Respondent submits that the law applicable to denial of justice, as detailed in the Counter-Memorial, is well developed. The threshold for finding a violation of denial of justice under international law is very high. A denial of justice only occurs when a host state's judiciary, as a whole, behaves in a way that is "notoriously unjust", "egregious", or that "offends a sense of judicial propriety."[871] International tribunals are not courts of appeal for domestic judicial decisions, and as such, more than a mere mistake of misapplication of facts or law by a host state's judiciary is required for a denial of justice to occur.[872] Finally, A claim of denial of justice can only be based on adjudicative measures that are a final, *i.e.*, Claimant must exhaust its rights of appeal unless recourse to further domestic remedies is obviously futile or manifestly ineffective.[873]

720. The Claimants suggest at paragraph 792 that the *Eli Lilly* tribunal confirmed that a 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 1105 notwithstanding that it is not cast in denial of justice terms.'"[874] This, however, ignores the *Eli Lilly* award read as a whole. To this

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[871] Exhibit RL-129, Zachary Douglas, "International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed, ICLQ vol 63, October 2014; *Bridgestone v Panama, Loewen*.

[872] Exhibit RL-115 Pablo Jaraslavsky and Florencia Wajnman, "The *Chevron* Saga: The Denial of Justice Standard under the Fair and Equitable treatment and Customary International Law" European Investment Law and Arbitration Review Online, (16 December 2019), ¶ 283; *Chevron v Ecuador,* Second Partial Award, ¶ 8.24.

[873] Exhibit RL-055 *Eli Lilly and Company v. The Government of Canada*, CIADI Case No. UNCT/14/2, "Submission of the United States of America," March 18, 2016, 20-24; *Lion Mexico Consolidated L.P. v. United Mexican States*, CIADI Case No. ARB (AF)/15/2, "Submission of the United States of America," June 21, 2019, ¶ 6-9.

[874] Reply, ¶ 792, quoting *Eli Lilly and Company v Canada*, ICSID Case No UNCT/14/2, Final Award (16 March 2017), ¶ 223.

end, the tribunal in *Eli Lilly* recognized that NAFTA tribunals are not courts of appeal with respect to domestic courts' application of their own laws, and that to challenge a State's judicial organ's application of its domestic laws, the investor bears the burden to provide "clear evidence of egregious and shocking conduct":

> [T]he Tribunal emphasizes that a NAFTA Chapter Eleven tribunal is not appellate tier in respect of the decisions of the national judiciary. It is not the task of a NAFTA Chapter Eleven tribunal to review the findings of national courts and considerable deference is to be accorded to the conduct and decisions of such courts. It will accordingly only be in very exceptional circumstances, in which there is clear evidence of egregious and shocking conduct, that it will be appropriate for a NAFTA Chapter Eleven tribunal to assess such conduct against the obligations of the respondent State under NAFTA Article 1105(1).[875]
>
> [Emphasis added]

721. The Claimants also argue at paragraph 796 of their Reply that *Waste Management II* does not stand for the proposition that the Claimants may only bring a denial of justice claim. Such a position ignores the fact that the Tribunal in *Waste Management II* confirmed that a denial of justice occurs when a decision by a domestic Court is "clearly improper and discreditable" in the sense that it would "shock or surprise" any impartial observer and would raise "justified concerns as to the judicial propriety of the outcome."[876]

722. It is also important that the Tribunal in *Waste Management II* approved the following test established in *Mondev*:

> In the ELSI case, a Chamber of the Court described as arbitrary conduct that which displays "a willful disregard of due process of law, … which shocks, or at least surprises, a sense of judicial propriety". It is true that the question there was whether certain administrative conduct was "arbitrary", contrary to the provisions of an FCN treaty. Nonetheless (and without otherwise commenting on the soundness of the decision itself) the Tribunal regards the Chamber's criterion as useful also in the context of denial of justice, and it has been applied in that context, as the Claimant pointed out. The Tribunal would stress that the word "surprises" does not occur in isolation. The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the

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[875] Exhibit CL-112, *Eli Lilly and Company v. The Government of Canada*, CIADI Case No. UNCT/14/2, "Final Award," March 16, 2017, ¶ 224.

[876] Exhibit CL-37 , *Waste Management, Inc. v. United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 95. and footnote 43, citing Exhibit CL-17, Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, "Award", October 11, 2002, ¶ 127.

> protection of investments) is intended to provide a real measure of protection. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment. This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities.[877]

723. In the *Thunderbird* case, the tribunal held the investors, also Mexican casino-operators, were not denied justice because the investors were "given a full opportunity to be heard and to present evidence at the Administrative Hearing, and that it made use of this opportunity."[878] This is similar to the situation of the Claimants who, despite not achieving their desired successes before The Respondent's judiciary, were not denied justice or due process because they were afforded a chance to speak and be heard.

724. Specifically, the Claimants allege that the Respondent's judiciary violated their "due process rights by denying" them the "opportunity to present evidence or argument in support of the validity of the November 16, 2012 Resolution."[879] However, this argument misconceives the applicable legal standards.

725. Although the right to present evidence flows from the right to due process inherent in the protections against a denial of justice, the right to present evidence is not unlimited. The right to present evidence prevents a court from "refusing to hear the party interested, or to allow him [an] opportunity to produce proofs."[880] Therefore, a right to present evidence is not a right to be able to present any evidence at any time and have the court accept it as material.

726. This is similar to how the Claimants misconceive and misapply the requirement on the Respondent's judiciary to provide adequate reasons.[881] The Claimants argument amounts to an allegation that a denial of justice occurred because they did not receive the reasons they wanted and the Respondent's judiciary did not accept the arguments and evidence the Claimants put

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877 Exhibit CL-17, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 127 (footnote omitted).

878 Thunderbird, ¶ 198. Annex CL-07, *International Thunderbird Gaming Corporation v. México*, UNCITRAL, Award, January 26, 2006 ¶ 198.

879 Reply, ¶ 767.

880 *Cotesworth & Powell; Cutter Case*, Mr Bayard, Secretary of State, to Mr Jackson, Minister to Mexco (1886) 2 Moore Digest, 228, 229; *Ambatielos Claim* (Greece v UK).

881 Discussed below.

forward. This is similar to the investor's arguments in *GEA Group Aktiengesellschaft v Ukraine* where the investor argued it had suffered a denial of justice because the domestic courts had failed to take the investor's arguments into account.[882] In that case, the tribunal concluded that the courts had not failed to take the investor's arguments into account but had rather merely rejected the investor's arguments.[883]

727. Just because the Respondent's judiciary has rejected the Claimants arguments does not mean that the Respondent's judiciary did not allow the Claimants to present evidence. The Claimants' argument ignores the fact that, in any adversarial judicial process, not all submissions will be accepted and one or more of the participating parties will be disappointed in the outcome. This is one of the reasons that international tribunals presume that courts have acted properly unless the claimant can rebut that presumption. As confirmed in *Chevron v. Ecuador*:

> 8.40 […]The Tribunal emphasizes that the legal test for denial of justice requires the claimant to prove objectively that the impugned judgment was "clearly improper and discreditable", with the failure by the "national system as a whole to satisfy minimum standards". There have been many shocks and surprises caused by court judgments in legal history, but without much more, amounting to discreditable improprieties and the failure of the whole national system, such judgments do not amount to a denial of justice.
>
> [Emphasis added]
>
> 8.41 A claimant's legal burden of proof is therefore not lightly discharged, given that a national legal system will benefit from the general evidential principle known by the Latin maxim as *omnia praesumuntur rite et solemniter esse acta donec probetur* in contrarium. It presumes (subject to rebuttal) that the court or courts have acted properly […]
>
> 8.42 This general principle subsumes a second principle, namely that a court is permitted a margin of appreciation before the threshold of a denial of justice can be met.[884]

728. The Claimants have simply failed to provide evidence capable of overcoming the presumption that domestic decisions are in conformity with national law. This is an onus that falls squarely upon the Claimants.

729. Even if this Tribunal were to find that Mexico's judiciary conducted itself in a way that was procedurally or substantively deficient, these errors do not constitute acts that are "notoriously

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882 Exhibit RL-060, *GEA Group Aktiengesellschaft v Ukraine*, ICSID Case no ARB/08/16, Award, 31 March 2011.

883 Exhibit RL-060, GEA Group Aktiengesellschaft v Ukraine, ¶ 318.

884 Exhibit CL-199, *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador (II)*, CPA Case No. 2009-23, "Second Partial Award on Track II", August 30, 2018, ¶¶ 8.40-8.42.

unjust", "egregious", or that "offend a sense of judicial propriety" and therefore cannot be considered a breach of the minimum standard of treatment obligation embodied in Article 1105.

730. At paragraph 659 of their Memorial, the Claimants quote *Siag v Egypt*, arguing that "an egregious denial of justice"[885] occurred because of the "Egyptian government's stubborn refusal to comply with court rulings."[886] In this case, SEGOB implemented a judicial ruling.

731. The Claimants' references to *Siag v Egypt* do the opposite of helping them prove their case because the facts of this case and of *Siag* are so dissimilar. In *Siag*, the executive of the Egyptian government had ignored "no fewer than eight rulings in Claimants' favour"[887] constituting "a twelve-year denial of justice."[888] The Claimants attempt to equate "SEGOB's failure to respect the injunction" to twelve years of Egypt's government explicitly ignoring the Egyptian judiciary's repeated decisions must fail because they are just not factually similar.

732. As explained at ¶¶ 325 to 341 of the Counter-Memorial, the injunction did not prevent SEGOB from exercising oversight and surveillance powers, and SEGOB was not prevented from exercising its verification powers. Moreover, unlike the facts in *Saig*, the Respondent implemented the ruling issued by the Sixteenth Court in Amparo 1668/2011, dated March 10, 2014. The revocation of the Claimants' was valid and it was thereafter illegal to continue operating the casinos under those conditions.

2. The Respondent did not violate its obligation to afford the Claimants Full Protection and Security as circumscribed by the minimum standard of treatment at international law

733. Similar to the Claimant's disguised judicial expropriation claim, the Respondent submits that the Claimant's stand-alone full protection and security claim is another disguised denial of justice claim the Claimant is deploying an effort to avoid the high legal and evidentiary requirements of full protection and safety standard.

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[885] Exhibit RL-065, *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, "Award", June 1, 2009, ¶ 455.

[886] Memorial on the Merits, ¶ 659.

[887] Memorial on the Merits, ¶ 659, citing to RL-065, *Siag v Egypt*, ¶ 455.

[888] Exhibit RL-065, *Siag v Egypt*, ¶ 453.

734. Under full protection and security, the *standard* of protection speaks to the care a host State must give to an investor under the treaty.[889] The *scope* of protection speaks to the content of a State's primary obligation.[890]

735. The Respondent submits that standard of full protection and security is due diligence. Moreover, under the established investment arbitral jurisprudence, the scope of full protection and security is only about an investor's physical security. Nothing more.

736. Investment cases such as *AAPL v. Sri Lanka*,[891] *AMT v. Zaire*[892] and *Wena Hotels Ltd v. Egypt*[893] are all concerned about destruction to persons and property during internal armed conflict, riots and acts of violence. In other words, the primary obligation of full protection and security of a host State is to prevent an investor from harms occurred in physical violence and harm.

737. Restricting full protection and security to an investor's physical security makes sense. As McLachlan, Shore and Weiniger explain, investment treaties provide fair and equitable treatment and the protection from expropriation, treating the full protection and security standard the same as the other two would render it a mere duplication of the other two primary obligations.[894] The authors went on to state that:

> A failure in full protection and security is only one of the grounds upon which the minimum standard of treatment may be invoked at customary international law. For this reason, both NAFTA and the US model BIT (in a formulation now also widely exported into other free trade agreements) state that the minimum standard of treatment at customary international law includes both fair and equitable treatment and full protection and security. The incorporation of both of these standards into an investment treaty requires an interpretation in accordance with the principle of effectiveness or effet utile

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[889] RL-118, McLachlan, Campbell, Shore Laurence and Weiniger, Matthew, *International Investment Arbitration: Substantive Principles* 2nd Edition (Oxford University Press, 2017) pp. 331-32.

[890] Id., pp. 334-36.

[891] CL-251, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990.

[892] CL-311, *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997.

[893] CL-293, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000.

[894] RL-118, McLachlan, Matthew, Shore, Laurence and Weiniger, Matthew, *International Investment Arbitration: Substantive Principles* 2nd Edition (Oxford University Press, 2017), p. 335.

> that accords a distinct meaning to each. If the terms were synonymous, the inclusion of both would be otiose.[895]

738. This conclusion is supported by *Suez v. Argentina*.[896] Like the Claimants in this case, Suez argued that the full protection and security extended to legal protection. In that context, the Tribunal wrote as follows:

> Traditionally, the cases applying full protection and security have dealt with injuries to physical assets of investors committed by third parties where host governments have failed to exercise due diligence in preventing the damage or punishing the perpetrators. In the present case, the Claimants are attempting to apply the protection and security clause to a different a different type of situation. They do not complain that third parties have injured their physical assets or persons, as in the traditional protection and security case. They are instead asserting Argentina denied it protection and security by dint of the auctions which Argentina itself took in exercise of its governmental powers against AASA's contractual rights under the Concession Contract and the governing legal framework. This Tribunal must therefore decide whether they treaty provisions apply to the Claimants' situation.[897]

739. The Tribunal in Suez then went on to reject the notion that full protection and security extends to legal protection:

> [T]his Tribunal is of the view that the stability of the business environment and legal security are more characteristic of the standard of fair and equitable treatment, while the full protection and security standard primarily seeks to protect investment from physical harm.[898]

740. If the Claimants' interpretation is accepted, the full protection and security standard will provide the same due diligence that fair and equitable treatment provides in NAFTA Article 1105(1). The Claimants' interpretation effectively erodes the NAFTA Parties' clear intention to treat full protection and security differently from fair and equitable treatment.

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[895] *Id.*, pp. 334-35.

[896] CL-332, Suez, *Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic,* ICSID Case No. ARB/03/19, Decision on Liability, 30 June 2010.

[897] *Id.*, ¶ 165.

[898] *Id.*, ¶ 173.

741. The Respondent submits that this interpretation of full protection and security Note of Interpretation issued by the Free Trade Commission 31 July 2001.[899] NAFTA tribunals, since the FTC issued the Interpretation, have all accepted the official interpretation.[900]

742. For example, the tribunal in *ADF v United States of America* held that "The FTC Interpretation of 31 July 2001 specifies that the 'treatment in accordance with international law' referred to in Article 1105(1) is the minimum standard of treatment of aliens prescribed by customary international law."[901] This approach has been echoed by scholars confirming that "the minimum standard and the full protection and security standard provides the same level of protection … and the standard 'does not require the treatment that would be added or that would exceed the requirements of the minimum standard of international customary law in the treatment of aliens.' "[902]

743. This is relevant, because the Claimants quote over fifteen non-NAFTA international arbitration decisions to support their argument that NAFTA's Article 1105 includes legal security.[903] However, because the Full protection and security provision under examination in those decisions was not bound by the MST like NAFTA's Article 1105(1) is, these decisions do not aid this Tribunal determine the scope of legal protections for an full protection and security standard circumscribed by customary international law. Article 1105(1), which includes the full

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899 Exhibit RL-054, North American Free Trade Agreement, Notes of Interpretation of Certain Chapter 11 Provisions. NAFTA Free Trade Commission, July 31, 2001, http://www.sice.oas.org/tpd/nafta/commission/ch11understanding-e.asp. Accessed on 22 November 2018.

900 Christoph Schreuer, Full Protection and Security, Journal of International Dispute Settlement (2010), pp 1-17 at 11; *Pope & Talbot v Canada*, Award in Respect of Damages, 31 May 2002 (2002) 41 ILM 1347, paras 17–69; Mondev Intl Ltd v United States of America, Award, 11 October 2002, 6 ICSID Rep 192, paras 100ff; *United Parcel* Service of America Inc v Canada, Award, 22 November 2002, 7 ICSID Rep 288, para 97; ADF Group Inc v United *States of America*, Award, 9 January 2003, 6 ICSID Rep 470, paras 175–8; *Loewen Group, Inc and Raymond L.* Loewen v United States of America, Award, 26 June 2003, 7 ICSID Rep 442, paras 124–8; Waste Management, Inc. *v United Mexican States*, Award, 30 April 2004 (2004) 43 ILM 967, paras 90–1; *Methanex v United States*, Award, 3 August 2005, Part IV, Chapter C, paras 17–24; *Thunderbird v Mexico*, Award, 26 January 2006, paras 192, 193. See also *United Mexican States v Metalclad Corp*., Judgment, Supreme Court of British Columbia, 2 May 2001, 5 ICSID Rep 236, paras 61–5.

901 Exhibit CL-18, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, "Award", January 9, 2003, ¶ 168.

902 Orsat Miljenić, Full Protection and Security Standard in International Law, Pravni VJesnik God 35 BR 3-4, 2019 at 44, quoting the FTC Interpretive Declaration.

903 *See* footnote 2121 of the Reply below.

protection and security obligation, has as its ceiling of protection the protections offered by the MST at customary international law. And therefore, it only protects an investor's physical security.

744. The exact scope of physical protection and security that a host state must provide to an investor has yet to be firmly decided upon by international tribunals and scholars.[904] However, at a minimum, a host state must at least make a serious attempt at resolving security-related issues.[905]

745. The Claimants' argument that Mexico failed to afford the Claimants physical protection and security relies upon an inaccurate framing of the events surrounding the closing of the Claimants' casinos. The Claimants characterize the lawful seizure of their casinos by creditors as an illegal seizure of their casinos' physical premises and physical hardware. Moreover, the Claimants elected not to participate in judicial proceedings initiated by the landlords to recover their property.

D. México did not breach NAFTA Article 1102 (National Treatment)

746. NAFTA Article 1102 requires host states to afford treatment to investors and investments of the other two NAFTA states parties that is no less favourable than the treatment the host state affords to its own nationals and investments owned by its own nationals. The Respondent has addressed the law applicable to Article 1102 at ¶¶ 802 to 840.

747. The Claimants discrimination claim is flawed because it disregards the fundamental principle underlying an assessment of discrimination-- the treatment at issue must be assessed between situations that are "comparable" so that a fair comparison can be made. This is the basis for the term "comparators", which refers to the points of comparison that are used in a discrimination analysis. In the context of investments, a broad range of comparability factors could be relevant. They will be specific to the facts and circumstances of the investments being compared. If a relevant factor is omitted from the comparison, the construction of the comparators will be defective and a fair comparison will not be possible.

748. The "in like circumstances" requirement, demands that the Claimants and the comparators be in like circumstances in the context of the measures. This is the only way to ensure the

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[904] It is still not settled whether the host state's level of development impacts the analysis or if it is enough that a host state "tried its hardest" to resolve the security-related issue but was unable.

[905] Some tribunals hold the standard is an obligation of conduct while others argue it is an obligation of a particular result.

construction of appropriate comparators required to ensure a fair comparison can be undertaken and an accurate determination of discrimination made.

749. In the case of complex investments like the ones at issue in this arbitration, care must be taken when identifying comparators against which to undertake a fair comparison. The more complex an investment, the greater the number of relevant comparability factors. Moreover, measures affecting such investments, by their very nature, may result in superficial differences in the treatment of the investments being compared. However, the existence of such differences does not mean that the treatment is discriminator. As explained below, such differences will not be discriminatory if they are rationally connected to differences in comparability factors that reflect legitimate regulatory policies and objectives.

750. In this context, the Respondent reiterates its long-standing position on national treatment, which is fully supported by the other two NAFTA parties, summarized in its Article 1128 submission in Mercer v. Canada:

> The NAFTA Parties have repeatedly made submissions to common effect on the proper interpretation and application of NAFTA Articles 1102 and 1103, both in their own submissions in cases where they are the disputing Party, and in their Article 1128 submissions in cases where one of the other Parties is the disputing Party. Mexico, Canada, and the United States have consistently maintained that:
>
> • the national treatment obligation is intended to prevent discrimination against investors of the other Parties (and their investments) on the basis of nationality;
>
> • the claimant bears the onus of proving all of the items required to establish a breach of the national treatment obligation, and this onus does not shift to the respondent State simply because there is an apparent difference between the treatment accorded to the claimant and the treatment accorded to a domestic or third-party investor (or investment);
>
> • the items of the Claimant are required to establish, […] are the following:
>
> i) that the respondent state has accorded "treatment" (i.e., a measure or measures, as defined in Article 201) to the claimant;
>
> ii) that such treatment is less favorable than the treatment accorded to domestic investors [and] their investments; and
>
> iii) that the less favorable treatment of the claimant (or its investment) was accorded "in like circumstances" to treatment accorded to domestic investors (or their investments) that the claimant identifies as comparators; or, put another way, that the claimant and the comparator(s) must be in like circumstances in the context of the measure(s) at issue.
>
> Mexico agrees with the previous submissions of the United States and the current submissions of Canada that the existence or absence of "like circumstances" requires a careful analysis of all of the relevant facts and circumstances. Mexico observes that there may be cases where the claimant and the domestic comparators do not operate in the same business sector but are none the less in like circumstances in the context of the measure(s)

at issue (e.g., a discriminatory tax on foreign-owned enterprises). However, there will also be cases where the claimant and the domestic comparator(s) are competitors but are not in like circumstances in the context of the treatment at issue upon taking into account (inter alia) differences in the operations of the comparators (or their investments), the applicable regulatory regime, contractual terms, relative timing of the measures at issue, environmental conditions, specific market conditions, local needs or requirements, and all manner of other differences that may serve to distinguish the treatment that was accorded on either side.

Mexico agrees with Canada that the analysis under NAFTTA Articles 1102 and 1103 is an analysis of the "treatment" accorded to the claimant versus the "treatment" accorded to domestic or third-party investors. The question is whether the "treatment" was accorded in like circumstances, not whether the "investments" are in like circumstances.

Mexico also agrees with Canada that a Claimant must do more than prove a prima facie violation of Articles 1102 and 1103. The burden does not shift to the respondent state to defend the appearance of differential treatment on rational governmental policy grounds. It is the claimant's burden to prove that it has been accorded less favorable treatment in like circumstances to other domestic or third-party investors on the basis of nationality. Moreover, NAFTA tribunal should accord significant deference to governmental policy making. It is not the role of a tribunal to sit retrospectively in judgment against the discretionary exercise of sovereign power "not made irrationally and not exercised in bad faith."

Mexico further affirms that a NAFTA tribunal should only find a breach of Article 1102 where the impugned measure facially discriminates on the basis of nationality, or where it properly can be inferred in all of the circumstances that a facially neutral measure has the effect of discriminating against foreign investors as a class with no rational or good faith policy objectives. Mexico adds that such a finding will be mostly unlikely in situations where the treatment accorded to domestic investors is not materially different to that accorded to other foreign investors, particularly other investors of the claimant's home State.[906]

[Emphasis added]

751. In assessing whether the Claimants haven proven all of the items required to establish a breach of the national treatment obligation, the Respondent submits that:

- "like circumstances" cannot be determined on the basis that the proposed comparators operate in the same economic sector;[907]

[906] Exhibit RL-069, Submission of Mexico Pursuant to Article 1128 of NAFTA in *Mercer International Inc v. Government of Canada*, CIADI Case No. ARB(AF)/12/3, May 8, 2015, ¶¶ 11-15.

[907] *Merrill and Ring Forestry L.P. v. Canada*, CIADI Case UNCT/07/1, "Award," March 31, 2010, ¶ 88; *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, CIADI Case No. ARB(AF)/12/1, "Award (Redacted)," August 25, 2014, ¶ 8.15.

- The legal regime applicable to the proposed comparators is a significant factor. The Claimants and the proposed comparator must be subject to "like legal requirements" in order to be in "like circumstances;[908] and
- The "like circumstances" with any comparator must be considered in the context of the specific measures.[909]

752. The Claimants have failed to establish that either Producciones Móviles or Petolof are comparators in like circumstances. The many differences between these proposed comparators and the Claimants have been detailed in Sections II.P, II.R, II.T of the Counter-Memorial, and are further expanded in the facts section of this Reply. . Respondent then refers very succinctly to some of the reasons why Producciones Móviles and Petolof are not in similar circumstances as E-Games.

753. In the first place, the permit granted to Producciones Móviles was not a consequence of Resolution 2009-BIS, which was the official letter through which the subsequent acts of SEGOB emanated, culminating in the granting of the official letter of Permit Holder-BIS. The letter of Permit Holder-BIS was revoked in strict compliance with Amparo 1668/2011, as mentioned in section F above. Consequently, the fact that the E-Games permit and the Producciones Móviles permit had certain similarities is irrelevant, since there was never a court ruling ordering SEGOB to declare non-subsistent or revoke the Producciones Móviles permit. The declaration of non-subsistence of the office of Permit Holder BIS was a consequence of compliance by SEGOB, within the framework of its powers, of an order issued by the Sixteenth Judge. Mr. Lazcano's explanation in his second expert report emphasizes the lack of a third actor (E-Mex in the case of Producciones Móviles) that disagreed and successfully fought the permit under which said company conducted its operations business:

> The similarity that existed between E-Games and Producciones Móviles ended at the moment in which the Federal Justice ruled that the rights of E-Mex had been violated by the administrative acts granted in favor of E-Games, considering them in violation of their

[908] *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, "Award (Redacted)," January 12, 2011, 166-167; and *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, CIADI Case No. ARB(AF)/12/1, Award (Redacted), August 25, 2014, ¶ 8.40.

[909] *Mercer International Inc v. Government of Canada*, CIADI Case No. ARB(AF)/12/3, "Award," March 6, 2018, ¶¶ 7.18-7.21.

> individual guarantees, not so the administrative acts granted in favor of Producciones Móviles (Producciones Móviles, for example, never requested to be an "Independent Operator"), therefore, it ordered that they be declared invalid by SEGOB.[910]

754. Regarding Petolof, the Respondent explained in detail in section M above that Petolof and E-Games are not in similar circumstances for the following reasons: (i) the legal regime to which they were subject was different; (ii) the contractual relationship between E-Mex and E-Games and the joint venture agreement between Petolof and EDN were substantially different; (iii) the issuance of the Petolof Resolution was the consequence of an injunction and its permission was the consequence of a sentence issued by an administrative court; (iv) the declaration of non-subsistence of the E-Games permit was not an act that SEGOB had decided on its own, but was the consequence of complying with a court ruling.

E. México did not breach NAFTA Article 1103 (Most Favored Nation Treatment)

755. The Claimants argue they are able to import more favourable standards of investment protections through NAFTA's Article 1103 – MFN clause. Specifically, they attempt to import:

- An unqualified and autonomous fair and equitable treatment standard from the Mexico-Denmark, Mexico-Austria, Mexico-Australia- and Mexico-Czech Republic BITs.[911]
- A prohibition of unjustifiable, unreasonable or discriminatory measures from the Mexico-Switzerland, Mexico-Netherlands, Mexico-Austria, Mexico-Italy, and Mexico-Finland BITs.[912]
- Inclusion of denial of justice in the FET standard from the CAFTA-Mexico treaty, Mexico-Panama FTA, Pacific Alliance Additional Protocol, and the CPTPPP.[913]

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910 RER-5, Segundo informe pericial del Sr. Alfredo Lazcano Sámano, ¶ 111.

911 Mexico-Denmark BIT, Article 3(1); Mexico-Austria BIT, Article 3(1); Mexico-Australia BIT, Article 4(1); Mexico-Czech Republic BIT, Article 2(3).

912 Mexico-Switzerland BIT, Article 4(1); Netherlands-Mexico BIT, Article 3(1); Austria-Mexico BIT, Article 3(2); Italy-Mexico BIT; Finland-Mexico BIT, Article 2(3).

913 CAFTA-Mexico, Article 11.3(2); Mexico-Panama FTA, Article 10.5(2); Pacific Alliance Additional Protocol, Article 10.6(2); CPTPP, Article 9.6 (2).

- An obligation to accord sympathetic consideration to E-Games' permit requests from the Mexico-Finland BIT.[914]

756. As set out in detail in the Counter-Memorial, Article 1103 does not allow for the importation of standards from other treaties. The Respondent's detailed legal submissions on this issue can be reviewed at ¶¶ 842 to 858 of the Counter-Memorial.

757. The Claimants cite the *Pope & Talbot* tribunal's Award on the Merits of Phase 2 for the proposition that "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."[915] It is important that this Tribunal recognize that the *Pope & Talbot* Award on the Merits of Phase 2 was issued *before* the FTC Interpretation.[916] When the same tribunal revisited the issue later on in the proceedings, they did not determine that the investor was able to import a higher FET provision into the NAFTA, finding a violation on the original NAFTA provision and therefore importation unnecessary. The tribunal specifically stated that "it is unnecessary to consider issues relating to Articles 1102 or 1103 which have been raised following upon the Interpretation. The Tribunal accordingly does not do so."[917]

758. The Claimants are unable to provide any example where a NAFTA tribunal has actually held that an investor could import substantive protections via Article 1103 despite claiming the opposite. Moreover, the Claimants' citations to non-NAFTA cases where investors imported investment protections pursuant to an MFN clause are unapplicable in this case. As the *Pope & Talbot* tribunal made clear, the FTC's 2001 Note of Interpretation clarified their determination of whether an investor could avail themselves of the MFN clause and thus, tribunals' interpretations of non-NAFTA treaties are not an effective interpretive aid.[918]

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914 Mexico-Finland BIT, Article 2(4).

915 Reply, ¶ 1044; CL-210, *Pope and Talbot*, Award on the Merits of Phase 2, ¶ 115.

916 The Award on the merits of phase 2 is dated April 10, 2001. The Interpretive Note of the NAFTA Free Trade Commission is dated July 31, 2001.

917 CL-169, *Pope and Talbot v. The Government of Canada*, CNUDMI, "Award in Respect of Damages", May 31, 2002, ¶ 66.

918 Annex CL-318, *UP and CD Holding Internationale v Hungary*, Caso CIADI No. ARB/13/35, "Decision on Preliminary Issues of Jurisdiction", March 3, 2016 ¶ 173.

759. The Claimants also argue that "under the 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 in line with the *Neer* case from 1926 …. because that minimum standard had evolved."[919] However, as already stated, the 2001 *Pope & Talbot* decision was issued *before* the NAFTA FTC's 2001 Interpretation and the tribunal changed their reasoning regarding Article 1103 *after* the FTC issued their Interpretation.[920]

760. The Claimants argue at paragraph 1047 of their Reply, that the *ADF* and *Chemtura* tribunals "declined to apply NAFTA Article 1103 …[but] both awards found that Article 1103 *could be* used to offer better treatment than that otherwise provided under Article 1105."[921] However, this is false and, very importantly, the *ADF* and *Chemtura* tribunals did not firmly establish that investors could use Article 1103.

761. The *Chemtura* tribunal turned "to the alternative claim that the Claimant's investment was treated in breach of a more favorable FET clause through Article 1103 of NAFTA. The Respondent as well as the United States and Mexico in their Article 1128 interventions … firmly oppose of the possibility of importing a FET clause from a BIT concluded by Canada. The Tribunal can dispense with resolving this issue as a matter of principle."[922] Therefore, the tribunal clearly turned their mind to the issue but declined to decide one way or the other.

762. The Claimants also argue the MST present in NAFTA Article 1105 does not prevent the importing of higher standards of protection because the *Chemtura* took "into account the evolution of [the MST standard under] international customary law as a result *inter alia* of the conclusion of numerous BITs providing for fair and equitable treatment"[923] However, it is one thing to show that the MST is capable of evolution, which the Claimants have done, and quite another to show that the MST has evolved to a particular standard, which the Claimants have not done.

763. Additionally, the Claimants state that "the *ADF* tribunal found that there was no proof that the fair and equitable treatment standard in treaties differed from the minimum standard of

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[919] Reply, ¶ 1046.

[920] CL-169, *Pope & Talbot*, Award in Respect of Damages (31 May 2002), ¶ 66.

[921] Reply, ¶ 1047; citing *Chemtura*, "Award", ¶ 236; and CL-18 *ADF*, Award ¶ 194

[922] *Chemtura*, ¶ 235 [underline added].

[923] Reply, ¶ 1047. Citing *Chemtura*, Award ¶ 236

treatment."[924] The Claimants cite paragraph 236 of *ADF* for this proposition, however *ADF* only has 200 paragraphs, and it is unclear what exactly the Claimants were attempting to cite.

764. At paragraph 1048 of their Reply, the Claimants specifically draw attention to the fact that "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."[925] The Respondent is unsure what the Claimants' intent was in drawing the Tribunal's attention to this fact. It is the Respondent's position that the FTC's Interpretation bars importing a higher FET standard because the *Pope & Talbot* tribunal ruled that an investor could use NAFTA's MFN clause to import a higher FET standard *before* the FTC's Interpretation but did not make the same holding *after* the FTC's Interpretation. This further demonstrates that NAFTA Article 1103 is not applicable to the case before this Tribunal.

924 Reply, ¶ 1047.

925 Reply, ¶ 1048.

IV. DAMAGES

765. The Claimants insist on their extraordinary claim for damages, notwithstanding the clear evidence that approximately half of the amount claimed corresponds to the Expansion Projects that had either failed before the alleged expropriation measures or were in very early stages of planning and definition. The other half of the amount claimed is the product of a valuation in such a way that it considerably exaggerates the value of the Claimants' Casinos.

766. The main flaws in the Claimants' claim for damages will be explained in the following sections. The Respondent will address issues such as the lack of specificity of the claim, in particular, if it is presented under Article 1116 or 1117. Next, some relevant aspects of the applicable standard of compensation and the standard of proof will be discussed. Subsequently, it will be shown that the damage claim related to the Expansion Projects does not comply with the principle of reasonable certainty that applies to all damage claims. Immediately after, the issues of causation and contributory fault will be addressed and will conclude with a section on the valuation of the Claimants.

767. The Respondent files with this brief a Second Expert Report from RIóN, which responds to the criticisms presented by BRG in its Second Expert Report. The section entitled “Valuation” summarizes its main conclusions, however, the Respondent invites this Tribunal to review its second report carefully.

768. Nothing in this section should be construed as a dismissal of the defense on the merits or an acceptance of Respondent's liability.

A. The Claimants still do not specify which damages they claim on their own behalf and which on behalf of the companies they control.

769. As explained in the Counter-Memorial, the Respondent does not dispute that the Juegos and E-Games Companies (the Mexican Companies) are protected investments under NAFTA or that they collectively have legal standing to file a claim on their behalf under Article 1117, in view

of the Tribunal's decision in the jurisdiction phase. The Respondent also does not dispute that the Claimants' shares in those companies constitute an investment under the Treaty and, therefore, that they have legal standing to bring a claim on their own behalf. However, it was explained that the nature of a claim under section 1116 is different from the nature of a claim under section 1117 and, therefore, the type of damages that can be claimed in each case are also different.

770. In their Reply, the Claimants simply ignored this argument.

771. As eloquently explained by the United States in a recent 1128 brief filed in another case, Articles 1116 and 1117 serve to address different types of claims. Under the former, an investor may claim damages suffered directly by him as a result of a violation of the Treaty. Article 1117, for its part, allows an investor to claim damages suffered by a company incorporated in the host country as long as it is directly or indirectly owned or controlled by him. In other words, article 1117 covers damages suffered indirectly by the investor through the company in which they invested.[926]

772. As also explained there, the distinction between articles 1116 and 1117 was deliberate and obeys two principles of customary international law. The first is that a shareholder cannot claim losses suffered directly by the company of which he is a shareholder, because international law has recognized the principle of domestic law that establishes that a company has its own legal personality:

> 17. The distinction between Articles 1116 and 1117 was drafted purposefully in light of two existing principles of customary international law addressing the status of corporations. The first of these principles is that no claim by or on behalf of a shareholder may be asserted for loss or damage suffered directly by a corporation in which that shareholder holds shares. This is so because, as reaffirmed by the International Court of Justice in *Diallo*, "international law has repeatedly acknowledged the principle of domestic law that a company has a legal personality distinct from that of its shareholders." As the *Diallo* Court further reaffirmed, quoting Barcelona Traction: "a wrong done to the company frequently causes prejudice to its shareholders." Nonetheless, "whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose

[926] Exhibit CL-299, United States Brief 1128 filed in the case of Alicia Grace et. to the. c. Mexico, ICSID Case No. UNCT/18/4, on August 24, 2021.

> rights have been infringed." Thus, only direct loss or damage suffered by shareholders is cognizable under international law.[927]
>
> [Énfasis añadido]

773. The *second* principle, as explained by the United States, is that a person cannot bring an international claim against the State of which he is a national. Thus, a situation could arise in which the investor decides to make his investment through a company incorporated in the host country, and is left with no legal remedy to claim damages suffered directly by the company. He would not be able to claim damages directly under section 1116 because the damage was suffered by the company, and the company would not be able to claim damages in an international forum because it cannot bring a claim against the State of which it is a national. Article 1117 was devised to solve this problem:

> 20. The second principle of customary international law against which Articles 1116 and 1117 were drafted is that no international claim may be asserted against a State on behalf of the State's own nationals (discussed above as part of the "dual nationality" discussion).
>
> 21. Under these background principles, a common situation is left without a remedy under customary international law. Investors often choose to make an investment through a separate enterprise, such as a corporation, incorporated in the host State. If the host State were to injure that enterprise in a manner that does not directly injure the investor/shareholders, no remedy would ordinarily be available under customary international law. In such a case, the loss or damage is only directly suffered by the enterprise. As the investor has not suffered a direct loss or damage, it cannot bring an international claim. Nor may the enterprise maintain an international claim against the State of which it is a national under the principle of non-responsibility.[928]

774. All three NAFTA Parties agree that a claim under Article 1116 only covers damages suffered directly by the investor and that any damage suffered by a company owned or controlled by the investor can only be claimed under Article 1117. Since it is a common and reiterated position of the NAFTA Parties, this Tribunal must take it into consideration in accordance with Article 31(3)(a) and (b) of the Vienna Convention.[929]

775. By virtue of these principles, background and the common position of the NAFTA Parties, it is clear that a self-employment claim under Article 1116 in this case would be limited to the

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927 *Id*., ¶ 17. *See* also Exhibit RL-163, Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), 2010 I.C.J. 639. Exhibit RL-164, Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain), 1970 I.C.J. 3 (Feb. 5).

928 Exhibit CL-299. United States Brief 1128 filed in the case of Alicia Grace et. to the. c. Mexico, ICSID Case No. UNCT/18/4, August 24, 2021, ¶¶ 20-21

929 *Id.*, ¶ 16.

value of the Claimants' shareholding in the Mexican Companies since the Claimants cannot claim, under article 1116, damages suffered by the Mexican Companies. Likewise, it is noted that the Claimants have not presented a quantification of the damage allegedly suffered directly as shareholders of the Mexican Companies. The damages they claim are the damages suffered jointly by the Mexican Companies and, therefore, must be presented under Article 1117.

776. It should also be noted that, in the jurisdiction phase, the Tribunal determined that the Claimants do not own said companies.[930] There are therefore other shareholders and creditors who would also have rights over the assets of the Mexican Companies. Therefore, it would be inappropriate for the Claimants to directly receive compensation equal to the full fair market value (FMV) of the Mexican Companies. This is one of the reasons why section 1135(2)(b) requires that when a claim is brought under section 1117 the damages must be paid directly to the company.

777. In their Reply, the Claimants simply ignored the Respondent's argument.

B. Compensation standard and burden of proof

778. In their Memorial, the Claimants noted that the applicable standard of compensation for all violations was full reparation, citing the *Chorzów* case to explain the content of that standard, saying that "reparation must, to the extent possible, eliminate all the consequences of the unlawful act and restore the situation that, in all probability, would have existed if the act had not occurred."[931]

779. In the Counter-Memorial, the Respondent acknowledged that the full reparation standard was applicable to determine damages arising from a violation of the national treatment (article 1102) and minimum standard of treatment (article 1105) provisions. It also pointed out that, although it was debatable whether the compensation measure established in Article 1110 was applicable in cases of illegal expropriation, it did not make sense to enter into that discussion because the Claimants had applied it, that is, they estimated the damages as the VJM of the investment immediately prior to expropriation. This is a tacit acceptance that the compensation measure specified in Article 1110 is compatible with the standard of full reparation in the

930 Partial Award, ¶ 203.

931 Memorial on the Merits, ¶ 795-767. Reply, ¶ 1051.

circumstances of this case. Therefore, there does not appear to be any dispute as to how to determine damages in this case.

780. However, there is uncertainty as to the content of the full remedy standard and this is highly relevant to part of the damage claim. As explained in the Counter-Memorial, the legally relevant damage is delimited by the principles of causality and reasonable certainty. Under the first, Claimants must prove that the damages they claim were caused by the alleged violations. According to the second, damages must be proven on a basis of reasonable certainty, since absolute precision is impossible for purposes of determining *quantum*.

781. The applicability of these two principles is implicit in the Claimants' proposed full reparation standard since, paraphrasing *Chorzow*, the objective of the standard is to eliminate the consequences of the wrongful act and restore the situation that, in all probability, would have existed had it not been for the violation.[932] The concept of causality is implicit in the reference to the elimination of "the consequences of the wrongful act". The principle of reasonable certainty is implicit in the reference to the "situation that in all probability would have existed" but for the violation. Accordingly, under the applicable compensation standard, damages cannot include damages that were not caused by the infringing measures or damages arising from an unlikely and/or speculative but-for scenario. The full reparation standard does not imply re-establishing the situation in which the investors anticipated being in accordance with their expectations or good wishes, but rather putting them in the situation in which they would have been in all probability had it not been for the violating measure.

782. On the other hand, the Claimants allege in the Reply that the applicable standard of proof in the context of damages is that of "balance of probabilities". They also allege that they have met the burden of proving their damages on a prima facie basis under this standard, and accuse Mexico of ignoring that it has the burden of proving the facts underlying its defense to the damages claim.[933] Respondent evidently does not share this position.

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932 Exhibit CL-231, *Case Concerning the Factory at Chorzów* (Germany/Poland) (Merits) [1928] PCIJ Series A, No. 17, p. 47: "[R]eparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."

933 Reply, ¶¶ 1067, 1072.

783. The Respondent does not dispute that the "balance of probabilities" applies both to the fact of the damage and to the facts underlying the claim for damages. However, it is difficult to accept that this standard applies to the amount of damages, since it would be impossible to determine how likely a particular outcome is. This is so because, unlike a specific fact, which may or may not be accepted based on the available evidence (a binary decision), damage estimates occur over a continuous range of values.

784. This is why International Tribunals apply the principle of reasonable certainty and although there is no precise formulation of this principle, various Tribunals have held that future losses must be proven with a "sufficient degree of certainty" and speculation must be avoided. The Respondent provided several examples of the application of this principle in its Counter-Memorial and the Claimants do not appear to dispute its applicability.[934]

C. The damages claimed that relate to the Expansion Projects do not comply with the principle of reasonable certainty

785. The Respondent contends that the Claimants have not met the burden of proving their damages to a reasonable degree of certainty, in particular, as regards the claim for damages from the so-called Expansion Projects.

786. As explained in the section devoted to the objection to jurisdiction, these projects never operated or were close to starting operations. Using a DCF to try to determine its value under these conditions is nothing more than an exercise in speculation. And it is, not only because there is no information to reliably project future profits, but also because there is no certainty that the projects would have been carried out and the terms and conditions of the potential agreements with their intended partners are unknown, among other things.

787. In the Counter-Memorial, the Respondent referred to various cases that demonstrate the reluctance of international tribunals to use the DCF methodology to assess projects in the pre-operational stage, and many others that refer to the conditions that must be present in order to accept a DCF valuation (*Metalclad v. México, Merill & Ring, Gemplus c. México, Siag v. Egypt, Rusoro c. Venezuela,* y *Cengiz Insaat Sanayi ve Ticaret A.S. v. Libya*). Mexico reiterates here those

934 Counter-Memorial on Merits, ¶ 929, citing the cases: *Amoco v. Iran, Gemplus/Talsud v. México, BG Group v. Argentina, Asian Agricultural Products v. Sri Lanka y S.D. Myers v. Canada*.

allegations and the position that in this case the conditions do not exist to determine the damages related to these projects based on an income approach, such as the DCF.[935]

788. In their Reply, the Claimants rely on *Khan Resources v. Mongolia* to argue that "[w]hile the tribunal recognized that 'there may have been a number of uncertainties that the claimant had to overcome before the mine could be put into production,' it noted that 'the Donovan project itself had considerable inherent value,' according to the reserves. of uranium reflected in the plaintiffs' feasibility studies."[936] Although the case was cited in the context of causality, it serves to demonstrate the applicability and validity of the principle of reasonable certainty.

789. In the first place, it is observed that this case is related to a mining project that, despite being in the pre-operational stage, had "proven reserves" and a technical and economic feasibility study.[937] The technical and economic feasibility studies used in mining projects are very complex studies that are prepared by independent specialized firms and cover a wide spectrum of regulatory, technical and economic aspects, among others.[938] They are necessary because mining projects usually involve very large investments and it is necessary to have a good idea of the potential profitability of the project before committing a large amount of resources. The project in that case also had proven reserves, which means that they had a precise quantification of the amount of resources that could be profitably extracted – for which a feasibility study is necessary. This is why the Tribunal concluded:

> 391. The Claimants advocated using a DCF method, which they state is appropriate for determining the fair market value of a mine with proven reserves. According to the Claimants, once these reserves are known, together with the costs associated with development and production, the market price for the relevant resource can be applied

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935 Counter-Memorial on the Merits, ¶¶ 950-968.

936 Reply, ¶ 1095.

937 Exhibit CL-330, *Khan Resources Inc., Khan Resources B.V. y Cauc Holding Company Ltd. contra el Gobierno de Mongolia y Monatom Co., Ltd.*, PCA Caso n.º 2011-09, Laudo (2 de marzo de 2015), ¶¶ 57, 59-60, 391.

938 The Canadian Institute of Mining, Metallurgy and Petroleum (CIM) defines the term "Feasibility Study" como: "a comprehensive technical and economic study of the selected development option for a mineral project that includes appropriately detailed assessments of applicable Modifying Factors together with any other relevant operational factors and detailed financial analysis that are necessary to demonstrate, at the time of reporting, that extraction is reasonably justified (economically mineable). The results of the study may reasonably serve as the basis for a final decision by a proponent or financial institution to proceed with, or finance, the development of the project. The confidence level of the study will be higher than that of a Pre-Feasibility Study". Respondent's Emphasis. Exhibit R-136, CIM Definition Standards, p. 4

> to estimate future earnings with reasonable certainty. It therefore does not matter that the mine has not actually come into full production or is not a functioning "going concern." The Tribunal agrees that, in the case of a mine with proven reserves, the DCF method is often considered an appropriate methodology for calculating fair market value.[939]
>
> [Énfasis añadido]

790. In this case there is nothing even close to a feasibility study or a determination of proven reserves in relation to the Expansion Projects. Nothing that can give this Tribunal a minimum of certainty that the Expansion Projects would be carried out and would be profitable.

791. Second, the Tribunal in *Khan Resources*, while agreeing that a DCF is often considered an appropriate approach when the miner has proven reserves, and acknowledging that Khan Resources had proven reserves and a feasibility study, rejected the DCF proposed by the applicant due precisely to the uncertainty associated with other elements of the project:

> 392. However, in this particular case, there are a number of additional factors and uncertainties which, in the Tribunal's view, make the use of the DCF method unattractive and speculative. These uncertainties include:
>
> (i) how the Dornod Project would have been financed;
>
> (ii) whether a further strategic partner would have been brought into the business and, if not, whether Khan was capable of bringing the Dornod Project into production itself;
>
> (iii) whether Khan would have taken the Dornod Project through to production or sold it;
>
> (iv) when and how the Additional Property would have been merged into the CAUC joint venture to create a single "Dornod Project"; and
>
> (v) the signing of various agreements (an investment agreement and a new joint venture agreement) to finalise the commercial terms of the Dornod Project.[940]
>
> [Énfasis añadido]

792. Many of the factors that the Khan Resources Tribunal identified as a source of additional uncertainty that precluded the use of DCF are present in this case. For example, there was no financing for the projects and there were no agreements with the strategic partners for the construction and operation of the casinos (e.g., there were no agreements with the Medano Beach Hotel, the Marcos family, Poker stars or Bally). Importantly, as explained in the jurisdiction part, the Claimants had not committed resources in the development of the Projects beyond a loan to

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939 Exhibit CL-330, *Khan Resources Inc., Khan Resources B.V. and Cauc Holding Company Ltd. v. the Government of Mongolia and Monatom Co., Ltd., Caso PCA No. 2011-09*, "Award", March 2, 2015, ¶ 391.

940 *Id.*, ¶ 392.

the Medano Beach Hotel to acquire land for the construction of the hotel that could eventually house its casino. Loan that by the way was repaid almost in full.

793. The Respondent is clearly not including as an investment here the alleged paid option to acquire rights to the E-Games license because a transaction of this nature is illegal. The Tribunal is reminded that article 31 of the LFJS prohibits the marketing of permits.

794. The Claimants advance two additional considerations. Based on Mr. Soll's opinion, they argue that game "licenses" are very valuable and attractive and have a high opportunity cost of abandonment.[941] Mr. Soll does not seem to notice that the number of casinos authorized by the permits issued by SEGOB far exceeds the number of installed casinos. As explained by Mr. Pérez Lizaur, there are currently between 150 and 300 authorized casino rooms that are not operating, and the main reasons are "the lack of a market, saturation of the main cities, lack of attractiveness of second-level places" and other factors.[942] Additionally, it is noted that the Claimants had since at least 2008 the "right" to open two additional casinos in Los Cabos and Cancún and did not do so.

795. The Claimants also rely on Mr. Soll's report to argue that "there were only a limited number of parties undertaking new Casino projects in Mexico, in particular casino resort projects geared towards tourist markets, such as those Claimants had planned to develop in Cabo and Cancún" and that "[t]his explains why many of the lead developers were eager to work with Claimants to advance expansion plans in Cabo and Cancún [...]".[943]

796. This is also not true to reality. If developing a casino in tourist destinations like Los Cabos and Cancun had been a great opportunity, there would be numerous casinos in the area and vigorous competition today. However, that is not what you see in those markets. Mr. Pérez Lizaur explains that the "casino industry in Mexico is aimed primarily at a local market" and that casinos in beach destinations "do not have large influxes of foreign tourists". According to Mr. Pérez Lizaur: "[t]here are only two hotel casinos in Mexico, one is located in Cancun with approximately 20 machines and the other is located in Tijuana with approximately 200 machines."[944]

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941 Reply, ¶ 1100.

942 RWS-8, Witness Statement of Mr. Pérez Lizaur, answer to question 16, p. 8.

943 Reply, ¶ 1100.

944 RWS-8, Witness Statement of Pérez Lizaur, answer to question 7.

797. Nor has it been shown that "many of the core developers were eager to work with the Claimants." This is the type of unsubstantiated verbiage that Claimants frequently resort to spice up their arguments.

798. The second aspect to which the Claimants allude to try to establish the probability of success of the Expansion Projects is "the history of success and knowledge of the claimants".[945] They argue that "the Expansion Projects did not exist in a vacuum"; that "prior to Mexico's NAFTA violations, Claimants' Casino business had been operating successfully for more than 9 years and its operations were expanding"; that since they opened the Naucalpan casino "the Claimants demonstrated that they were able to successfully expand their model" and that "Mexico did not dispute, [that] the Claimants' Casinos were one of the most organized and profitable operations in Mexico".[946]

799. First of all, it should be noted that it is false that the Claimants have operated "casinos" for more than 9 years. As explained in the facts section of this brief and the Counter-Memorial, from 2005 to 2008, the Claimants operated under the Monterrey Resolution and were not authorized to operate casinos, games of chance, or gambling. When they entered the casino business in 2008 they had five video game rooms that they converted into casinos and they did not open a single one from 2008 to 2014. The Huixquilucan casino is obviously not their property, otherwise it would be included in the claim of damage. This means that they were illegally operating a third party casino under their permission without having the owner of that casino as their operator.

800. Finally, it is clear that the experience that the Claimants had in their casinos cannot be extrapolated to the type of casinos such as those that they allegedly intended to develop in Los Cabos, Cancún or online. These new casinos were simply not comparable in the type of operations they had as the market was substantially different and they had no experience in those markets. Fortunately, the Tribunal does not have to take this at Respondent's word, it can instead take Claimants' own representations to their investors regarding the risks associated with the Los Cabos project:

> a. Inexperience In and Untested Market for Tourist Destinations; Associated Gaming Risks. Exciting Games and our principals have developed extensive experience and expertise in constructing and operating casinos in locations that are not tourists

945 Reply, ¶ 1104.

946 *Id.*, ¶ 1104.

> destinations and for local customers. Neither have experience in operating, managing or marketing gaming in a tourist destination to tourists. There are no casinos catering to tourists in the Cabo area; the absence of those operations may indicate that a market does not exist for a casino and there can be no assurance that the Cabo market will be profitable for a casino operation. We cannot assure that we will be able to market successfully to the tourist trade or operate the Casino profitably in that market. The Mexican Subsidiary may be required to obtain the services of third parties more experienced in tourist areas, at an increased cost and with no better guaranty of success. In addition, unlike the other casinos operated by Exciting Games, which generally are for local residents with lower stakes gambling, the Casino may be patronized by players who make significantly larger wagers, with the attendant risk of larger winnings and consequently larger losses for the Casino. While we will attempt to manage such risks, we cannot guarantee the absence of significant fluctuations in revenue as a result of larger bets and wins by big players.[947]
>
> [Énfasis añadido]

801. Although there is no analogous document for the Cancun project because it was in an even earlier planning stage, what is said in this document (i.e. Exhibit C-466) applies equally to that project. And not to mention the online casino project that hardly shares features with real casinos. There, the market and the competition are completely different and, contrary to what the Claimants argue, the experience of other operators cannot serve as a basis for predicting the success of their project.

D. Causality

802. The Respondent previously explained that there is no evidence of an investment in casinos in Los Cabos, Cancun or online. However, if the Tribunal finds that mere plans to open these casinos constitute a NAFTA-covered investment, Respondent contends in the alternative that Claimants have failed to prove the existence of a causal link between the alleged NAFTA-infringing measures and the claimed damages.

803. The Respondent explained at the time that causality has two variants: de facto and legal chance. The first refers to whether the violating conduct caused the damage, that is, the but-for test.[948] The second answers the question of whether the conduct is a sufficient, proximate,

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947 Exhibit C-466, Subscription Agreement.

948 Counter-Memorial on the Merits, ¶ 921.

adequate, foreseeable or direct cause of the damage.[949] The Respondent further noted that the Claimants failed to satisfy either of the two causality tests with respect to the Expansion Projects.[950]

804. The Claimants argue that "Mexico simply fails to make a causation case with respect to the Cabo Project and Online Gaming and, with respect to the Cabo Project, "Mexico merely attempts to recast its failed objection, alleging that the alleged measures […] could not have affected the Cabo Project, because said Project only contemplated the construction of a hotel"[951]. Subsequently, the Claimants state that the operation of the casinos in Huixquilucan and Veracruz was temporary to prevent the Government from canceling the "licenses" while the Cabo and Cancún projects were being developed.[952]

805. In the following sections, the Respondent will first demonstrate, with the facts and based on contemporaneous evidence, that neither factual nor legal causality exists in relation to the Expansion Projects. In other words, the Expansion Projects did not prosper for various reasons not attributable to the Respondent. It will also show that the Claimants have also failed to prove legal causation.

1. There is no causal link between the measures claimed and the failure of the Cabo Project

806. The Claimants argue that, had it not been for the closure of the casinos in 2014, they would have begun construction of the casino in Cabo in mid-2014, and would have opened the establishment in mid-2016.[953] They further state that when Mexico revoked E-Games' permit, they had earmarked considerable resources for the development of the project in Cabo and that they were in the process of finalizing the contractual terms with their partners (i.e. Medano Beach Group).[954]

807. According to the Claimants, in 2012 Mr. Burr and Mr. Ferdosi signed a letter of intent to begin negotiations for the construction of a hotel and casino in Cabo; In January 2013, Mr. Burr

949 *Id.*, ¶ 921.

950 *Id.*, ¶ 923.

951 Reply, ¶¶ 1087.

952 *Id.*, ¶¶ 1088-1089.

953 CWS-50, Third Witness Statement of Mr. Gordon Burr, ¶ 80.

954 Reply, ¶ 580.

established B-Cabo and began contacting potential investors; During 2013 and 2014 the parties continued negotiations and exchanged numerous drafts of the Investment Agreement and "were in the process of finalizing the terms of the Investment Agreement when Mexico illegally closed the Casinos in April 2014".[955] The Claimants also allege that B-Cabo invested USD $600,000 in the project in 2013 through two loans to the Medano Beach company for the purchase of a property adjacent to where the hotel would be located.[956]

808. However, the evidence presented by the Claimants themselves demonstrates that: (i) the project was at a very early stage of development and there had been no substantial progress; (ii) the Claimants abandoned the project months before the closure of the casinos and; (iii) the Claimants failed to obtain local permission to install a casino in the future hotel. The following subsections elaborate on these points.

a. The Cabo Project was at a very early stage of development and there had been no substantial progress

809. The Claimants rely on Exhibit C-466 to argue that the Cabo project included both the construction of a hotel and a casino.[957] Exhibit C-466 is a draft of the Subscription Agreement, dated 2013, between B-Cabo and the potential investors for the financing of B-Cabo. The Claimants state that the Subscription Agreement refers to the capitalization of a Mexican subsidiary for the construction of the casino that would be located in the hotel and that it "presents the project in detail, including the size of the casino, the number of machines, as well as the target market for the casino."[958]

810. As mentioned in the jurisdiction section above, the Subscription Agreement is relevant because it identifies two different projects: the "Hotel Project" and the "Casino Project" and, for obvious reasons, the second depended on the first. This is why the Respondent initially argued that the Claimants' investment (i.e., the loans) could not be considered an investment in a casino. They were, in fact, an investment in a hotel in which they hoped to eventually open a casino. By the time the Claimants requested repayment of the loan, the hotel had not even begun construction.

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955 *Id.*, ¶ 587.

956 *Id.*, ¶¶ 572 y 1091.

957 *Id.*, ¶ 591.

958 *Id.*, ¶ 593.

811. The Subscription Agreement is also relevant because it describes in detail the steps that were envisaged for the establishment of the hotel and a potential casino within the hotel. Pursuant to the Subscription Agreement, the successful establishment of the casino depended on

- B-Cabo will make an offer between US investors to raise up to $10 million dollars for the financing of the hotel and the Mexican subsidiary that would own the casino;
- B-Cabo will lend Medano Beach up to $4 million for the construction of the hotel;
- The Mexican subsidiary will be constituted and the assets of the casino that owns the casino and its assets will be acquired; and
- Once said subsidiary is constituted, a machine leasing contract and an administration contract will be signed with E-Games to operate the casino under the latter's permission and a leasing contract will be signed for the casino premises.[959]

812. As of the expropriation date, there is no evidence that B-Cabo has raised the expected funds through the offer, there is no evidence that the construction of the hotel has begun or that the Mexican subsidiary has been incorporated and funded. As mentioned in the jurisdiction section, the Claimants had not even entered into the Investment Agreement with their partners in the Cabo Project.

813. Under the title of "Current Status of the Hotel Project: Interest Purchase Agreement" the Subscription Agreement also indicates that the hotel project was in the planning and development stage, and practically none of the necessary requirements to undertake and complete the project had been completed.[960] The document identifies as risk factors: the uncertainty around obtaining the construction permit; the uncertainty as to whether or not the other licenses were legally obtained, and; the uncertainty that licenses and authorizations could be challenged or revoked. [961]

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959 *See* Jurisdiction Section. Exhibit C-466.

960 Exhibit C-466, p. 6. Respondent's translation, the original English text states "*Current Status of Hotel Project: Interest Purchase Agreement" the document states that the hotel project was in "the planning and development stage, and virtually none of the prerequisites necessary for undertaking and completing the project have been completed*".

961 Exhibit C-466, p. 25.

814. With respect to casino permits, Exhibit C-466 states that there can be no guarantee that all state and local permits will be obtained or that compliance with such requirements is economically feasible.[962] The Claimants have not presented any evidence showing that, in April 2014, they would have been able to obtain all the authorizations for the construction of the Hotel and, ultimately, the construction and operation of the Casino.

b. The evidence shows that the Claimants abandoned the Cabo Project months before the closure of the casinos

815. Mr. Taylor states that in January 2014, four months before the casinos closed, Mr. Burr informed him that the deal with Medano Beach and Messrs. Fedrosi and Brasel was dead.[963] Contemporary evidence confirms Mr. Taylor's assertion.

816. On January 21, 2014, B-Cabo filed a lawsuit in Colorado district court against Mr. Ferdosi, Mr. Brasel and Stanhope in order to obtain payment of the loans (Exhibit CRT-24).[964] The lawsuit was filed by Mr. Ayervais (Plaintiff in this proceeding) who signed it as the legal representative of B-Cabo. The lawsuit is relevant because it summarizes what happened in the words of the Claimants themselves:

- "Beginning 2012, Brasel approached Mr. Burr to propose that Mr. Burr assist him, Ferdosi and Stanhope in a project to construct a luxury hotel (the "Hotel") and related facilities in Cabo San Lucas, Mexico (the 'Project')."[965] (It should be noted that the "Project" to which the document refers is a luxury hotel, not a "hotel/casino".)
- "The parties engaged in extensive negotiations over the terms of an agreement ("Investment Agreement") to govern the relationship of the parties and the terms on which B-Cabo would raise funds to invest in and lend funds to Medano Beach."[966]
- "Ferdosi and Brasel proposed that B-Cabo advance funds to Medano Beach in anticipation of the execution of the Investment Agreement, so that the Project could

962 *Id.*, p. 33.

963 Reply RT, ¶ 11; Second Witness Statement of Mr. Taylor, ¶ 28.

964 Exhibit CRT-24, p. 1.

965 *Id.*, p. 2.

966 *Id.*, p. 3.

proceed"[967] and agreed that they would guarantee repayment of any advance made by B-Cabo in the event that an Investment Agreement was not finalized".[968]

- "[O]n January 25, 2013, B-Cabo lent Medano Beach USD $100,000."[969]
- "After the initial loan from B-Cabo, the parties continued to negotiate an Investment Agreement but could not reach an agreement."[970] [Énfasis añadido]
- "B-Cabo lent Medano Beach USD $500,000, on 17 May 2013".[971]
- "On July, 26, 2013, by email from counsel to B-Cabo, B-Cabo advised Defendants and Medano Beach that the parties transaction was terminated and that, pursuant to the Guarantee Agreement, Defendants had thirty days to repay all funds then advanced but unpaid." [972] (Esto es relevante no sólo porque demuestra que el proyecto fracasó por su propia cuenta, sino porque la fecha indicada es anterior a la declaración de insubsistencia del permiso de E-Games y la clausura de los casinos existentes.)
- "[B]ased on assurances from Defendants [Mr. Ferdosi *et. al*.] that an Investment Agreement would be forthcoming, B-Cabo withdrew that demand and transmitted another version of the proposed Investment Agreement which Ferdosi promised to review with Mr. Erikson and provide a prompt response."[973]
- "When a response from Ferdosi did not occur, by letter dated August 8, 2013, B-Cabo again terminated all transactions and demanded repayment of all loans still outstanding."[974] [Emphasis added] (This also predates the closure of the casinos that Claimants identify as the cause of the Project's failure).

967 *Id.*, p. 3

968 *Id.*, p. 3.

969 *Id.*, p. 3.

970 *Id.*, p. 3.

971 *Id.*, p. 4.

972 *Id.*, p. 4.

973 *Id.*, p. 4.

974 *Id.*, p. 4.

- After numerous communications and demands, by email from Mr. Burr on 3rd November 2013, "B-Cabo demanded that an agreement be finalized, in the absence of which all outstanding loans must be returned".[975]
- "No final Investment Agreement or any other agreement was ever executed."[976]

817. The foregoing reveals that the "Project" consisted – at least at that stage – of a luxury hotel and not a hotel/casino as the Claimants assert in these proceedings; that at the end of July 2013 – i.e., more than a month before SEGOB declared the E-Games Permit "insubstantial" and 9 months before the closure of the casinos, B-Cabo informed Medano Beach and Messrs. Ferdosi and Brasel that terminated the transaction. In other words, the "Project" failed before the alleged expropriation, because the partners did not reach an agreement. Despite subsequent attempts to revive the project in August and November of that year, the partners failed to reach an agreement and Mr. Burr requested and obtained repayment of the loans, except for $100,000.

818. Other documents confirm that, prior to the revocation of E-Games' permit, the Claimants were dissatisfied with the negotiations with Medano Beach and were considering withdrawing from the project. For example, on August 8, 2013, Mr. Ayervais sent a communication to Messrs. Ferdosi, Brasel, and Erickson on behalf of his clients (Mr. Burr and B-Cabo) stating that his patience simply had expired[977]; that instead of a signed contract they had received nothing but excuses[978] and; that Mr. Burr and B-Cabo terminated their interest in the hotel and demanded the return of the remaining $500,000 [979].

> Our clients have exhibited our good faith by not enforcing the June 15 deadline despite the absence of an executed definitive agreement and the fact the the [sic] absence of an agreement thwarts their ability to undertake an offering to obtain funds to invest in Medano Beach Hotel S.D.R.L. We have continued to negotiate with you and, despite your promise to have Mr. Rosen draft an agreement reflecting our understandings, we have provided you with several redrafts memorializing the current status of negotiations. In addition, we have continued to discuss the hotel venture despite the abject failure of your representative to obtain assurances that we can construct and operate a casino in the hotel. We are certain that, if you had let our clients' representatives undertake the negotiations, the result would have been different. On several occasions in the last week,

975 *Id.*, p. 5.

976 *Id.*, p. 5.

977 Exhibit R-135, p. 2. [Neil Ayervais Letter to Fedrosi, datted 8 August 2013]

978 Exhibit R-135, p. 2. [Neil Ayervais Letter to Fedrosi, datted 8 August 2013]

979 Exhibit R-135, p. 2. [Neil Ayervais Letter to Fedrosi, datted 8 August 2013]

> we imposed deadlines by which we needed to receipt of the executed agreement. The draft we provided has few changes from prior draft containing terms on which you already had agreed.
>
> Our clients' patience simply has expired. We have received nothing but excuses instead of a signed agreement. Most recently you have asserted a pretextual concern over the viability [sic] of a construction loan if a casino is part of the **hotel project**, despite no evidence underlying that concern and despite the fact that this matter could have been raised at any time in the last six months. Compounding our frustration is the additional fact that your promised return to Mr. Burr of$100,000 by wire transfer did not occur.
>
> As such, pursuant to the Letter Agreement, please be informed that our clients are terminating their involvement in the **hotel venture** and demanding the immediate return of the remaining $500,000 advanced by them. We also remind you that the non-circumvention agreement executed by you remains in full force and effect.[980]

819. It is important to note that this communication was sent several weeks before SEGOB annulled E-Games' permit on August 28, 2013 in compliance with the order of the Sixteenth Court. Of course, it also predates the closure of the existing casinos that the Claimants identify as the expropriatory measure. It is also worth noting that the email refers to the "hotel project" and the "hotel venture", which is indicative that the project, at that stage, consisted of a hotel as the Respondent has explained.

820. Two months later, on October 17, 2013, Mr. Burr sent a communication to Mr. Ferdosi stating that, in the course of negotiating and finalizing the transaction and the Investment Agreement, various events and material disagreements with regarding the documents that implement the operation had delayed the transaction.[981] The letter speaks for itself, after months of negotiations, the parties had material disagreements regarding the transaction and the Investment Agreement:

> In the course of negotiating and completing the transactions set forth and contemplated by the Investment Agreement (the "Agreement") between B-Cabo, LLC ("B-Cabo) and you, individually and on behalf of Medano Beach Hotel, S.de R.L. de C.V. (the "Hotel Company"), Randall Taylor has provided funds which were lent to you and the Hotel Company, pending finalization of the documents governing our proposed relationship. During that time, events and disagreements over material terms of the governing documents have occurred that have delayed the transaction.[982]
>
> [Énfasis añadido]

980 Exhibit R-135, p. 2. [Neil Ayervais Letter, dated 8 August 2013]

981 Exhibit C-531, p. 1.

982 Exhibit C-531, p. 1.

821. The foregoing demonstrates that the Claimants were not close to "finalizing the terms of the Investment Agreement when Mexico illegally closed the Casinos in April 2014". It also shows that it is false that "at all times, they remained fully committed to the development of the hotel and casino project in Cabo and that they made substantial progress towards that end when Mexico closed the Claimants' Casinos in April 2014"[983]. The Claimants' own evidence leaves no doubt that the Investment Agreement, and the Cabo Project in general, failed for reasons not attributable to the Respondent. Mr. Taylor confirms that the Project was at a preliminary stage and that the Claimants did not make any real progress:

> [a]t no time did Gordon, Erin, or counsel for B-Cabo, Neil Ayervais, ever indicate to Taylor that they or B-Cabo had a finalized deal or were even close to a finalized deal with Medano Beach, Stanhope, Ferdosi or Brasel for a casino or hotel in Cabo.[984]

822. The Claimants and Mr. Taylor agree that the amount spent on the Cabo Project was $600,000 ($500,000 provided by Mr. Taylor).[985] The Claimants assert that Medano Beach Group eventually reimbursed them $500,000 and that Mr. Taylor was reimbursed $350,000 through B-Cabo.[986]

823. There is no contemporaneous evidence on the record to suggest that the Medano Group and the Claimants continued negotiations on the progress of the Cabo Project after October 2013 or that significant progress was made. Therefore, it has been shown that the parties to the transaction spent more than a year and a half trying to reach an agreement on the terms of the Investment Agreement and never did; that the Claimants' investment at that stage consisted of two loans for the construction of a luxury hotel, which were recovered almost in full; that construction of the Hotel had not even started when the casinos were closed; that the Claimants never raised the capital that they would invest in the project, and; that the Mexican subsidiary that would own the casino was never incorporated or funded.

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983 Reply, ¶ 609.

984 Reply RT, ¶ 14; CRTWS-1, ¶ 32.

985 Reply RT, ¶ 6. Reply, ¶¶ 572 y 604-605.

986 Reply, ¶ 610.

c. The Claimants failed to obtain the local permit for the operation of the casino

824. In addition to the above, there is evidence that the project partners were unable to obtain authorization from the municipal authorities for the construction and operation of the casino within the hotel. The Court will recall that, in accordance with article 22 section IX of the RLFJS, the operator must present the "[d]ocumentación que acredite que el solicitante cuenta con la opinión favorable de la entidad federativa, ayuntamiento o autoridad delegacional que corresponda para la instalación del establecimiento".[987] In addition, for the establishment of a casino, the permit holder must have all the specific construction and operation authorizations required by both the federal entity and the municipality.

825. Documents obtained in the document production phase show that the local authorities had not given their approval for the possible construction of a casino in the hotel. In fact, on July 26, 2013, Mr. Ayervais sent an email to Mr. Ferdosi regretting the outcome of the discussions with the mayor. As can be seen, Mr. Ayervais attributed the failure to the fact that they were not allowed to participate in negotiations with the mayor:

> Gordon wanted me to express his disappointment and belief that, if we had been able to handle the discussions with the mayor, as we have in the past in other places, we would have been able to make arrangements. He also wanted to remind you that the NOA is still in effect.[988]
>
> [Énfasis añadido]

826. Three days later, on July 29, 2013, Mr. Ayervais wrote again to Mr. Ferdosi saying that, due to the apparent failure to obtain local authorizations, they had taken the initiative to make changes to the investment agreement. The draft attached to the email states:

> Farzin, in light of the apparent failure to secure the authority for the casino and in the absence of a draft from Ben Rosen, we have taken the initiative and redrafted the agreement, which attach in redline and clean fashion. You can see the changes we have made and the conditions on which we will undertake an offering. We need this document executed immediately and, as noted in the document, $100,000 returned to us.[989]
>
> [Énfasis añadido]

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987 Exhibit R-033, LFJS, article 22, fraction X.

988 Exhibit R-134, p. 2. [2780 – 30 Jul 2013 Email Ferdosi Ayervais and Draft Investment Agreement].

989 Exhibit R-134, p. 1. [2780 – 30 Jul 2013 Email Ferdosi Ayervais and Draft Investment Agreement].

827. Pursuant to the new wording of the Investment Agreement proposed by Mr. Ayervais, the contribution of additional capital was conditional on obtaining a commitment from the municipal authorities to allow the construction and operation of the casino. The new draft further notes that it appeared local authorities would not approve the construction and operation of the casino:

> To date, the Investor has provided $500,000 USD in operating capital, without a final investment agreement, and has spent substantial time, money and other resources assisting the Company in its project. Principal among the occurrences set forth in this Agreement upon which the Investor's obligation to contribute the Investment is conditioned is a commitment by the appropriate municipal authorities to allow the construction and operation of the Casino. At the date of this Agreement, it appears that such a commitment may not be forthcoming or, if so, may require significant time and effort. The parties desire to recognize the Investor's efforts to date, even if no Investment is contributed and provide the conditions upon which the Investment may be made even if no authority to construct and operate the Casino can be obtained. [990]
>
> [Énfasis añadido]

828. There is no evidence on record to show that the Claimants or their partners in the Cabo Project have obtained the go-ahead from local authorities for the establishment of the casino in Cabo that the RLFJS required. There is also no evidence that they have obtained state and municipal construction and operation authorizations in accordance with local legal systems.

829. In conclusion, it cannot be stated, as the Claimants do, that were it not for the closure of the existing Casinos, the Claimants would have been able to start the construction of the casino in Cabo in mid-2014.[991] Contemporary evidence demonstrates that, after more than a year of negotiations, Mr. Burr: (i) failed to enter into an Investment Agreement with Medano Beach; (ii) did not establish the Mexican entity that would be the owner of the casino and the one in charge of its construction of the casino; (iii) he failed to raise the necessary funds to finance the project, and; (iv) he was unable to obtain the approval of the local authorities for the construction and operation of the casino in Cabo. Furthermore, the evidence shows that, since before the cancellation of the E-Games permit in August 2013, Mr. Burr had tried to separate himself from the project due to differences with Mr. Ferdosi et. to the. on the terms of the Investment Agreement. This was stated by the Claimants themselves before the courts of the state of Colorado.

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990 Exhibit R-134, p. 19. [2780 – 30 Jul 2013 Email Ferdosi Ayervais and Draft Investment Agreement].

991 CWS-50, Third Witness Statement of Mr. Gordon Burr, ¶ 80.

830. Finally, it is reiterated that the Claimants recovered practically all of the loans granted to Mr. Ferdosi. The Claimants and Mr. Taylor agree that the total amount of the loans to Medano Beach was $600,000 (of which $500,000 was provided by Mr. Taylor).[992] Claimants acknowledge that, prior to the closings, Medano Beach Group reimbursed them USD $500,000[993] The Respondent does not know if Medano Beach eventually reimbursed the remaining USD $100,000 but, in any event, the Respondent cannot be held responsible for the breach of an individual.

2. It doesn´t exist causal link between the alleged measures and the fracaso of the Cancun Project

831. The Cancun Project appears to have been at an even earlier stage than the Cabo Project. However, as with the last one, the Claimants claim damages related to the Cancun Project as if it were a going concern. The truth is that it was a mere opportunity that was being explored and that it had not even passed the planning and definition stage of the project. As will be seen below, contemporary evidence demonstrates that the Cancun casino project failed for reasons beyond the Respondent's control and that it "died" long before the expropriation date.

832. The Claimants allege that all the efforts made to open a casino in Cancun "were thwarted when Mexico unlawfully revoked the E-Games Independent Permit and permanently shut down Claimants' Casino business." 994 The Claimants state that negotiations with the Marcos family for the Cancun hotel and casino began in 2011 and continued until Mexico shuttered the Casinos.".995 Mr. Burr further testifies that discussions regarding the planning of the Cancún project continued in 2013 and 2014:

> As early as 2011, I was working with Federico Carstens on the Cancun project. Federico Carstens is a veteran in real estate development […] On November 13, 2012, Federico Carstens shared the renderings for the proposed hotel with me. On November 25, 2012, Erin sent an email to Sabrina González, my assistant, asking her to set up a meeting with Federico Carstens and the architects. This meeting related to the casino that we were working on in Cancun. Productive planning discussions with Mr. Carstens and the Marcos family for our Cancun project continued into 2013 and 2014. After a successful meeting with the Marcos family regarding the hotel and casino project, I left Mr. Ferdosi a voicemail in which I informed him about a successful meeting I had with the Marcos family and the possibility of also bringing them into the Cabo project. […]

992 Reply RT, ¶ 6. Reply, ¶¶ 572 y 604-605.

993 Reply, ¶ 610.

994 *Id.*, ¶ 1092.

995 Reply, ¶ 577.

833. Although there is evidence in the file of talks and communications with the Marcos family, it is unquestionable that the project never materialized. As in the case of Cabo, the Claimants planned to establish a Mexican subsidiary that would be in charge of the construction of the casino, the acquisition of the assets of the casino and the execution of contracts with E-Games for the operation of the casino under its permission. There is no evidence that the Mexican subsidiary has been incorporated and funded or that an agreement has been entered into with the Marcos family or that construction of the hotel has begun.

834. The contemporary evidence on the supposed progress of the project (for example, draft contracts) is from 2011 and 2012[996] and the little evidence from the first half of 2013 confirms that no progress was made. The Claimants have not provided a single document regarding the project in Cancun dated late 2013 or 2014. All of this demonstrates that the project stopped moving forward long before the measures claimed in this arbitration occurred.

835. Due to the foregoing, the Respondent considers it unnecessary to go into the detail of each draft and communication dated 2011 and 2012. However, it will briefly analyze the only evidence presented corresponding to the first half of 2013 to demonstrate that, in more than two years of alleged negotiations with the Marcos family, there was no progress in the Cancun casino Project.

836. The Claimants cite, first, Exhibit C-493 in support of the proposition that "in March 2013, Mr. Moreno again discussed the Cancun Project with Mr. Carstens, who requested an update on Claimants' Cancun expansion plan, as confirmed in the contemporaneous email submitted as Exhibit C-493."[997] The document contains two emails between Mr. Carstens and Messrs. Moreno and Burr dated March 19, 2013. Mr. Carstens refers to a presentation made "a couple of years ago" and asks whether the financial projections are still realistic and executable. The document does not include any attachments and/or responses to Mr. Carstens.[998] From the mail it is not inferred that between 2012 and 2013 there was any major progress in the project.

996 Exhibit C-245, C-455, C-471, C-473, C-491 y C-492.

997 Reply, ¶ 576.

998 Exhibit C-493, p. 1.

837. The Claimants also rely on Exhibit C-335 to support the proposition that "Mr. and Mrs. Burr solidified a business plan for a casino in Cancún"[999]. In addition, they point out that the document said "details the Claimants' plan to build a world-class casino in Cancun for high-end tourists and wealthy local residents".[1000] Exhibit C-335 is a presentation on the Cancun project dated April 15, 2013 containing 21 slides of which only 8 correspond to the Cancun casino project. The document is identical to Exhibit C-245 dated April 14, 2011 to which Claimants refer to as the "Cancun business plan.". The only difference between both documents is the date on the first slide and slide number 5 where the number of gaming machines and tables is updated, which is reproduced below:

838. Exhibit C-245, April 14, 2011.

839. Exhibit C-335, April 15, 2013.

999 Reply, ¶ 1092.

1000 *Id.*, ¶ 575.

840. As you can see, in two years there was no progress.

841. The latest document from 2013 to which the Claimants refer is Exhibit C-474, which is an email from Mr. Ferdosi to Mr. Burr dated August 1, 2013. Mr. Burr refers to said document to support his assertion that the Marcos family could be interested in the Cabo project, but not as evidence that the Cancun project was advancing. Mr. Burr refers to said document to support his assertion that the Marcos family could be interested in the Cabo project, but not as evidence that the Cancun project was advancing.

> From: FFerdosi@aol.com
> Sent: Thursday, August 01, 2013 8:58 AM
> To: gordon_burr@comcast.net
> Cc: eburr@kash.com.mx
> Subject: Call re Marcos Family
> Hi Gordon,
> Sorry I missed your call. I was in meetings all day in NYC.
> Received your voice mail regarding the meeting with Marcos Family. Great news.
> I am traveling today.
> Thanks
> FF1001

[1001] Exhibit C-474, p. 1.

842. Finally, Claimants are mistaken with respect to the date of Exhibit C-472 in their index of exhibits. That document is identified as a mail from Mr. Carstens to Mr. Moreno Quijano dated November 13, 2013, however, the document is clearly dated November 13, 2012.[1002]

843. In summary, contemporaneous documentary evidence shows that no agreement had been reached with the Marcos family to build a hotel/casino in Cancun and that throughout 2013 there was no progress on the project. Again: (i) there are no hotel or casino plans; (ii) there is no evidence that funds were raised to finance the project; (iii) there is no evidence that they had requested and obtained authorization from the local authorities to open a casino in hotel; (iii) there is no evidence that the hotel has started or was even close to starting construction; (iv) the Mexican subsidiary had not been established or funded. Furthermore, the only investment associated with this project that the Claimants have been able to identify is the illegal trading of rights under the permit (i.e., the "license"). Pretending that from the few emails that show contacts with the Marcos family and the payment for the license, a concrete and advanced project for the construction of a casino in Cancun can be inferred, is simply dishonest.

844. On the other hand, Mr. Taylor states that Mr. Burr kept him informed of the negotiations and asked him for his opinion on the drafts of the transaction contracts because he was the one who acquired the right of first refusal *(i.e., the alleged option*).[1003] According to Mr. Taylor, "*[t]he reports got progressively bleaker and Gordon eventually indicated no deal was likely and that the Marcos family were realistically no longer interested*".[1004]

845. Mr. Taylor also states that, in 2013, the transaction with the Marcos family was "basically dead" ("*basically dead*"[1005]) and, consequently, requested that Colorado, Cancun and Mr. Burr return it the USD $250,000 corresponding to the payment for the right of first refusal:[1006]

1002 Exhibit C-472, p. 1. See footnote 1506 and 2542 of the QE Reply, and the index to Claimants' Exhibits.

1003 Second Witness Statement of Mr. Randall Taylor, ¶¶ 36 y 41.

1004 Reply RT, ¶ 30.

1005 Second Witness Statement of Mr. Taylor, ¶ 47.

1006 Reply RT ¶ 31.

> 47. By late 2013, since the Cancun deal with the Marcos family was basically dead, I wanted my loan repaid by Colorado Cancun and Gordon at that time rather than continue to wait.[1007]

846. Mr. Taylor's assertions are consistent with the briefs filed on behalf of B-Mex and B-Mex II in the AAA commercial arbitration[1008]:

> 19. Towards the end of 2013, Taylor told Burr that he needed funds for other projects he was pursuing. Burr mentioned that there was no longer a need to tie up the license, and Burr and Taylor verbally agreed that B-Mex II would repurchase the Option For Cancun and would make monthly payments of $25,000 beginning in 2014.[1009]

847. Mr. Taylor received three payments for USD $25,000 between January and April 2014, that is, prior to the closure of the casinos which is what the Claimants have identified as the expropriation measure.[1010]

3. The Online Casino

848. The Respondent reiterates all the arguments in the Counter-Memorial about the online casino project (paragraphs 521 to 543). It also reiterates what is stated in the jurisdiction section of this submission at paragraphs 605 to 610.

849. The Online Casino project was in a similar situation to the Cabo and Cancun projects. The evidence shows that some exploratory efforts were made to establish an online casino, but there is no evidence that it was within a few months of opening, as Claimants assert.

850. The Claimants have been unable to provide evidence of their own projects, such as the extensive due diligence they conducted to understand the online gaming landscape they claim to have undertaken, or communications discussing the decision or the financial and tax reasons for installing the servers in Querétaro.

851. The Claimants have been unable to provide any of the contracts necessary for the operation of the casino with their suppliers and partners. They claim that they were about to sign the contract

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1007 Second Witness Statement of Mr. Randall Taylor, ¶ 47.

1008 Case No. 01-19-0001-3949 *American Arbitration Association* (AAA) between B-Mex, LLC and B-Mex II, LLC, as plaintiffs, and Messrs. Randall Taylor and David Ponto as defendants for alleged breaches of the companies' operating agreements. The final award was issued in March 2020 in favor of Mr. Taylor in the amount of USD $347,692.

1009 Exhibit CRT-12, ¶ 19.

1010 Reply RT, ¶ 32.

with Bally, Pokerstars and the contract for the lease of the space to install the servers, but have not provided evidence of a single agreement even though they were just 2 to 3 months away from starting operations, according to them. In many cases not even a draft contract has been provided.

852. There is also no evidence that the investments for USD $2.5 million listed in its business plan have been carried out[1011], or that written authorization has been requested from the SEGOB to offer online games as established in Article 85 of the Regulations. Once again, it is hardly credible that, just a few months before starting operations, they have not even approached the SEGOB to request authorization and did not have ready the documentation describing the procedures and rules to guarantee the integrity of the game and prevent its manipulation, which is also required by the Regulations.

853. The evidence again demonstrates an incipient project in its planning stages, not a mature project backed by investments made and contracts signed with suppliers and potential partners. There is nothing to indicate that, but for the closure of the Casinos, this project would have been carried out and would have been successful.

854. Furthermore, the Claimants downplay the complexities and challenges of establishing and running a successful online casino. Regarding the business of an online casino, Mr. Pérez Lizaur mentions that, unlike physical casinos, obtaining and retaining customers in an online casino represents very high challenges and costs:

> Among the main challenges that a company that wants to develop an online casino has is to have a high flow of capital to be able to compete with online casinos in Mexico and the world, since a lot of money must be invested in retaining customers because unlike a physical casino that may be the only one or one of the few existing in a region, so the local market will always go to those facilities; in the online casino that does not happen, the client today can be in the online casino A and remains a few minutes without playing, or having played, closes the application or page and changes to another casino and so on, so It must invest a lot in retaining the customer through promotions, technology development to make the games attractive, among other aspects.
>
> Acquiring a client portfolio is very expensive, so you must have considerable capital for "marketing". It is also very difficult to keep the customer because with just one click they go to the page of the competition.[1012]

1011 Counter-Memorial on the Merits, ¶¶ 532-538.

1012 RWS-8, Witness Statement of Mr. Pérez Lizaur, p. 7.

855. In addition, Mr. Perez Lizaur affirms that he is aware that in order to launch an online casino, certain licensees have invested up to US$ 30 million to start the business, not counting the substantial additional sums required in marketing to keep customers and be competitive with other online casinos in Mexico and the world.[1013] Regarding the type of game, Mr. Pérez Lizaur points out that 80% of online betting is sports betting and only 20% corresponds to slot machine simulators and games such as poker or *blackjack*.[1014]

856. In any event, as mentioned in the jurisdiction section above, the Claimants have not provided any evidence that they invested $2.5 million in the online casino project prior to the closure of the casinos.

4. The various crime denounced by Mr. Taylor and the traffic of rights under the permit break the causal link between the measures claimed and the damages related to existing Casino

857. There is ample evidence in the record of wrongdoing by Claimants that would break the causal link between the measures and the claimed injury. Respondent has already referred to these alleged crimes and will not repeat the list here. But in addition to those alleged by Mr. Taylor and supported by the recordings he obtained from Mr. Burr, his daughter, Mr. Rudden and Mr. Conley, there must be added the open commercialization of the rights that E-Games received with his permission. As already explained, this is in violation of Article 31 of the Regulations and the Claimants cannot evade this argument by claiming that they were not trading not the permit but the rights to open a casino under the permit. Such a reading would render the provision of the Regulation useless and should not be accepted by this Tribunal.

858. As stated in the witness statement of Mr. Mauricio Ayala of SEGOB:

> The Article 31 of the RLFJS, states that the permits are non-transferable and may not be subject to any encumbrance, assignment, alienation or commercialization whatsoever. Therefore, if the above assumptions are proven and in accordance with articles 147, section IV, 149 and 151, section VI, of the RLFJS, the latter establishing as a serious infraction that the permit holder assigns, pledges or transfers in any way the permit or the rights conferred therein, the revocation of the permit would be appropriate." Article 151 of the Regulations.[1015]
>
> [Emphasis added]

1013 *Id.*, p. 8.

1014 *Id.*, p. 7.

1015 RWS-9, witness statement of Mr. Mauricio Ayala, ¶ 18.

859. The Claimants openly acknowledge that they sold "licenses" to operate casinos in Mexico. In fact, they identify these "licenses" as an investment in several contexts. For example, the most significant investment in the online casino project consisted precisely of the license to be purchased from E-Games:

Inversion inicial	
Licencias	1,535,000
EG	1,500,000
Cash box	35,000
Infraestructura	395,000
Adecuaciones	45,000
IT Site	350,000
Racks y accesorios	20,000
Mercadotecnia	550,000
Produccion de Video	50,000
Lanzamiento	500,000
Total	2,480,000

860. It also represents the only investment they claim to have made with respect to the Cancun Project - i.e., the "option to purchase a license from B-Mex II under its permit"[1016] that Mr. Taylor purportedly acquired.

861. In a counterfactual scenario in which the permit had not been declared invalid by instruction of the Sixteenth Court, it is not clear that the casinos would have been able to operate for a long time since SEGOB would surely have learned that E-Games incurred in the practice of selling rights under its permit and would surely have initiated an administrative proceeding against it and proceeded to revoke the permit.

862. The same can be said of the various offenses identified by Mr. Taylor. The eventual finding of any of them would have been a serious breach of the provisions of the Regulations and would have resulted in sanctions that could well include revocation or no renewal of the permit.

E. Contributory Fault

863. Respondent reiterates its arguments on contributory fault in paragraphs 931-949 of Counter-Memorial.

864. In their Reply, the Claimants rely on article 39 of the Draft Articles on Responsibility of States for International Wrongful Acts to argue that the "threshold for establishing contributory negligence is high". However, article 39 does not refer to the threshold for proving contributory negligence, it simply states that "not every act or omission that contributes to the damage suffered

1016 Memorial, ¶ 65.

is relevant for that purpose but only those that are intentional or negligent, that is, "manifesting a lack of due care on the part of the victim[...]".[1017] The Claimants also cite *Occidental v. Ecuador* for the proposition that "Mexico must establish (i) that the Claimants committed a deliberate and negligent act, and must rule out (ii) that such negligence was sufficiently material to break the chain of causation".[1018] They add that Mexico has failed to prove that the Claimants committed any deliberate or negligent act, much less one that would satisfy the applicable standard. Mexico disagrees.

865. The Claimants committed a series of negligent and deliberate acts which resulted in the closure of their operations. The principal one is their association with Mr. Rojas knowing of his dark history and the express recommendation of the firm they commissioned to conduct the background check on Mr. Rojas. But it is also a negligent and deliberate act because they were aware that E-Mex had a huge debt with Bluecrest and there was a possibility that it would be declared bankrupt and lose the license under which it operated its casinos (as it happened).[1019]

866. Claimants rely on the argument that the association with E-Mex was a condition of the transaction that Bluecrest/Advent planned with E-Mex. However, no evidence has been presented in this proceeding that Bluecrest and/or Advent actually conditioned the eventual deal on Claimants' association with Mr. Rojas. In the factual section of this brief, Respondent explained that both the contemporaneous evidence and Claimants' arguments in other proceedings demonstrate that Claimants: i) ignored all red flags regarding Mr. Rojas; ii) knowingly decided to continue doing business with Mr. Rojas; and iii) the transaction with BlueCrest and Advent was not conditioned on Claimants entering into an agreement as operator of E-Mex in order for the transaction to materialize.[1020]

867. In the end, it was E-Games' negligent and deliberate decision to partner with Mr. Rojas and its failure to comply with the agreement it entered into with E-Mex that led to all of its misfortunes,

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1017 Reply, ¶ 1110.

1018 *Id.*, ¶ 1111.

1019 For example, at ¶138 of the Reply, Claimants assert that "the testimonies of Messrs. Chow and Pelchat reaffirm Mexico's political motivation to destroy Claimants' investments." But they also assert that all of the allegations referred to in Exhibit R-75, Mr. Taylor's affidavit, derive from false information provided by Mr. Chow and Mr. Alfredo Moreno Quijano, see ¶413 of the Reply.

1020 See section II.B of this document "The decision to operate under the E-Mex license".

as noted in the Counter-Memorial.[1021] It was, after all, the dispute between E-Games and Mr. Rojas/E-Mex that triggered a series of litigation, including: (i) the arbitration that E-Games lost in which E-Mex accused it of having breached the terms of the agreement they had[1022] and, significantly; (ii) the amparo 1668/2011 that resulted in the removal of its permit. The false allegations of corruption and political motivation are nothing more than a smokescreen to hide their own responsibility for the damage they suffered.

868. Mr. Burr has proven to be a poor judge of the character of the people with whom he associates. Mr. Rojas' case is the most notable, but it should not be forgotten that he also associated with Messrs. Chow and Pelchat who defrauded Claimants and caused them to lose control of their casinos. Claimants even presented Messrs. Chow and Pelchat as their witnesses at the jurisdictional phase knowing that they had lied in their affidavits. Indeed, Claimants continue to rely on their testimony as if the Tribunal had not been present when Mr. Chow confessed to perjury. For example, in paragraph 138 of the Reply, Claimants assert that "the testimonies of Messrs. Chow and Pelchat reaffirm Mexico's political motivation to destroy Claimants' investments." But they also affirm that all of the allegations referred to in Exhibit R-75, Mr. Taylor's witness statement, derive from the false information provided by Mr. Chow and Mr. Alfredo Moreno Quijano.[1023]

869. But in additional to Mr. Rojas and Messrs. Chow and Pelchat, it should be remembered that Mr. Rudden is in jail for having participated in a millionaire fraud through a "*Ponzi scheme*". Mr. Rudden is one of the plaintiffs in this proceeding and was also a member of the Board of Directors of at least two of the Gaming Companies. In fact, Mr. Rudden signed the powers of attorney and waivers that Claimants characterized during the jurisdictional stage as constituting expressed written consent to arbitration. In particular, Mr. Rudden signed the “waivers” in his own name and on behalf of Family Vacation Spending, LLC, Victory Fund, LLC and Financial Visions, Inc.[1024] The last mentioned company was the company involved in the "*Ponzi scheme*" mentioned above by which Mr. Rudden defrauded investors of more than USD $19 million, as mentioned in a Department of Justice memo:

1021 Counter-Memorial on the Merits, ¶¶ 947-948.

1022 Id., ¶¶ 143-146, C-356, p.107.

1023 Reply, ¶ 413.

1024 Exhibit C-4, pp. 15, 30, 31 y 39.

> DENVER – Daniel B. Rudden, age 72 of Denver, Colorado, was sentenced yesterday by U.S. District CourtJudge Christine M. Arguello to serve 121 months (just over 10 years) in federal prison, followed by 3 years on supervised release for mail fraud after he defrauded 175 investors out of more than $19 Million. […] Rudden was the President and sole owner of Financial Visions, Inc. (FV). […] FV had become a Ponzi scheme.[1025]
>
> [Énfasis añadido]

870. Another partner of the Claimants and member of the board of the Juegos Companies, Mr. Alfredo Moreno Quijano, was the one who, -according to the Claimants-, removed without their permission or authorization the machines from the Naucalpan casino after the closure.[1026] In this regard, the Claimants affirm that "this unauthorized removal of the gaming machines was yet another attempt by Mr. Moreno Quijano to try to derail the NAFTA Claimants' efforts, sow disagreement among the Claimants' group, and profit from Mexico's illegal and discriminatory treatment of the Claimants." Contrast this with Mr. Conley's description of Mr. Moreno Quijano in his first witness statement:

> […] I transferred 13.34% of my E-Games' stock to my longstanding business partner and friend, Mr. Alfredo Moreno ("Mr. Moreno"). Mr. Moreno and I have had a close professional relationship for over 25 years and, since 1992, he had been a close business partner and director of some of my previous business ventures in Mexico […][1027]
>
> [Emphasis added]

871. Plaintiffs claim to be victims of all of these persons, but the facts demonstrate a patron of negligence that should not go unnoticed by this Tribunal.

F. Valuation

872. The following is a summary of the main conclusions of the Respondent's damages expert (RIóN) contained in his second report. It is noted that what is said here is not intended to be an exhaustive summary of RIóN's expert report. The Tribunal is invited to read the report in the entirety of the report and to consider its contents in its entirety.

1025 Exhibits R-137, Boletin USA-CO_Department of Justice. *Ver* también R-138, CBS Denver. Colorado's versión of Bernie Madoff y R-139, Ponzi Schemer Dan Rudden.

1026 Reply, ¶ 343.

1027 CWS-13, First witness statement of Mr. Conley, ¶ 11.

1. Valuation perimeter, consolidation of results and accounting irregularities

873. RIóN explains that, in order to value the Claimants' casinos, it is necessary to carry out a consolidation of the results of multiple companies because the operation of the casinos was not concentrated in a single company. On the one hand, E-Games was the licensee and, therefore, the only one authorized by SEGOB to conduct games and raffles. However, the casinos and their assets were owned by the Gaming Companies. Therefore, the only way to value the operation of the Casinos that are the subject of this controversy is to consolidate the results of these companies.[1028]

874. However, RIóN notes that the consolidation carried out by BRG uses various resources that are not congruent with each other, and does not explain the criteria used to carry it out and, consequently, is not transparent.[1029] This results in differences in important items such as depreciation[1030] and machine leasing expenses[1031], which have a significant impact on valuation.

875. For example, in relation to the flows from leasing machines, RIóN detected an important difference. To understand this point, it should be remembered that the Gaming Companies had a machine lease agreement with E-Games. Since machine leases represent an expense for E-Games and income for the Gaming Companies, the amount of these leases would have to be reversed out when consolidating results. However, there is a significant difference between the expense reported by E-Games (MXN $301.3 million in 2012) and the revenue reported by the Gaming Companies (MXN $271.5 million in 2012). The difference (MXN $29.7 million) would therefore represent an additional expense for E-Games because the leasing revenues of the Gaming Companies could not offset all of E-Games' expenses for the same concept. However, in the consolidation of BRG, the total machine lease expenses (the MXN 301.3 million) are excluded, as if all had been paid to the Juegos Companies.[1032] The difference for 2013 is even more marked (MXN 38.5 million).

1028 RER-6, RIóN, ¶¶ 16-23.

1029 *Id.*, RIóN, ¶¶ 24-29 y 30-42.

1030 *Id.*, RIóN, ¶ 27.

1031 *Id.*, ¶ 37-40.

1032 *Id.*, ¶¶ 38-39 y Table 3.

876. RIóN también detectó algunos errores en la información presentada por las Demandantes.[1033] The most significant item is the Participaciones payable to SEGOB. These participations, in theory, should be calculated as 2% of the income from games and raffles, net of prizes and refunds. However, as explained by RIóN in its report, the revenue base used by Claimants to calculate the Participaciones is much lower than the revenues reported by E-Games - i.e., it is equivalent to approximately 20% of such revenues.[1034] BRG, in its calculation, uses a historical average based on what was actually paid, without taking into account the statutory rate of 2% or the base to which such percentage should be applied.[1035] In other words, it takes as good the calculations of E-Games' participations without having validated the calculation.

877. Another important problem is that the accounting of E-Games includes the flows from the Huixquilucan casino that is not part of the claim for damages. Through a reconciliation exercise of the Participaciones paid to SEGOB, RIóN had the possibility to detect, for example, that the Claimants include the Participaciones corresponding to the Huixquilucan casino in the accounting of the Naucalpan and D.F. casinos.[1036] Therefore, by using the total amount of Participaciones that E-Games paid to SEGOB, BRG implicitly includes expenses in its model that do not correspond to the operation of the five existing casinos covered by the damage claim.[1037] And this is just one example. RIóN concludes:

> 50 Since the accounting ledger do not separate accounts for the Huixquilucan operation, it is impossible to determine what income and expenses correspond to this operation. However, it can be concluded that BRG includes expenses21 corresponding to Huixquilucan within its model, thereby distorting the reasonableness of its assumptions.[1038]

878. BRG appears to ignore other problems, such as the tax liability for MXN 172.5 million originating in the 2009 fiscal year (notified to the company on February 28, 2014), which should be deducted from the valuation of damages.[1039] RIóN also refers to the irregularities identified by

1033 *Id.*, ¶¶ 43-56.

1034 *Id.*, ¶ 45.

1035 *Id*.

1036 *Id.*, ¶ 47-49.

1037 *Id.*, ¶ 49 y Table 6.

1038 *Id.*, ¶ 50.

1039 *Id.*, ¶ 53.

Mr. Taylor with respect to tax payments, omissions in reporting revenues, overpricing of inputs and diversion of money, among others. RIóN concludes that these "red lights" are a factor of risk and uncertainty in the determination of the FMV of the Casinos and would justify adding an additional premium in the discount rate.[1040]

2. Valuation of the existing casinos

879. Both parties' experts agree that the DCF method is appropriate for valuing existing casinos, i.e., casinos that were in operation before they were closed in April 2014. However, they maintain disagreements on the assumptions used in the DCF model. RIóN notes that BRG maintains the assumptions it used in its first report without providing new evidence.[1041]

880. The differences focus mainly on the assumptions used in the revenue projection, the operating costs and expenses, and the applicable taxes and participations. The following subsections will summarize the most significant critiques.

881. However, it is noted that there are additional differences on other assumptions and variables which, because they have a relatively minor impact on the valuation, will not be addressed in this submission. The Tribunal is invited to review the report of RIóN for a full explanation of all these assumptions and variables.

a. Currency and discount rate

882. The parties' experts differ as to the approach to be used in the DCF model. A first approach is to calculate cash flows in pesos, convert these cash flows into dollars at the end of each year using an estimate of the exchange rate, and then discount them at a dollar rate. This is the approach used by BRG.[1042]

883. The alternative is to discount the cash flows in pesos at a peso rate, and convert the final result to dollars using the exchange rate in effect at the valuation date. This is the approach followed by RIóN.

1040 *Id.*, ¶ 56.

1041 *Id.*, ¶ 62.

1042 BRG uses this approach from 2014 to 2019. Hereafter it projects flows in U.S. dollars.

884. RIóN explains that, in theory, the two approaches should give the same result, however, in practice this is not the case mainly because some variables have to be estimated (e.g., the exchange rate to convert flows to dollars at the end of each period) and this introduces an unnecessary distortion in the analysis. [1043] The approach used by RIóN does not have this problem because the exchange rate at the valuation date is known and a reasonably reliable estimate of the discount rate in pesos can be obtained.

b. Income projection

885. The revenue projection is based on the historical revenues reported for the 2011-2013 period. However, for the specific case of Casino D.F., BRG makes a series of adjustments arguing that said casino suffered from a series of interferences that affected its growth and performance.[1044] RIóN is in disagreement with this adjustment.

886. In its second report, RIóN explains that, in order to eliminate the alleged effect of the interference on Casino D.F.'s operation, BRG adjusts the historical result and then uses this adjusted historical basis to project future results. RIóN considers this adjustment to be arbitrary, speculative, and significantly overstates Casino D.F.'s potential.[1045] RIóN explains that BRG erroneously extrapolates annual revenues by applying a higher correction factor than necessary, and by failing to recognize that the interruptions had no major effect.[1046] RIóN performed its own adjustment and estimates that Casino D.F.'s revenues would have been at most MXN $83.1 million instead of the MXN $96.7 million estimated by BRG.

887. RIóN further notes that, although BRG recognizes that revenues are determined by three main variables - i.e., number of players, average bets per visitor and house edge - BRG does not apply these factors to determine the rate of revenue growth. Instead, it uses the GDP growth expectation and assumes a perfect correlation between this indicator and future casino revenue growth.[1047] RIóN disagrees with this approach to projecting casino growth..[1048]

1043 RER-6, RIóN, ¶¶ 207-209.

1044 *Id.*, ¶ 67.

1045 *Id.*, ¶¶ 72-73.

1046 *Id.*, ¶¶ 74, 76-82.

1047 *Id.*, ¶¶ 67-68.

1048 *Id.*, ¶ 86.

888. RIóN initially questioned the approach used by BRG on the grounds that it had selected an arbitrary time period to analyze the correlation between industry growth and national GDP. RIóN demonstrated, for example, that in the 5 years prior to the valuation date (2008-2013) the growth of the industry had been -0.33% despite the fact that the GDP had grown 1.56% in real terms in that same period.[1049] RIóN further notes that the 2008-2013 period would have been the most relevant period for a potential buyer at the valuation date.[1050]

889. BRG's second expert report criticizes RIóN's growth projection as inconsistent with historical data and also because it holds the growth rate constant. RIóN maintains the position that BRG's arbitrary selection of periods leads the reader to the incorrect conclusion that there is a correlation between industry growth and GDP. In addition, he argues that it is incorrect to assume that a positive correlation implies that GDP growth and casino industry growth will be of the same magnitude.[1051] To exemplify the above, RIóN notes that in the 2004-2018 period the economy grew 2.22% in real terms, while the casino industry grew only 1.65%. BRG uses the growth of the economy to project the growth of the industry and does not seem to care that the evidence shows that the sector grew at a lower rate.

890. RIóN also examined the daily operating records of the Claimants' Casinos and found that the operation did not show a positive trend in several metrics. For example: the after-tax gross revenue of the Casinos was analyzed and, from such analysis, it could be found that, in the last four full years of operation, the gross revenue decreased by 1.2%. In the last full year (2013) the reduction was even more pronounced (-2.9%) with respect to the previous year. RIóN estimates that at constant prices this represents a real reduction of 5% over the last four years.[1052]

891. The second metric analyzed by RIóN was the number of daily active players -i.e., another of the variables that BRG identified as a relevant variable for revenue forecasting. It was found that the Casinos lost on average 1.5% of players each year from 2010 to 2013, with the exception of the Cuernavaca casino which reported a growth of 9.6%. The Naucalpan Casino, which was the

1049 *Id.*, ¶ 87.

1050 *Id.*, ¶ 92.

1051 *Id.*, ¶ 90.

1052 *Id.*, ¶ 101.

largest and did not suffer any interference in this period, lost customers at a rate of -2.4% per year.[1053]

c. Operating margin and EBITDA

892. In its first report, RIóN questioned the reasonableness of BRG's projected EBITDA margin. They argued that the projected margin for 2014-2020 (34.6%) was 2.5 times higher than the historical margin of 13.5% and almost 50% higher than the margin for the five years prior to the valuation date. In the opinion of Mexico's damages expert, this material improvement in the margin was unreasonable and unsupported.[1054]

893. RIóN also contrasted BRG's EBITDA margin projections with domestic and international industry margins and found that BRG's projections far exceeded the observed margins: while BRG projected a margin of between 31% and 40% as of 2020, the domestic and international industry reported between 18.5% and 21%, respectively.[1055]

894. Finally, RIóN questioned why a high proportion of expenses were considered fixed, when many of them would have a variable or semi-variable behavior in the medium term. Combined with the projected growth in revenues, the result was a substantial improvement in operating margins.[1056]

895. In its second report of BRG presents three main criticisms of RIóN's analysis. First, it points out that EBITDA margins cannot be compared without taking into account the differences in the ownership of the machines - i.e., that some casinos rent them and others purchase them. Second, it criticizes the comparison with the profitability of international companies arguing that the RIóN sample includes companies diversified in different lines of business and, by not separating the other lines of business, the comparison is inappropriate. Third, BRG criticizes RIóN for considering changes in only one period (2012 vs. 2013) as it does not represent a stable period.

1053 *Id.*, ¶ 102.

1054 *Id.*, ¶ 108.

1055 *Id.*, ¶ 109.

1056 *Id.*, ¶ 110.

According to RIóN, BRG relies on unsupported statements by Ms. Burr to conclude that the payroll expenses would be fixed and not variable.[1057]

896. In its second report, RIóN explains that in all this analysis BRG offers no explanation to justify the improvement in margins projected by BRG vis-à-vis the historical margins of the Casinos. [1058] It also points out that neither Claimants nor BRG have presented any evidence that the Casinos' operating model has been different from that of their competitors, and that this explains the difference in margins.[1059]

897. As to BRG's second critique, RIóN points out that BRG presents a list of international companies involved in the casino industry, but does not present figures of operating expenses to make an EBITDA calculation, nor does it present historical data or financial metrics to make a projection. Given that BRG only presents a description of the business of these companies and the countries in which they operate, RIóN considers its analysis as superficial and insufficient to refute its argument.[1060]

898. Regarding the third critique, RIóN is of the opinion that it is not reasonable to consider that the Casinos' personnel will remain constant in the face of a significant increase in the number of visitors. Therefore, RIóN maintains the position that payroll expenses must be considered as a variable expense for valuation purposes. RIóN also observes that the alleged savings referred to by BRG -e.g., the alleged dismissal of Mr. Alfredo Moreno- are unsubstantiated and rely solely on Ms. Burr's statement.[1061]

d. Participating, taxes and PTU

899. Regarding the calculation and payment of participations, RIóN detected a significant difference between what is reported to SEGOB and what is indicated in the financial statements and daily operation reports of the Casinos. RIóN found that the 2013 financial statements report a net income of MXN $553.7 million, while the daily operation reports, report income of MXN$

1057 *Id.*, ¶¶ 111-113.

1058 *Id.*, ¶ 114.

1059 *Id.*, ¶ 115.

1060 *Id.*, ¶ 121.

1061 *Id.*, ¶¶ 125-129.

561.72 million for that same year; that is, a difference of MXN $8 million or 1.4%. Given that the Participaciones a la SEGOB are calculated as 2% of net revenues, both sources would yield a result of approximately MXN$11 million (MXN$11.07 million and MXN$11.23 million respectively).[1062]

900. This contrasts sharply with the Participaciones reported to SEGOB which amount to MXN $1.83 million, or approximately 16.5% of the amount that would be obtained from using the revenues reported in the financial statements. The report provided to SEGOB (based on unaudited financial statements) reports revenues of MXN $553.7 million, however, it includes a footnote indicating that revenues subject to payment of participations are only MXN $91.3 million.[1063] No explanation has been offered for this.

901. Another problem detected by RIóN is that the accounting records with which BRG performs its analysis of operating expenses and tax payments include expenses corresponding to the Huixquilucan casino that is not part of Claimants' claim.[1064] This means that E-Games' financial statements cannot be used without adjustment to exclude the results of that casino.

902. Regarding PTU, BRG points out in its second expert report that the Juegos and E-Games Companies were not required to pay PTU since they did not have directly hired personnel. Since the personnel were subcontracted to a third party, BRG maintains the 30% tax rate.[1065] RIóN responds that, although in theory the direct payment of PTU could be avoided by outsourcing services, the service providers have to comply with this obligation and this would imply that E-Games and the Juegos Companies would indirectly pay this cost. Likewise, RIóN notes that, if the company that subcontracts the personnel is a related party, it must ensure that it generates a profit and charges a market price, otherwise, the labor cost would be underestimated and, therefore, the profit on which BRG makes its projections.[1066]

903. Another problem detected by RIóN is the lack of transparency about the personnel company, which makes it impossible to determine whether there are labor liabilities or

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1062 *Id.*, ¶¶ 134-135.

1063 *Id.*, ¶ 136.

1064 *Id.*, ¶¶ 138-139.

1065 *Id.*, ¶ 141.

1066 *Id.*, ¶ 142.

contingencies to identify flows that should be included in the valuation perimeter. According to RIóN, the information available comes from Ms. Burr, who simply states that the company with which the personnel was subcontracted did not generate profits, which is an indication that the personnel service was not provided at market prices. Finally, RIóN refers to the expert report of Mr. Claudio Jiménez, who points out that there are certain conditions that must be met in order to determine whether the subcontracting of personnel complies with the applicable legislation. There is no evidence that these requirements have been met.[1067]

904. The Respondent's expert report prepared by Mr. Juan José Díaz Mirón, explains that the 2012 Federal Labor Law sought to regulate subcontracting, to avoid evasion and avoidance of compliance with the employer's obligations and to make employers and intermediaries jointly and severally liable for the obligations contracted with the workers. Thus, it was established that subcontracting had to comply with certain requirements which, if not complied with, the contractor of the personnel services would be considered as the employer of the workers for purposes of the LFT. These requirements are: (i) they cannot cover all of the activities, the same or similar in their totality, that are developed in the work center, (ii) they must be justified by their specialized nature and (iii) they cannot include the same or similar tasks to those performed by the rest of the workers in the service of the employer.[1068]

905. Respondent's expert reviewed Ms. Burr's testimony regarding the issue of outsourcing of personnel services. Respondent's expert notes that from this review certain breaches of the OCT obligations can be identified. Consequently, the Respondent submits that the valuation should be adjusted to consider the impact of the PTU, [1069] which is estimated in the second report of RIóN to be US$8 million.

e. Other considerations

906. There are other differences between the experts that, although relevant, need not be explained in detail here. These other differences relate to the calculation of CAPEX (¶¶ 147-155

1067 *Id.*, ¶¶ 141-146.

1068 RER-7, Expert report by Mr. Juan José Díaz Miron, ¶¶ 24-26.

1069 *Id.*, ¶¶ 29-32

of the RIóN report), the calculation of terminal value (¶¶ 156-161) and the calculation of changes in working capital (¶¶ 162-169). The Tribunal is invited to review them carefully.

3. Expansion Project Valuation

907. BRG insists on using the DCF methodology to value the Expansion Projects. RIóN opposes the use of this methodology because it considers that there are no elements necessary to reliably project future results. In particular, it refers to the fact that these projects were not ongoing businesses and there is no history of profitable operations with which to project results. For this reason, RIóN in its first report decided to adopt the liquidation value methodology, which is consistent with the World Bank Guidelines.[1070]

908. RIóN advises in its second report that the use of the DCF is inappropriate by virtue of the applicable standard of compensation (reasonable certainty of damages) and the fact that the SEGOB permit alone was not sufficient to operate the prospective casinos - *i.e*., local permits, authorizations for commercial activity, commercial agreements, among others, were required.

909. RIóN also notes that the track record of the other operating casinos is not indicative of the potential performance of the proposed projects because the business is materially dependent on the location (*i.e., the market*) and tourist destinations such as Los Cabos and Cancun are simply not comparable to the markets in which the other casinos operated.[1071] As explained in previous sections, the subscription agreement for the Los Cabos project explained to potential investors that: there were no casinos that catered to tourists in Los Cabos; the Claimants had no experience operating casinos in tourist destinations; there was no guarantee that the casino would be profitable; the Mexican subsidiary might need to hire third parties with more experience in tourist areas; and that, unlike other casinos operated by Exciting Games, which generally catered to local residents, there were additional risks such as facing greater losses from gambling by higher income players.[1072]

910. The statement of Mr. Pérez Lizaur, President of the Asociación de Permisionarios y Proveedores de Juegos y Sorteos, A.C., confirms this reality:

1070 RER-6, RIóN, ¶¶ 170-172.

1071 *Id.*, ¶ 174(d) y (e)

1072 Exhibit C-466.

> The casino industry in Mexico is aimed primarily at a local market. In relation to the opening of casinos in beach destinations to take advantage of the foreign tourist market, it should be mentioned that they do not have large influxes of foreign tourists, since, for example, in cities where there are beaches, the casinos that exist are mostly frequented by local customers and it is understandable that foreign tourists do not frequent these casinos because if they come to cities like Cancun or Los Cabos, they do so to enjoy some moments in the cities or spend most of the time on the beaches. Foreign tourists who come on cruise ships, whose stops in each city are for a limited time, prefer to visit or enjoy the beaches than go into a closed space such as a casino. In addition to the fact that, in the case of cruise ships, the ships themselves bring their casino, so. that the foreign tourist does not intend to enter a casino in the city he visits. This is the reason why casinos in cities like Cancun or Los Cabos have more local customers than foreigners.
>
> There is not a city in Mexico that is considered relevant for foreign tourists that has a casino exclusively dedicated to that sector. Foreign tourists do not spend in casinos.
>
> Casinos in tourist areas have average revenues relative to other casinos in Mexico. Cruise ship tourists have casinos on the cruise ship and tourists in hotels with purchased "*ali inclusive*" packages do not leave those hotels to spend in local casinos. So casinos in tourist areas are not very successful.
>
> There are only two hotel casinos in Mexico, one is located in Cancun with approximately 20 machines and the other is located in Tijuana with approximately 200 machines.[1073]

911. RIóN also refers to the fact that the Claimants did not always get it right in the selection of locations for their Casinos and cites the example of the first casino in Puebla that failed and they had to make a new investment to relocate it to another location. The possibility of a failure like the one in Puebla in a destination such as Cancun or Los Cabos was latent by virtue of the Claimants' inexperience in such markets and the risks inherent to the investment which were significantly higher.

912. In addition to emphasizing that according to Mr. Taylor, the Cabo and Cancun projects were not close to start-up, RIN notes that the evidence presented in BRG's second report reflects the high degree of speculation in the financial projections. RIóN notes that the Cancún Project presentation, for example, reflects that Claimants expected a fifth year income of USD $38.4 million with a net profit of USD $18.8 million. For the same year, BRG projects revenue of USD $15.1 million and net income of USD $2.5 million. RIóN concludes that far from demonstrating a

1073 RWS-8, Witness statement of Mr. Alfonso Pérez Lizaur, p. 6.

conservative nature of BRG's estimates, these differences demonstrate the wide margin of error and that Claimants' knowledge of the market was insufficient.[1074]

913. About the online casino project, RIóN believes that BRG's valuation is even more speculative because: Claimants had never operated an online casino; Claimants' business model was questionable because it relied on Bally's platform, which was available to anyone who wanted to use it (they had no differentiator against potential competitors); Bally did not guarantee the success of the project, in fact, the 42 customers that Bally reports as customers, none of them use it today.[1075]

914. There are additional observations in the second RIóN report that are omitted here to avoid unnecessary repetition.

4. Results

915. The table below contains RIóN's conclusion of value for the Claimants' business:

Tabla 20: Resumen de nuestra estimación de Valor Justo de Mercado

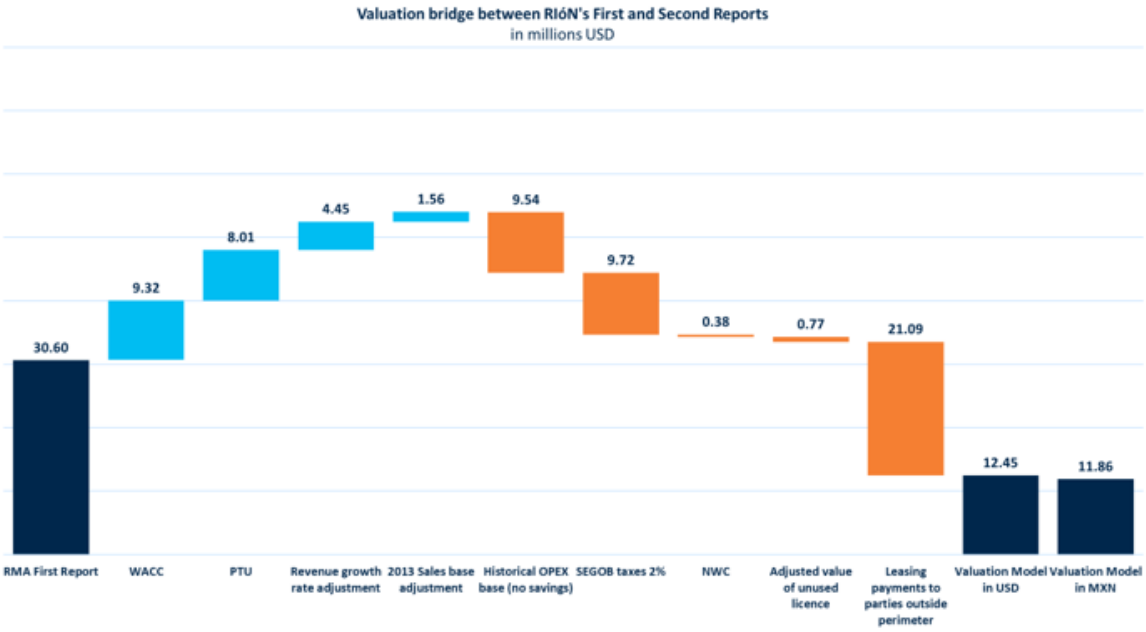
Damages Summary MXN Model					
MXN Million	April 2014 - Nov. 2037	Nov. 2037 - Nov. 2052	Terminal Value	Total Damages	Total Damages (USD)
Naucalpan Casino	$15.93	$1.45	[illegible]	$17.38	$1.33
Villahermosa Casino	$13.15	$1.87	[illegible]	$15.02	$1.15
Puebla Casino	$58.97	$9.36	[illegible]	$68.32	$5.24
Cuernavaca Casino	$70.37	$11.00	[illegible]	$81.36	$6.24
DF Casino	($6.28)	($1.10)	[illegible]	($7.38)	($0.57)
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Discounted Cash Flow	**$152.13**	**$22.58**	**$0.00**	**$174.71**	**$13.40**
Estimated value of unused license				$18.58	$1.43
Private Company Discount				**($38.66)**	**($2.96)**
Fair Market Value				**$154.63**	**$11.86**
Pre-Award Interest					$3.28
Total with Pre-Award Interest					**$15.13**

916. The second expert of RIóN also includes a reconciliation between the results obtained in its first report and those reported in the previous table, which are summarized in the following chart:

1074 RER-6, RIóN, ¶ 178

1075 *Id.*, ¶ 183(a) a (e).

Ilustración 13: Impacto de cambios entre modelo de Primer Informe y Segundo Informe



917. As can be seen, the change in valuation is mainly explained by the difference detected in the leasing of machinery, the computation of participations and the historical basis of operating expenses.

G. Interest

918. The Claimants' expert suggests two possible reference rates. The first is the Mexican government's cost of financing. The second is Claimants' cost of financing. BRG calculates the first by adding a country risk premium (CRP) to the U.S. risk-free rate. This yields a result of 4.57% according to BRG's second report. Alternatively, BRG.[1076] proposes to use Claimants' cost of financing, which it calculates as the Mexican government's financing rate plus an industry credit risk premium - *i.e.*, U.S. Hotel/Gaming. The sum of these two components yields a result of 7.57% according to its second report. Alternatively, BRG proposes to use Claimants' cost of financing, which it calculates as the Mexican government's financing rate plus an industry credit risk premium - *i.e.*, U.S. "Hotel/Gaming". The sum of these two components yields a result of 7.57% according to its second report.

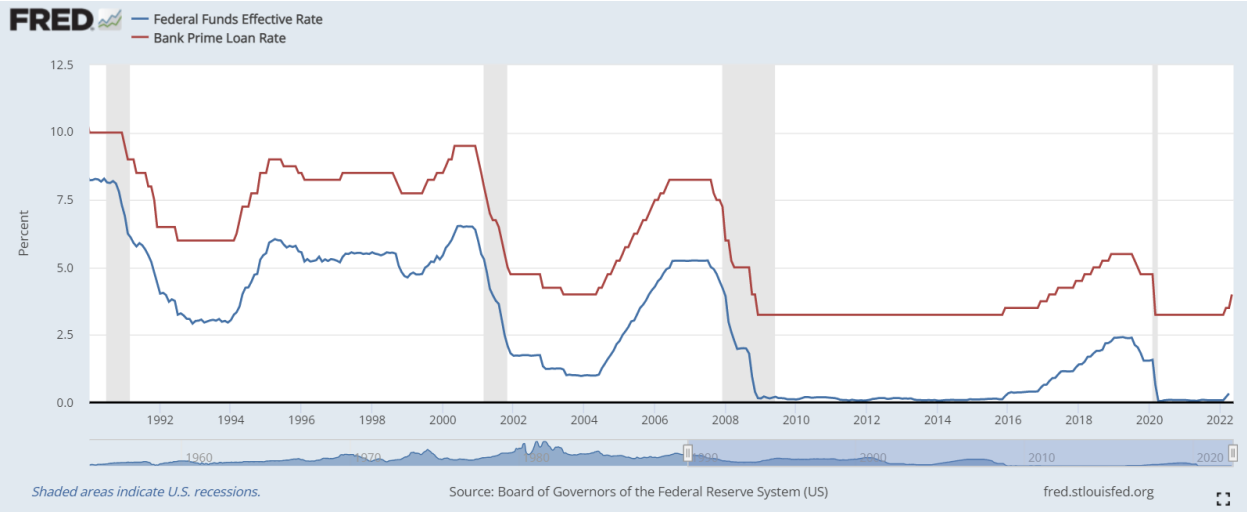
919. The only guide contained in the NAFTA in relation to the payment of interest is found in Article 1110(4), which provides that "[i]f compensation is paid in the currency of a member

1076 *Id.*, ¶ 254.

country of the Group of Seven, the compensation shall include interest at a reasonable commercial rate for the currency in which such payment is made, from the date of expropriation until the date of payment." The Respondent considers this guidance to be reasonable for determining the rate of pre- and post-award interest in a case such as this.

920. Following this Guide, RIóN proposes an interest rate of 3.25% corresponding to the U.S. Prime Rate for an award denominated in U.S. dollars. For an award denominated in Mexican pesos, RIóN proposes a rate of 6.15% which corresponds to the return on 10-year Mexican peso-denominated bonds in April 2014.[1077] Both rates are reasonable trading rates for the currency in question.

921. This is the rate charged by U.S. commercial banks to their most creditworthy customers and, although it is based on the Federal Funds rate[1078] -*i.e.*, the risk-free rate- it includes an additional premium that places it around 3 percentage points above the Federal Funds rate, as shown in the following chart[1079]:



922. RIóN observes that Claimants' opportunity cost or financing cost proposed by BRG is not appropriate in this case since the business risk is already considered in the discount rate and, therefore, in the amount of the loan. the damages. More important still, is the fact that these rates

1077 *Id.*, ¶ 256.

1078 Reply, ¶ 1245.

1079 https://fred.stlouisfed.org/series/fedfunds#0

would overcompensate the Claimants because they are no longer exposed to the risks associated with the investment. RIóN cites two renowned economists (Fisher and Romaine) who explain:

> In depriving the plaintiff of an asset worth Y at time 0, the defendant also relieved it of the risks associated with investment in that asset. The plaintiff is thus entitled to interest compensating it for the time value of money, but it is not also entitled to compensation for the risks it did not bear. Hence prejudgment interest should be awarded at the risk-free interest rate.[1080]

923. The rates proposed by BRG are not commercial rates and are not reasonable in this case for the reasons aforementioned above.

924. The QE Claimants also allege in their Reply that "Mexico, however, appears to question the Claimants' basis for seeking an award of damages denominated in U.S. dollars (USD), claiming that since 'the Claimants' business was located in Mexico, they consider that reparation should be determined in Mexican pesos (MXN)'". They are then surprised that Mexico does not cite any authority in support of this proposition.[1081]

925. The reason is very simple. Mexico never proposed that damages should be paid in pesos. What it argued is that damages should be determined (*i.e.,* calculated) in pesos because the Casinos' cash flows were denominated in pesos. However, once the amount of damages is calculated, it can be converted to any other currency using the exchange rate existing on the valuation date, so that if the Tribunal orders the damages to be paid in pesos, it would apply a rate of 6.15% and, if it ordered payment in U.S. dollars, it would apply the *United States Prime Rate*, which is a reasonable commercial rate for that currency.[1082] These rates would apply to both pre-award and post-award interest.

926. The Respondent does not oppose to the interest that be compounds and proposes a period of composition of one year, which is what is commonly determined by international courts in investor-state cases.

927. Finally, with respect to The Claimants' request that the Tribunal declare that any damages award be net of all applicable taxes, Respondent observes that, although the calculation of the

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1080 *Id.*, ¶ 259 citing to Franklin M Fisher and R Craig Romaine; 'Janis Joplin's Yearbook and the Theory of Damages', Journal of Accounting, Auditing & Finance, Vol. 5, Nos. 1/2 (1990), p. 146

1081 *Id.*, Reply, ¶

1082 Counter-Memorial on the Merits, ¶ 1017.

flows that serve as the basis for the DCF calculation are after-tax, there is a very significant tax liability that must be deducted from any compensation that the Tribunal orders. Mexico notes that there is contemporaneous evidence that E-Games was not paying its taxes:

> JOHN CONLEY:[…] SEGOB didn't want me. When I was negotiating with Televisa, they told me SEGOB thought we were still associated with Rojas and that there were major tax issues, which there are – and tax issues aren't like Gordon says there are, we didn't pay our fucking taxes, didn't pay them. He said we didn't have to, but now [UNINTEL]. We didn't pay period. They are due every month. We didn't pay.[1083]
>
> JOHN CONLEY: The reason I [UNTNTEL] it even came up at all is we didn't pay our individual income taxes on the different juegos on the five companies, for 2013. And 1 asked Arturo, "What the fuck? We don't pay our taxes?" I mean, they can shut us down for that Why not Arturo?[1084]

928. On the other hand, the Claimants have been unable to demonstrate that the SAT's determination is invalid, and it would be inappropriate for them to be allowed to use this arbitration proceeding to avoid their tax obligations.

V. REQUEST FOR RELIEF

929. For the reasons stated above, the Respondent respectfully requests that this Tribunal:

- Dismiss Claimants´ claims in their entirety because the claims are without merit;
- Dismiss the Claimants' claims relating to the projects in Los Cabos, Cancun and online casinos in their entirety, either because the Tribunal lacks jurisdiction to consider Claimants' claims or, in the event that it determines that it has jurisdiction to decide one or more of Claimants' claims, because the claims lack merit;
- In the event that the Tribunal determines that the Respondent expropriated the Claimants' casinos, determine damages based on Rion M&A's valuation and reduce the amount payable by such percentage as the Tribunal deems pertinent for the Claimants' contributory fault;
- Dismiss the claim for violation of Articles 1102, 1103 and 1105 because Claimants have failed to quantify the damages associated with such violations;

1083 Exhibit CRT-07, p. 5.

1084 Exhibit CRT-08, p. 7.

- Order the Claimants to indemnify Respondent for costs and expenses incurred in this arbitration, including legal costs and those incurred by their legal team, witnesses and experts; and

VI. CONCLUSION

930. Por todo lo anterior, la Demandada solicita a este Tribunal desestimar por completo la reclamación de la Demandante, con la correspondiente condena en costos a favor de la Demandada.

Respectfully submitted,

General Director of Legal Consulting of International Trade

Orlando Pérez Gárate