

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ESPÍRITU SANTO HOLDINGS, LP AND L1BRE HOLDING, LLC

Claimants

v.

UNITED MEXICAN STATES

Respondent

(ICSID Case No. ARB/20/13)

AWARD

MEMBERS OF THE TRIBUNAL

Mr. Eduardo Zuleta Jaramillo, President of the Tribunal

Mr. Charles Poncet, Arbitrator

Mr. Raúl Emilio Vinuesa, Arbitrator

SECRETARY OF THE TRIBUNAL

Ms. Patricia Rodríguez Martín

26 March 2026

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DEFINED TERMS

Memorial or Memorial on the Merits	Claim memorial submitted by claimant Espíritu Santo Holdings, LP on 17 September 2021
L1bre Holding Addendum	L1bre Holding's Addendum to ESH's Memorial
Reply	Reply memorial submitted by Claimants Espíritu Santo Holdings, LP and L1bre Holding LLC on 4 November 2022
ESH	Espíritu Santo Holdings, LP
L1bre Holding	L1bre Holding LLC
Claimants	ESH and L1bre Holding
Respondent	The United Mexican States
Counter-Memorial	Counter-Memorial submitted by Respondent on 13 May 2022
Rejoinder	Rejoinder memorial submitted by Respondent on 7 March 2023

I. INTRODUCTION

A. THE PARTIES AND THEIR REPRESENTATIVES

1. Claimants

1. Claimants in this arbitration are (i) Espíritu Santo Holdings LP (“**ESH**”), a limited partnership incorporated under the laws of Alberta, Canada, and (ii) L1bre Holding LLC (“**L1bre Holding**”), a limited liability corporation incorporated under the laws of Delaware, U.S.¹
2. Claimants are represented in this arbitration by:

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¹ C-0001, Certificate of Good Standing of ES Holdings, under the laws of Alberta, Canada, 21 May 2019; C-0069, Lusad’s Corporate Structure since November 2017.

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2. Respondent

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B. THE TRIBUNAL

4. The Tribunal members and their addresses are as follows:

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II. PROCEDURAL HISTORY

A. THE INSTITUTION OF THE PROCEEDING ICSID CASE NO. ARB/20/13

5. *The Request for Arbitration of ESH.* On 1 May 2020, ESH submitted a request for arbitration, together with factual exhibits C-001 through C-0037 and legal authorities CL-0001 through CL-0005, to ICSID (the “**Request**”).
6. On 11 May 2020, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified ESH and Respondent of the registration. In the Notice of Registration, the Secretary-General invited them to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
7. *The Constitution of the Tribunal.* The Tribunal was constituted in accordance with NAFTA Article 1123. According to this Article, the Tribunal consists of three arbitrators, one to be appointed by each party and the third, presiding arbitrator to be appointed by agreement of the Parties.
8. The Tribunal is composed of Eduardo Zuleta Jaramillo, a Colombian national appointed by agreement of ESH and Respondent as the presiding arbitrator; Charles Poncet, a Swiss national, appointed by ESH; and Raúl E. Vinuesa, an Argentine and Spanish national, appointed by Respondent.
9. On 27 January 2021, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “**Arbitration Rules**”), notified ESH and Respondent that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date.
10. *The First Session.* In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session on 11 May 2021 by video conference. Participating in the conference were:

Members of the Tribunal

Eduardo Zuleta Jaramillo, President of the Tribunal
Charles Poncet, Arbitrator
Raúl E. Vinuesa, Arbitrator

ICSID Secretariat:

Francisco Abriani, Secretary of the Tribunal

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11. *Procedural Order No. 1*. Following the first session, on 29 March 2021, the Tribunal issued Procedural Order No. 1 recording ESH's and Respondent's agreements on procedural matters and the Tribunal's decisions on the disputed procedural issues.
12. *ESH's Memorial on the Merits*. On 17 September 2021, ESH filed a Memorial on the Merits, together with (i) factual exhibits C-0038 through C-0114; (ii) legal authorities CL-0006 through CL-0103; (iii) the witness statement of Mr. Santiago León Aveleyra dated 14 September 2021; (iv) the witness statement of Mr. Eduardo Zayas Dueñas dated 13 September 2021; and (v) the expert report of Mr. Howard Rosen (Secretariat Advisors) dated 17 September 2021, together with exhibits HR-0001 through HR-0121.
13. *The Proposal to Disqualify Howard Rosen*. On 9 December 2021, Respondent filed a proposal to disqualify Mr. Howard Rosen, together with factual exhibits R-0001 through R-0008 and legal authorities RL-0001 and RL-0012.
14. On 10 January 2022, ESH submitted its response to the proposal to disqualify Mr. Howard Rosen with factual exhibit C-0115 and legal authorities CL-0104 through CL-0116.
15. On 31 January 2022, the Tribunal issued its decision dismissing Respondent's proposal to disqualify Mr. Howard Rosen.

B. THE CONSOLIDATION WITH ICSID CASE NO. ARB/21/55

16. *The Request for Arbitration of L1bre Holding*. On 27 October 2021, L1bre Holding submitted a request for arbitration together with supporting documentation to ICSID.
17. On 15 November 2021, the Secretary-General registered L1bre Holding's request for arbitration in accordance with Article 36(3) of the ICSID Convention.
18. *The Consolidation of the Proceedings (Procedural Order No. 2)*. On 26 January 2022, ESH filed a letter "seeking the Tribunal's agreement to have the claims of the Claimant's wholly owned subsidiary, [L1bre Holding] heard together with those of [ESH] before this Tribunal."
19. On 31 January 2022, Respondent informed the Tribunal that it did not object to ESH's proposal.
20. On 1 March 2022, L1bre Holding consented to having its claims heard together in this proceeding, confirmed that it had no objections to the constitution of the Tribunal in this proceeding, and agreed to adopt (i) all of the submissions made so far by ESH subject to its "Supplement to Claim Memorial" and (ii) all of the procedural steps taken in ICSID Case No. ARB/20/13.
21. On the same date, L1bre Holding filed a letter with the Secretary-General on behalf of the parties to ICSID Case No. ARB/21/55, with the Tribunal in copy, informing the Centre of the parties' agreement to discontinue ICSID Case No. ARB/21/55, adding L1bre Holding as a claimant to ICSID Case No. ARB/20/13.
22. On 4, 6 and 7 March 2022, the Members of the Tribunal signed their respective updated declarations pursuant to ICSID Arbitration Rule 6(2).
23. On 7 March 2022, the Tribunal issued Procedural Order No. 2 ordering the addition of L1bre Holding to ICSID Case No. ARB/20/13. The Tribunal also accepted the procedural calendar agreed by the Parties and ordered that the rest of Procedural Order No. 1 apply unchanged to the consolidated proceeding.
24. On the same day, the Secretary-General of ICSID issued an order taking note of the discontinuance of ICSID Case No. ARB/21/55 pursuant to ICSID Arbitration Rule 43(1).
25. On 10 March 2022, L1bre Holding filed its Addendum to ESH's Memorial on the Merits dated 28 January 2022, together with factual exhibit C-0116 through C-0128 and legal authorities CL-0117 and CL-0018. In its Addendum, L1bre Holding noted that it "adopts and incorporates herein as if fully set out herein, *mutatis mutandis*, the Claim Memorial and ES Holdings' subsequent filings, together with their accompanying factual exhibits,

legal authorities, witness statements and expert reports” subject to additional allegations regarding “(i) the jurisdictional basis for L1bre Holding’s claims [...] and (ii) the computation of damages owing to L1bre Holding for its own losses and for those of Lusad...”²

C. THE WRITTEN PHASE OF THE PROCEEDING

26. *The Request for Provisional Measures (Procedural Order No. 3)*. On 17 March 2022, Claimants filed a request for provisional measures, together with factual exhibits C-0129 through C-0149 and legal authorities CL-0119 through CL-0142 (the “**Application**”). The Application sought urgent protection from a set of criminal actions brought by Mexico in relation to this arbitration and involving Claimants’ corporate representatives and fact witnesses in this proceeding, Messrs. Eduardo Zayas Dueñas and Santiago León Aveleyra.
27. On 25 April 2022, Respondent filed its response to the Application, together with factual exhibits R-0009 through R-0042 and legal authorities RL-0013 through RL-0042, in which it opposed the Application.
28. On 5 May 2022, Claimants submitted their reply on the Application, together with factual exhibits C-0150 through C-0156 and legal authorities CL-0143 through CL-0145.
29. On 16 May 2022, Respondent filed a rejoinder on the Application, together with factual exhibits R-0161 through R-0163 and legal authorities RL-0152 and RL-0153.
30. On 3 June 2022, the Tribunal issued Procedural Order No. 3 on Claimants’ request for provisional measures rejecting the Application. However, in the interest of maintaining the integrity of this proceeding, the Tribunal invited Respondent to consider in good faith deferring any proceeding to seek Mr. León’s extradition until the issuance of the award and noted that it expects Mexico to take all appropriate steps to ensure that Mr. Zayas’ freedom of movement is not unduly restrained and that he will be able to meet with counsel and render testimony not only in conditions similar to the ones he would have normally experienced, but without fear that may affect his free testimony.
31. *Respondent’s Counter-Memorial*. On 13 May 2022, Respondent filed a counter-memorial on the merits, together with: (i) factual exhibits R-0043 through R-0160; (ii) legal authorities RL-0043 through RL-0151; (iii) the witness statement of Mr. Andrés Lajous Loaeza dated 9 May 2022, together with exhibits ALL-001 through ALL-008; (iv) the witness statement of Mr. Rufino H. León Tovar dated 6 May 2022, together with exhibit RHLT-001; (v) the witness statement of Mr. Eduardo Clark García Dobarganes dated 10

² Addendum to ESH’s Memorial, ¶ 4.

May 2022, together with exhibits ECGD-001 through ECGD-004; (vi) the witness statement of Mr. Carlos Alberto Serdán Rosales dated 9 May 2022, together with exhibits ASR-001 through ASR-005; (vii) the expert report of Messrs. Max Alberto Diener Sala and Jorge González Gallástegui (DLG), together with exhibits DLG-001 through DLG-071; and (viii) the expert report of Ms. Rebecca Vélez and Mr. Timothy Hart (Credibility International) dated 13 May 2022, together with exhibits CRED-0001 through CRED-0023.

32. *Decision on Document Production (Procedural Order No. 4)*. Following exchanges between the Parties, on 22 July 2022, the Parties filed a request for the Tribunal to decide on their respective requests for the production of documents.
33. On 4 August 2022, the Tribunal issued Procedural Order No. 4 in which it ruled on the Parties' requests for the production of documents and further invited the Parties to (i) agree on a confidentiality protocol for the disclosure of documents identified under Claimants' document requests nos. 26 and 31, and inform the Tribunal of their agreement, or points of disagreement, no later than 22 August 2022; (ii) agree on a protocol for the simultaneous exchange and review of the source codes of the "Libre" and "Mi Taxi" systems, and to inform the Tribunal of their agreement, or points of disagreement, no later than 22 August 2022; and (iii) agree on a protocol for the review of documents requested pursuant to Respondent's document requests nos. 45 and 46 after Claimants inform Respondent and the Tribunal which of these documents are available in their original hard copy file and which are available in digital copy, and where the originals are available.
34. *The Parties' Protocols (Procedural Order No. 5)*. On 22 August 2022, the Parties submitted to the Tribunal their agreed confidentiality protocol for the disclosure of documents identified under Claimants' requests nos. 26 and 31 and their agreed protocol for the simultaneous exchange of the source codes and informed the Tribunal that the simultaneous exchange would take place on 9 September 2022 at 4 pm (Mexico City time). On 24 August 2022, the Tribunal issued Procedural Order No. 5 confirming the Parties' agreed protocols on confidentiality and for the simultaneous exchange of the source codes.
35. *The Inspection of the Original Hard Copy Documents (Procedural Order No. 6)*. On 22 August 2022, Claimants identified the documents requested by Respondent under its requests nos. 45 and 46 that were available in their original hard copy.
36. On 12 September 2022, the Parties informed the Tribunal of their points of agreement and disagreement on the protocol for the inspection of the original hard copy documents.
37. On 15 September 2022, the Tribunal issued Procedural Order No. 6 by which it (i) approved the agreed protocol for the inspection of Claimants' original hard copy

documents; (ii) decided that the inspection would take place at ICSID's facilities in Washington D.C. the week of 31 October 2022 through 4 November 2022; and (iii) invited the Parties to coordinate the necessary arrangements for the inspection with the ICSID Secretariat.

38. Between 31 October and 3 November 2022, the Parties conducted the on-site inspection of the originals of Claimants' exhibits requested under Respondent's document requests nos. 45 and 46. Participating in the inspection were:

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39. *The Emergency Motion for Access to Eduardo Zayas Dueñas (Procedural Order No. 7).* On 9 September 2022, Claimants submitted an emergency motion for access to Mr. Zayas, together with Exhibits A through G (the "**Emergency Motion**").
40. On the same day, the Tribunal invited Respondent to comment on the Emergency Motion by 13 September 2022.
41. On 13 September 2022, Respondent requested a one-day extension to respond to the Emergency Motion, which the Tribunal granted on the same day.
42. On 14 September 2022, Respondent filed its response on the Emergency Motion, together with Exhibits 1 through 11.
43. On 15 September 2022, Claimants sought leave to reply to Mexico's response by 19 September 2022. On the same day, Respondent sought permission to file a rejoinder on the Emergency Motion in the event Claimants' request was granted. On the same day, the Tribunal granted the Parties' respective requests.
44. On 19 September 2022, Claimants filed their reply on the Emergency Motion, together with Exhibits A through E.

45. On 23 September 2022, Respondent filed its rejoinder on the Emergency Motion, together with Exhibits 12 and 13.
46. On 29 September 2022, the Tribunal issued Procedural Order No. 7 dismissing Claimants' Emergency Motion and ordering Respondent to ensure that Mr. Zayas was able to meet with Claimants' counsel and render testimony not only in conditions similar to the ones he would have normally experienced, but without any fear that may affect his free testimony.
47. *The Renewed Emergency Motion for Access to Eduardo Zayas Dueñas (Procedural Order No. 8)*. On 7 October 2022, Claimants filed a renewed emergency motion for access to Mr. Zayas together with Exhibits A through E (the "**Renewed Motion**").
48. On 11 October 2022, Respondent filed its response to the Renewed Motion, together with Annexes 1 and 2. On the same day, Claimants provided the Tribunal with an update on Mr. Zayas' situation.
49. On 12 October 2022, the Tribunal invited Respondent to comment on Claimants' communication of 11 October by 14 October 2022. On the same day, Claimants sought leave to reply to Respondent's response.
50. On 13 October 2022, the Tribunal informed the Parties that it considered that it had received sufficient information and that it would determine whether further submissions or a short virtual hearing were required after reviewing the Parties' submissions.
51. On 14 October 2022, Respondent submitted its response to Claimants' communication of 11 October 2022.
52. On 14 October 2022, Claimants provided a further update on Mr. Zayas' situation.
53. On 17 October 2022, the Tribunal scheduled a virtual hearing on the Renewed Motion for 25 October 2022 at 11 am (Washington, D.C. time).
54. On 25 October 2022, the Tribunal and the Parties held a virtual hearing on the Renewed Motion. Participating in the hearing were:

Members of the Tribunal

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ICSID Secretariat:

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55. On 1 November 2022, Claimants sought permission to file a statement by Mr. Zayas. On the same day, the Tribunal instructed Claimants to explain by 2 November 2022 the subject matter of the statement and its relevance for this proceeding. The Tribunal further invited Respondent to provide any comments it may have on Claimants' explanation by 4 November 2022.
56. On the same day, Respondent wrote to the Tribunal addressing the conditions for Claimants' representatives to have access to Mr. Zayas.
57. On 2 November 2022, the Tribunal invited Claimants to submit brief comments on Respondent's communication of 1 November by 4 November 2022.
58. On 2 November 2022, Claimants submitted their explanation as to the relevance of Mr. Zayas' statement.
59. On 4 November 2022, Respondent provided its comments on Claimants' communication. On the same day, Claimants confirmed that they had already responded to Respondent's 1 November communication in their 2 November submission.
60. On 5 November 2022, the Tribunal issued Procedural Order No. 8 dismissing Claimants' Renewed Motion of 7 October 2022 in its entirety and reaffirming its findings and decisions in Procedural Orders Nos. 3 and 7.

61. *The Motion to Compel Production of Documents (Procedural Order No. 9)*. On 24 October 2022, Claimants filed a motion to compel production of documents, together with Exhibits 1 through 4. In their motion, Claimants requested that the Tribunal order Respondent to produce the complete files relating to the Concession responsive to Claimants' document request no. 1.
62. On October 25, 2022, the Tribunal invited Respondent to comment on the motion by 28 October 2022.
63. On 28 October 2022, Respondent submitted its response to the motion, together with Annexes 1 through 4. Respondent requested that the Tribunal dismiss the motion on the basis that the files had already been produced in accordance with Procedural Order No. 4.
64. On 31 October 2022, Claimants sought leave to reply to Respondent's response. On the same day, the Tribunal granted Claimants' request and invited Respondent to submit a rejoinder on the motion by 5 November 2022.
65. On 2 November 2022, Claimants filed their reply on their motion in which they reiterated their request that Respondent produce all files relating to the Concession which are responsive to their document request no. 1 and requested that the Tribunal reconsider its ruling on their document request no. 5.
66. On 5 November 2022, Respondent filed its rejoinder on the motion.
67. On 15 November 2022, the Tribunal issued Procedural Order No. 9 (i) ordering Respondent to confirm on or before 29 November 2022 that it had undertaken a search in good faith of the documents referred to under paragraph 22 of Procedural Order No. 9 and that the only "complete file or docket naming Lusad as a party from 2016 to 2018" is the one kept by DGLyOTV, an administrative unit within SEMOVI; and (ii) denying Claimants' request that the Tribunal reconsider its decision on their document request no. 5.
68. On 29 November 2022, Respondent provided its response to the Tribunal's orders in Procedural Order No. 9.
69. *Claimants' Reply on the Merits*. On 4 November 2022, Claimants filed a reply on the merits, together with (i) factual exhibits C-0023, C-0029, C-0040, C-0062, C-0098, C-0103, C-0108, C-0134, and C-0157 through C-0315; (ii) legal authorities CL-0001, CL-0002, CL-0007, CL-0008, CL-0010, CL-0013, CL-0016, CL-0021, CL-0028, CL-0030, CL-0037, CL-0040, CL-0042, CL-0043, CL-0045 through CL-0047, CL-0051, CL-0054, CL-0059, CL-0061, CL-0065 through CL-0067, CL-0069 through CL-0071, CL-0093, CL-0099, CL-0135, and CL-0146 through CL-0208; (iii) the second witness statement of Mr. Santiago León Aveleyra dated 3 November 2022; (iv) the witness statement of Mr.

Agustín Muñana Zúñiga dated 28 September 2022; (v) the witness statement of Mr. Eduardo Herrera de Juana dated 25 October 2022; (vi) the expert report of Mr. Joshua Mitchell (Kroll) dated 3 November 2022, together with exhibits KROLL-001 through KROLL-015 (the “**Mitchell Report**”); (vii) the expert report of Mr. Marco Antonio de la Peña Sánchez dated 3 November 2022, together with exhibits MAP-0001 through MAP-0066; and (viii) the second expert report of Mr. Howard Rosen dated 4 November 2022, together with exhibits HR-0121 through HR-0156.

70. *Eduardo Zayas Dueñas’ Second Witness Statement.* On 4 December 2022, Claimants sought leave to file a second witness statement of Mr. Zayas.
71. On 5 December 2022, Respondent asked the Tribunal for an extension of time to file its Rejoinder on the Merits in light of Claimants’ request to submit Mr. Zayas’ second witness statement.
72. On 13 December 2022, the Tribunal granted Claimants’ request and instructed them to file Mr. Zayas’ second witness statement by 20 December 2022. The Tribunal further granted Respondent’s request for an extension of time to file its Rejoinder.
73. On 16 December 2022, Claimants submitted the second witness statement of Mr. Eduardo Zayas Dueñas dated 30 November 2022.
74. *Procedural Order No. 10 on Transparency.* On 27 January 2023, the Tribunal issued Procedural Order No. 10 on the procedure governing the designation of confidential information and the preparation of redacted copies of documents for publication.
75. *Respondent’s Rejoinder on the Merits.* On 7 March 2023, Respondent filed a rejoinder on the merits, together with (i) factual exhibits R-0164 through R-0252; (ii) legal authorities RL-0155 through RL-0178; (iii) the second witness statement of Mr. Andrés Lajous Loaez dated 3 March 2023, together with exhibits ALL-009 and ALL-010; (iv) the expert report of Mr. George Thomas Edwards (Quandary Peak Research Inc.) dated 7 March 2023, together with Annex 2 and exhibits QP-001 through QP-031 (the “**Quandary Expert Report**”); (v) the expert report of Ms. Angélica Armenta Pichardo and Mr. Francisco Elías Bartolo Sánchez dated 7 March 2023, together with exhibits FEBS-0001 through FEBS-0054 (the “**Armenta-Bartolo Report**”); (vi) the second expert report of Ms. Rebecca Vélez and Mr. Timothy Hart (Credibility International) dated 6 March 2023, together with Exhibit 1 and Exhibit 2, and exhibits CRED-0024 through CRED-0043; and (vii) the second expert report of Messrs Max Alberto Diener Sala and Mr. Jorge González Gallástegui (DLG), together with exhibits DLG-072 through DLG-101.

76. *The NAFTA Non-Disputing Parties' Submissions*. On 21 March 2023, the Governments of Canada and the United States of America filed written submissions as Non-Disputing Parties pursuant to NAFTA Article 1128. On 4 April 2023, each Party filed comments on the NAFTA Non-Disputing Parties' written submissions.
77. *Claimants' Request to Adduce New Evidence and Access Documents (Procedural Order No. 11)*. On 3 May 2023, Claimants filed an application to (i) introduce new evidence into the record to respond to the report on graphoscopy and documentoscopy filed with Respondent's Rejoinder (Section A); (ii) access the original documents relied upon by Respondent's experts in the Armenta-Bartolo Report (Section B); (iii) access an original document in the Semovi File produced by Mexico (Section C); (iv) have the Tribunal strike a jurisdictional challenge raised by Respondent in its Rejoinder or, alternatively, allow them to respond to it (Section D); and (v) have Respondent facilitate Mr. Zayas' in-person participation at the final hearing (Section E) (the "**First Application**").
78. On the same day, the Tribunal invited Respondent to comment on the First Application by 12 May 2023. On 8 May 2023, Respondent sought an extension until 19 May to file its comments, which the Tribunal granted on 9 May 2023.
79. On 19 May 2023, Respondent filed its response to the First Application, together with Annexes A to C, opposing all of Claimants' requests.
80. On 22 May 2023, Claimants sought leave to reply by 24 May 2023. On the same day, the Tribunal granted Claimants' request and invited Respondent to file a rejoinder by 26 May 2023.
81. On 24 May 2023, Claimants filed their reply on the First Application and on 26 May 2023, Respondent filed its rejoinder on the First Application.
82. On 5 June 2023, Claimants' filed an application seeking to supplement the arbitration record with thirteen email exchanges (the "**13 Emails**"), together with Annexes A and B (the "**Second Application**"). On the same day, the Tribunal invited Respondent to comment on the Second Application by 9 June 2023.
83. On 9 June 2023, Respondent filed its Response to the Second Application together with Annex 1.
84. On 11 June 2023, Claimants sought leave to reply by 13 June 2023. Respondent opposed Claimants' request.
85. On the same day, the Tribunal granted Claimants' request and invited Respondent to file a rejoinder on the Second Application by 16 June 2023.

86. On 13 June 2023, Claimants filed their reply on the Second Application and on 16 June 2023, Respondent filed its rejoinder on the Second Application.
87. On 3 July 2023, the Tribunal issued Procedural Order No. 11 (i) denying Claimants' request in Section A of the First Application; (ii) granting Claimants' request in Section B of the First Application and instructing the Parties to submit a joint expert report to be prepared by Respondent's experts who produced the Armenta-Bartolo Report dated 7 March 2023 (i.e., Angélica Armenta and Francisco Elías Bartolo Sánchez) together with any experts that Claimants decided to appoint; (iii) denying Claimants' request in Section C of the First Application; (iv) denying Claimants' main relief requested in Section D of the First Application and granting Claimants' alternative relief to file a response to Respondent's jurisdictional objection; (v) denying Claimants' request in Section E of the First Application; and (vi) denying Claimants' Second Application.
88. On 23 July 2023, Claimants filed their response to Respondent's jurisdictional objection raised in its Rejoinder, together with legal authorities CL-0131 BIS-ENG, and CL-0211 through CL-0223.
89. *Claimants' Request for the Tribunal to Reconsider Procedural Order No. 11 and their Request regarding the Armenta-Bartolo Report (Procedural Order No. 12).* On 13 July 2023, Claimants filed an application, together with a second witness statement of Mr. Agustín Muñana Zúñiga, requesting that the Tribunal reconsider its decision in Procedural Order No. 11 to deny their application to supplement the documentary record with the 13 Emails (the "**Reconsideration Request**").
90. On 19 July 2023, Respondent filed its response opposing the Reconsideration Request. Respondent further reserved its right to seek costs against Claimants.
91. On 2 August 2023, the Tribunal informed the Parties that it required further information before deciding on the Reconsideration Request and asked them to respond to certain questions on the 13 Emails by 4 August 2023.
92. On 4 August 2023, the Parties filed their respective responses to the Tribunal's questions.
93. On 15 August 2023, Respondent informed the Tribunal that its expert, Dr. Angélica Armenta Pichardo, who Claimants had called for cross-examination, would not be able to attend the hearing on jurisdiction and the merits.
94. On 16 August 2023, the Tribunal invited Claimants to file any comments they may have on Respondent's 15 August letter by 21 August 2023.

95. On 21 August 2023, Claimants requested Mexico to make Dr. Armenta available for cross-examination or, otherwise, that the Armenta-Bartolo report be excluded from the record. On the same day, Respondent sought leave to file a reply.
96. On 22 August 2023, the Tribunal informed the Parties that it did not require any further pleadings on the attendance of Dr. Armenta to the hearing, and that the Parties would have an opportunity to be heard on this issue during the pre-hearing organizational meeting scheduled for 5 September 2023.
97. On 1 September 2023, the Tribunal informed the Parties that it would ask procedural questions on the Reconsideration Request during the pre-hearing organizational meeting.
98. On 5 September 2023, the President of the Tribunal and the Parties held a pre-hearing organizational meeting. Participating in the pre-hearing organizational meeting were:

President of the Tribunal
Eduardo Zuleta Jaramillo

ICSID Secretariat
Elisa Méndez Bräutigam, Secretary of the Tribunal

Attending on behalf of Claimants:
Richard C. Lorenzo
Juliana de Valdenebro
Nigel Blackaby KC
Lee Rovinescu

Attending on behalf of Respondent:
Alan Bonfiglio Ríos, Secretaría de Economía
Rosalinda Toxqui Tlaxcalteca, Secretaría de Economía
Geovanni Hernández Salvador, Secretaría de Economía
Pamela Hernández Mendoza, Secretaría de Economía
Ellionehit Sabrina Alvarado Sánchez, Secretaría de Economía
Jorge Escalona Gálvez, Secretaría de Economía
Aldo González Aranda, Secretaría de Economía
Stephan E. Becker, Pillsbury Winthrop Shaw Pittman LLP
Gary Shaw, Pillsbury Winthrop Shaw Pittman LLP
Alejandro Barragán, Tereposky & DeRose
Ximena Iturriaga, Tereposky & DeRose

99. On 13 September 2023, the Tribunal issued Procedural Order No. 12 (i) ordering Claimants to provide Respondent with immediate access to the 13 Emails; (ii) granting Respondent the opportunity to submit additional evidence exclusively in connection with the 13 Emails and Mr. Muñana's second witness statement no later than 30 October 2023; (iii) granting Respondent the right and opportunity to request Claimants to produce

additional documents that may be related to the 13 Emails and that may have been kept in the file where Mr. Muñana allegedly found them, no later than 18 September 2023. The Tribunal ordered Claimants to produce such documents –if any– to Respondent only and/or reply to such requests by 25 September 2023; (iv) deciding not to exclude the Armenta-Bartolo Report from the record under Section 18.2 of Procedural Order No. 1; and (v) postponing the hearing on jurisdiction and the merits scheduled for 16 to 20 October 2023.

100. On 14 September 2023, in accordance with Procedural Order No. 12, Claimants filed factual exhibits C-0330 through C-0342.
101. On 31 October 2023, in accordance with Procedural Order No. 12, Respondent filed factual exhibits R-0253 through R-0265, a witness statement of Mr. Emiliano Zepeda Strozzi and a witness statement of Mr. Arturo Martínez Salas in response to the 13 Emails.
102. *The Parties' Joint Expert Report (Procedural Order No. 13)*. On 7 September 2023, in accordance with the Tribunal's instructions in Procedural Order No. 11, the Parties filed a joint expert report authored by Mr. Alejandro Corral Serrano and Mr. Francisco Elías Bartolo Sánchez (the "**Bartolo-Corral Joint Report**").
103. On 30 January 2024, the Tribunal issued Procedural Order No. 13 ordering the Parties to instruct their experts to jointly prepare a supplementary report to the Bartolo-Corral Report to address the questions set out in paragraph 10 of the Procedural Order by 20 February 2024.
104. On 16 February 2024, Respondent informed the Tribunal that the Parties had not been able to agree on the exchange of the draft supplementary report and requesting that Respondent's expert be allowed to file his responses to the Tribunal's questions separately.
105. On 19 February 2024, the Tribunal invited Claimants to file any comments they may have on Respondent's letter by 21 February 2024 and postponed the submission of the supplementary joint report.
106. On 20 February 2024, Claimants filed their response to Respondent's letter of 16 February.
107. On 21 February 2024, the Tribunal ordered the Parties to instruct their experts to cooperate in good faith to prepare joint responses to the specific questions posed by the Tribunal following the instructions provided for in Procedural Order No. 13 and to submit the joint responses no later than 1 March 2024.

108. On 1 March 2024, the Parties submitted the supplemental joint expert report by Alejandro Corral Serrano and Francisco Elías Bartolo Sánchez, together with annexes Corral-0005 through Corral-0010 and annexes FEBS-0056 and FEBS-0057 (the “**Supplemental Joint Report**”).

D. THE HEARING ON JURISDICTION & THE MERITS

109. On 22 March 2024, each party provided a chronology of facts, a list of *dramatis personae* and a list of substantive issues for the Tribunal to consider for the hearing.
110. *Procedural Order No. 14 on Hearing Organization*. On 27 March 2024, following receipt of the Parties’ respective positions, the Tribunal issued Procedural Order No. 14 concerning the organization of the hearing.
111. The hearing on the jurisdiction and the merits was held from 8 April 2024 to 12 April 2024 at ICSID’s facilities in Washington, D.C. Participating at the hearing were:

Tribunal

Eduardo Zuleta Jaramillo, President
Charles Poncet, Arbitrator
Raúl E. Vinuesa, Arbitrator

ICSID Secretariat

Elisa Méndez Bräutigam, Secretary of the Tribunal

Attending on behalf of Claimants:

Richard C. Lorenzo, Hogan Lovells
Mark R. Cheskin, Hogan Lovells
Juliana de Valdenebro, Hogan Lovells
Francisco Rodriguez, Hogan Lovells
Nicolas Caballero Hernandez, Hogan Lovells
Marta Urrea, Hogan Lovells
Michael Jacobson, Hogan Lovells
Eduardo Lobatón, Hogan Lovells
Lee Rovinescu, Freshfields Bruckhaus Deringer
Nigel Blackaby KC, Freshfields Bruckhaus Deringer
Maria Paz Lestido, Freshfields Bruckhaus Deringer
Ruth Montiel, Freshfields Bruckhaus Deringer
Rubén Castro, Freshfields Bruckhaus Deringer
Santiago León, Client Representative/Witness
Eduardo Zayas Dueñas, Witness
Agustín Muñana Zúñiga, Witness
Eduardo Herrera de Juana, Witness
Howard Rosen, Secretariat, Expert Witness
Brendan Porter, Secretariat

Marco Antonio de la Peña Sánchez, Cuatrecasas, Expert Witness
Iván Esquivel Fernández, Cuatrecasas
Joshua M. Mitchell, Kroll, Expert Witness
Alejandro Corral Serrano, Expert Witness

Attending on behalf of Respondent:

Alan Bonfiglio Ríos, Secretaría de Economía
Rosalinda Toxqui Tlaxcalteca, Secretaría de Economía
Geovanni Hernández Salvador, Secretaría de Economía
Pamela Hernández Mendoza, Secretaría de Economía
Ellionehit Sabrina Alvarado Sánchez, Secretaría de Economía
Jorge Escalona Gálvez, Secretaría de Economía
Aldo González Aranda, Secretaría de Economía
Stephan E. Becker, Pillsbury Winthrop Shaw Pittman LLP
Gary Shaw, Pillsbury Winthrop Shaw Pittman LLP
Alejandro Barragán, Tereposky & DeRose LLP
Ximena Iturriaga, Tereposky & DeRose LLP
Carlos Alberto Serdán Rosales, Secretaría de Movilidad de la Ciudad de México
Andrés Lajous Loaeza, Secretaría de Movilidad de la Ciudad de México
Arturo Martínez Salas, Secretaría de Movilidad de la Ciudad de México
Emiliano Zepeda Strozzi, Secretaría de Movilidad de la Ciudad de México
Eduardo Clark García Dobarganes, Agencia Digital de Innovación Pública de la Ciudad de México
Tribunal Federal de Conciliación y Arbitraje
Max Alberto Diener Sala, DLG Abogados
Jorge González Gallástegui, DLG Abogados
Ruben Guillermo Lecona Morales, DLG Abogados
Amelia Cañas, DLG Abogados
Francisco Elías Bartolo Sánchez, CSIPD&CF
Marysol González León, CSIPD&CF
George Thomas Edwards, Quandary Peak Research, Inc.
Tuyana Molokhoeva, Quandary Peak Research, Inc.
Timothy Hart, Credibility International
Rebecca Vélez, Credibility International
Andrew Dillon, Credibility International

Non-Disputing NAFTA Parties:

Heather Squires, Deputy Director and Senior Counsel of Canada's Trade Law Bureau
Marie-Jeanne Tétreault, Articling Student of Canada's Trade Law Bureau
Lisa Grosh, Office of the Legal Adviser, U.S. Department of State
John Daley, Office of the Legal Adviser, U.S. Department of State
David Bigge, Office of the Legal Adviser, U.S. Department of State
Mary Muino, Office of the Legal Adviser, U.S. Department of State

Court Reporters:

D-R Esteno
Larson Reporting, Inc.

Interpreters:

Silvia Colla
Daniel Giglio
Charlie Roberts

112. During the hearing, the following individuals were examined:

On behalf of Claimants:

Santiago León Aveleyra, Witness
Eduardo Zayas Dueñas, Witness
Agustín Muñana Zúñiga, Witness
Eduardo Herrera de Juana, Witness
Howard Rosen, Secretariat, Expert Witness
Marco Antonio de la Peña Sánchez, Cuatrecasas, Expert Witness
Joshua M. Mitchell Kroll, Expert Witness
Alejandro Corral Serrano, Expert Witness

On behalf of Respondent:

Andrés Lajous Loaeza, Secretaría de Movilidad de la Ciudad de México
Carlos Alberto Serdán Rosales, Secretaría de Movilidad de la Ciudad de México
Arturo Martínez Salas, Secretaría de Movilidad de la Ciudad de México
Emiliano Zepeda Strozzi, Secretaría de Movilidad de la Ciudad de México
Eduardo Clark García Dobarganes, Agencia Digital de Innovación Pública de la Ciudad de México
Rufino H. León Tovar, Tribunal Federal de Conciliación y Arbitraje
Max Alberto Diener Sala, DLG Abogados
Jorge González Gallástegui, DLG Abogados
Francisco Elías Bartolo Sánchez, CSIPD&CF
George Thomas Edwards, Quandary Peak Research, Inc.
Tuyana Molokhoeva, Quandary Peak Research, Inc.
Timothy Hart, Credibility International
Rebecca Vélez, Credibility International

113. *Procedural Order No. 15*: During the Hearing, on 10 April 2024, Respondent requested the Tribunal to admit 53 certificates into the case file. At the Hearing, the Tribunal instructed the Parties to confer regarding Respondent's request but, after several exchanges, they were unable to agree on a resolution.
114. On 8 May 2024, Respondent formally submitted an application to add the 53 certificates to the case file pursuant to Section 16.3 of Procedural Order No. 1, together with an index listing the 53 certificates (the “**Additional Documents Request**”).
115. On 17 May 2024, Claimants filed their response to the Additional Documents Request, together with Annex A.

116. On 7 June 2024, the Tribunal issued Procedural Order No. 15 granting Respondent's request to add the 53 certificates to the case file by 14 June 2024 and inviting the Parties to simultaneously provide any comments they may have on the 53 certificates by no later than 10 July 2024. The Tribunal also conveyed its questions on certain issues discussed at the Hearing and invited the Parties to address these questions at the Closing Hearing.
117. On 13 June 2024, Respondent filed Exhibit R-0266 containing the 53 certificates identified in Respondent's Additional Documents Request.
118. On 10 July 2024, the Parties simultaneously provided their comments on the 53 certificates.
119. By communication of 15 September 2024, Claimants requested to supplement the evidentiary record with the criminal complaint filed by Lusad in November 2018. On 16 September 2024, Respondent confirmed that it did not object to Claimants' request.
120. On 17 September 2024, the Tribunal authorized the incorporation into the record of the criminal complaint filed by Lusad in 2018 and, on 23 September 2024, Claimants filed the new document as Exhibit C-343.
121. *Procedural Order No. 16 on Hearing Transcripts*: On 27 May 2024, the Parties informed the Tribunal of their joint corrections to the English and Spanish transcripts and of their disagreements concerning certain portions of the transcripts.
122. On 16 July 2024, the Tribunal asked the Parties to provide certain clarifications regarding their proposed corrections to the transcripts, which the Parties filed on 31 July 2024.
123. On 13 August 2024, the Tribunal issued Procedural Order No. 16 with the Parties' agreed corrections to the Hearing transcripts and the Tribunal's decisions on the disputed portions.

E. THE HEARING ON CLOSING SUBMISSIONS

124. At the end of the hearing on jurisdiction and the merits, the Tribunal and the Parties agreed to hold an additional hearing for the Parties to make closing submissions and respond to questions from the Tribunal.
125. On 2 and 3 October 2024, the Closing Hearing was held by video conference. The following persons attended the Hearing:

Tribunal

Eduardo Zuleta Jaramillo, President
Charles Poncet, Arbitrator

Raúl E. Vinuesa, Arbitrator

ICSID Secretariat

Elisa Méndez Bräutigam, Secretary of the Tribunal

Attending on behalf of Claimants:

Nigel Blackaby KC, Freshfields Bruckhaus Deringer

Richard C. Lorenzo, Hogan Lovells

Lee Rovinescu, Freshfields Bruckhaus Deringer

Mark R. Cheskin, Hogan Lovells

Juliana de Valdenebro, Hogan Lovells

Maria Paz Lestido, Freshfields Bruckhaus Deringer

Francisco Rodriguez, Hogan Lovells

Marta Urrea, Hogan Lovells

Jim Esparza, Hogan Lovells

Eduardo Lobatón Guzman, Hogan Lovells

Florencia Wajman, Freshfields Bruckhaus Deringer

Sindi Gavarrete, Freshfields Bruckhaus Deringer

Santiago León, Client Representative

Eduardo Zayas, Client Representative

Marco Antonio de la Peña, Legal Expert

Attending on behalf of Respondent:

Alan Bonfiglio Ríos, Secretaría de Economía

Rosalinda Toxqui Tlaxcalteca, Secretaría de Economía

Geovanni Hernández Salvador, Secretaría de Economía

Pamela Hernández Mendoza, Secretaría de Economía

Aldo González Aranda, Secretaría de Economía

Mariah Karla Arreola Alcántara, Secretaría de Economía

Stephan E. Becker, Pillsbury Winthrop Shaw Pittman LLP

Gary J. Shaw, Pillsbury Winthrop Shaw Pittman LLP

Carolina Plaza, Pillsbury Winthrop Shaw Pittman LLP

Alejandro Barragan, Tereposky & DeRose LLP

Francisco Elías Bartolo Sánchez, CSIPD&CF

Max Diener, DLG Abogados

Jorge González, DLG Abogados

Roberto Blum, DLG Abogados

Karla Estrada, DLG Abogados

Arturo Martínez, DLG Abogados

Diana Miranda, DLG Abogados

Non-Disputing NAFTA Parties:

Bradley Henderson, Trade Law Bureau, Global Affairs Canada

Mary Muino, Office of the Legal Adviser, U.S. Department of State

Court Reporters:

D-R Esteno

Larson Reporting, Inc.

Interpreters:

Silvia Colla

Luis Arango

Anna Sophia Chapman

126. *Procedural Order No. 17 on Hearing Transcripts*. On 29 October 2024, the Parties filed their corrections to the English and Spanish transcripts and informed the Tribunal of their disagreements regarding certain portions of the transcripts.
127. On 9 November 2024, the Tribunal asked the Parties to provide certain clarifications regarding their proposed corrections to the transcripts, which the Parties filed on 13 November 2024.
128. On 21 November 2024, the Tribunal issued Procedural Order No. 17 with the Parties' agreed corrections to transcripts of the Closing Hearing and the Tribunal's decisions on the disputed portions.
129. *Statements on Costs*: The Parties filed their respective statements on costs on 15 November 2024.
130. The proceeding was closed on 3 March 2026.

III. FACTUAL BACKGROUND

131. In the section below, the Tribunal summarizes the relevant facts as presented by the Parties. If a fact is not mentioned or included in the summary, it does not mean that the Tribunal did not consider such fact in its analysis for deciding the Parties' claims.³
132. In summary, Claimants' case is that its Mexican subsidiary, Servicios Digitales Lusad, S. de R.L. de C.V. ("**Lusad**"), was granted a concession in 2016 by the Secretary of Mobility of Mexico City ("**Semovi**") concerning the installation of proprietary digital taximeters and other technology in taxis operating within Mexico City, and the development of a mobile application allowing users to, among others, remotely request a taxi (the "**L1bre System**"). Claimants submit that, after complying with its obligations under that concession, and expending tens of millions of dollars, in 2018, Mexico suspended the

³ In accordance with Section 11 of Procedural Order No. 1, the Parties filed their pleadings in Spanish or English, followed by a courtesy translation into the other procedural language, and exhibits and legal authorities in English or Spanish without the need of providing a translation into the other procedural language. When available, the Tribunal cites to the English version of a pleading or document. For documents that have only been submitted in Spanish, the Tribunal provides its own English translation.

concession as a result of the political change brought about by the new mayoral administration in Mexico City.⁴

133. Respondent's position is that Lusad was never granted a concession in 2016, but only a "draft concession" ("*proyecto de concesión*"), with a definitive concession title to be awarded upon Lusad's fulfilment of additional conditions. The definite concession was issued on 13 April 2018. The concession was never suspended but it was ultimately abandoned by Claimants, who had never managed to develop a system capable of complying with the conditions set forth in the concession.⁵
134. The Tribunal notes that the Parties have disputed key factual events and have accused each other of submitting and relying on altered or falsified documents to support their account of events. Where relevant, the section below indicates each Party's position on these contested facts and documents. For the sake of clarity, the Tribunal will refer to the three key disputed concession documents as the "2016 Concession Document", "2017 Amendment" and "2018 Concession Document", without making any determination as to the legal validity of these documents.

A. THE ORIGINS OF THE L1BRE SYSTEM

135. The L1bre System was developed by Messrs. Santiago León Aveleyra and Eduardo Zayas Dueñas, two Mexican nationals, business partners, and witnesses for Claimants in these proceedings. Before developing the L1bre System, Messrs. León and Zayas collaborated in different deals, including in real estate transactions in Mexico City and a mining business. Messrs. Zayas and León initially carried out their business venture through Espíritu Santo Investments, LLC ("**ES Investments**"), a Delaware company which was established in 2013 and which they managed.⁶
136. In 2014, Messrs. León and Zayas explored a new business concept which would consist of providing Wi-Fi internet access in Mexico City through mobile hotspots incorporated in Mexico City's taxi fleet. In 2015, they approached Semovi to explore their investment idea.⁷ Semovi is the government agency in charge of planning and regulating the transportation system in Mexico City (i.e., public transport, taxis and applications that provide private services, such as Uber and Cabify) and granting concessions for the public

⁴ Reply, ¶ 49.

⁵ Rejoinder, ¶ 1.

⁶ Memorial, ¶ 30; First Witness Statement of Mr. Eduardo Zayas, 13 September 2021, ¶ 5; First Witness Statement of Mr. Santiago León Aveleyra, 14 September 2021, ¶¶ 6-7.

⁷ Memorial, ¶¶ 30-31; First Witness Statement of Mr. Eduardo Zayas, 13 September 2021, ¶ 7; First Witness Statement of Mr. Santiago León Aveleyra, 14 September 2021, ¶ 9.

transport service, highway design and registration of vehicles and drivers of Mexico City.⁸

137. According to Messrs. León and Zayas, they pitched their investment idea to the then Secretary of Semovi, Mr. Rufino H. León Tovar. Mr. Zayas explains in his first witness statement that, after meeting with Mr. León Tovar, he recognized the potential of expanding their initial investment venture into the development of a new digital taximeter system, which could replace the old taximeters of Mexico City's taxi fleet:

9. Following the meeting with Secretary León Tovar, we realized that taxis in CDMX were faced with several problems: (i) they did not have a mobile application for users to request the service; (ii) they did not have digital taximeters that could reliably measure the route, so there was much variation in the price to be paid by users; (iii) they did not have a GPS location system, which was an obligation for taxi drivers under current legislation; and (iv) there were many unregistered fake ("pirate") taxis, which increased the insecurity of the service. We realized that we could offer taxi drivers a more complete service, allowing them to compete with Uber and other applications.

10. Espiritu Santo Investments, LLC therefore decided to invest in developing a complete platform for taxi drivers in CDMX, which would include the following services: an application for users to request a taxi from a cell phone, a reliable and secure digital taximeter based on a GPS system, a panic button, a tablet that would enable micro-segmented advertising to be displayed, in addition to the mobile internet service that we had initially conceived.

11. At a meeting held on 14 April 2015, Espiritu Santo Investments, LLC presented to SEMOVI our project concept which offered the possibility of replacing all the taximeters in the CDMX taxi fleet, with the necessary services to provide a service that could compete with the new technologies. Secretary León Tovar was interested in the project and stated that it would be extremely useful to CDMX.⁹

138. The L1bre System would be comprised of hardware as well as software. The hardware would consist of 2 tablets to be installed in all taxis in Mexico City. The first tablet would be used as a digital taximeter and would be placed at the front of the taxi. It would have geolocation capabilities and the ability to function off-line. The second tablet would be placed in the back seat and would be used as an electronic interactive media display for the passenger. It would display information about location and fare as well as targeted advertisements. The software would include GPS, wireless internet hotspot and a panic button which would be connected to the security and surveillance service of the Mexican

⁸ First Witness Statement of Mr. Andrés Lajous Loaeza, 9 May 2022, ¶ 4.

⁹ First Witness Statement of Mr. Eduardo Zayas, 13 September 2021, ¶¶ 9-11.

Police (“C5”). The software would function with a smartphone application which would enable online ride-hailing, among other services.¹⁰

139. Claimants rely on a letter dated 20 April 2015 in which Mr. León Tovar expressed that the L1bre System was a “hopeful” Project and that Semovi would await receiving a formal proposal for the Project,¹¹ which they say encouraged ES Investments “to pour additional capital and time into their plan to dramatically improve the City’s taxi system.”¹²
140. Respondent contends that the initial discussions between Mr. León Tovar and Messrs. León and Zayas which allegedly motivated Claimants’ investment never took place. In these proceedings, Respondent has submitted a witness statement from Mr. León Tovar, where he denies having met with Messrs. Zayas and León or seeing or signing the 20 April 2015 letter.¹³
141. Respondent does not dispute, however, that, over the next months, Semovi and Lusad held several meetings and corresponded with the purpose of discussing the L1bre Project. In particular, in July 2015, Mr. León Tovar was replaced by a new Secretary of Semovi, Mr. Héctor Serrano Cortés. Messrs. Zayas and León met with Mr. Serrano to pitch the L1bre System as well as with Mr. Ruben García, then legal director of Semovi, to discuss the potential legal structures to implement the L1bre Project. As Mr. Zayas explains in his witness statement, one of the options discussed was to structure the Project through a direct, revocable contract, outside of any public procurement procedure:

16. At the meeting, SEMOVI proposed that the project be structured through a Temporary Revocable Administrative Permit (“PATR”). However, we clarified that the project would require substantial investment from foreign investors, and a revocable permit would not provide the necessary security to

¹⁰ Memorial, ¶ 38; First Witness Statement of Mr. Santiago León Aveleyra, 14 September 2021, ¶¶ 20-21.

¹¹ C-0038, Oficio No. SEMOVI/OSSM/137-2016 from Semovi confirming interest in the Taxis L1bre project, 20 April 2015, pp. 1-2. Claimants also submitted exhibit C-0228, which they say is a copy of C-0038 that bears Mr. Tovar’s signature and Semovi’s official stamp, and which was certified as an authentic version of the document contained in Semovi’s files by Semovi’s General Director of Legal and Regulatory Affairs (“*Director General Jurídico y de Regulación*”). The certification of the letter was, in turn, presented for apostille and certified and stamped by the Legal Department (“*Consejería Jurídica y de Servicios Legales*”) of Mexico City (see Reply, ¶ 66).

¹² Memorial, ¶ 236.

¹³ Counter-Memorial, ¶ 66; see also Witness Statement of Mr. Rufino H. León Tovar, 6 May 2022, ¶¶ 6, 8: “During the time I served as Secretary of Mobility, I never met with Mr. Zayas or Mr. Leon, nor with representatives of Lusad or ES Investments. Furthermore, during my tenure as Secretary of Mobility of Mexico City, I had no knowledge of the so-called L1bre Project or the L1bre System. Much less is it true that when my tenure ended at Semovi I informed Mr. Héctor Serrano, the incoming Secretary of Mobility, about the L1bre Project, as Claimants state” ... “I had never seen document C-0038, I did not sign it, and, therefore, I can point out that it is false as to its form and content”.

*accomplish the entire investment. We explained that a more robust legal procedure would be required...*¹⁴

142. Upon the suggestion of Mr. Serrano, Mr. Zayas also met with the Mayor of Mexico City's cabinet to present the L1bre System.¹⁵
143. In October 2015, ES Investments incorporated Lusad with the purpose of establishing a Mexican operating company to manage aspects of the L1bre System, interface with the Mexico City government, and to hold the concession. ES Investments eventually transferred Lusad to Espíritu Santo Technologies LLC, a Delaware company, which since 2017 has been wholly owned by ESH.¹⁶
144. Around the same time, ES Investments retained NullData, a technology and software company, to develop a beta version of the software of the digital taximeter and the L1bre smartphone application. ES Investments also partnered with Accendo Holdings, a Delaware company, which injected working capital into the Project in exchange for indirect equity in Lusad.¹⁷
145. Mexico City's Secretary of Economy would eventually approve a prototype of the L1bre System digital taximeter as accurate and as compliant with applicable laws and regulations, and authorized Lusad to commercialize the taximeters.¹⁸

B. THE NEGOTIATIONS BETWEEN LUSAD AND SEMOVI

146. During 2015 and the beginning of 2016, Lusad and Semovi contemplated the possibility of implementing the L1bre Project and discussed several options, including a direct adjudication and the structuring via a service contract. It was ultimately decided to proceed with a "Declaration of Necessity" procedure and a concession.

¹⁴ First Witness Statement of Mr. Eduardo Zayas, 13 September 2021, ¶ 16.

¹⁵ Memorial, ¶ 44; First Witness Statement of Mr. Eduardo Zayas, 13 September 2021, ¶¶ 16-19.

¹⁶ Memorial, ¶ 49; C-0091, Assignment and Acceptance of Units between ES Holdings and Mr. Eduardo Zayas Dueñas; 22 November 2017; C-0092, Assignment and Acceptance of Units between ES Holdings and Mr. Santiago León Avelayra, 22 November 2017.

¹⁷ Memorial, ¶ 47-50; Witness Statement of Mr. Rufino H. León Tovar, 6 May 2022, ¶ 26.

¹⁸ Memorial, ¶ 60; C-0011, Oficio No. DGN.312.01.2016.1534 from the Secretaría de Economía, authorizing Lusad's digital taximeter, 18 April 2016.

147. In particular, on 3, 8, 18 December 2015, Mr. Zayas and Mr. Ruben García exchanged comments on a draft service contract for the L1bre System to be executed by Semovi and Lusad.¹⁹
148. On 21 January 2016, Mr. Zayas was provided an “informative note on the requirements to the company for the concession in the Taxi matter.”²⁰ The requirements included, among others, proof of the relevant feasibility studies, proof that the company has the relevant experience, an insurance policy and a bond in favor of the grantor of the concession. The note also listed next steps, including (i) the preparation of a “program for the replacement of taximeters” in accordance with the Mobility Law; (ii) the drafting of a “Declaration of Necessity”; (iii) the preparation of “guidelines for the implementation of the satellite location of vehicles subject to the concession”; and (iv) the preparation of the regulation on the implementation of satellite location of vehicles subject to the concession.²¹
149. Six days later, on 27 January 2016, Mr. Zayas wrote to Mr. León and Lusad’s partners informing them that “[t]oday we were awarded the concession for our App L1bre. The legal Counsel of Semovi Ruben Garcia is waiting for the signed copy from Semovi’s Secretary Serrano. Congratulations to all the L1bre team!!!”²²
150. On 28 January 2016, Mr. Luis Fagoaga Orezza, an official at Semovi, wrote to Mr. Zayas “upon instructions of the director” and attached “the folder of the matter taxi”, which comprised several files, including a draft declaration of necessity, draft minutes from the adjudication committee, and a draft concession title in favour of Lusad.²³
151. On 2 February 2016, Mr. Zayas shared with Mr. León and Lusad’s partners a “signed copy of the concession with SEMOVI.” The attachment is dated January 2016 and signed by Mr. Zayas on behalf of Lusad and Mr. Héctor Serrano on behalf of Semovi.²⁴

¹⁹ R-0171, Email from Mr. Eduardo Zayas to Mr. Ruben García, 3 December 2015; R- 0172, Email from Mr. Eduardo Zayas to Mr. Ruben García, 8 December 2015; R-0173, Email from Mr. Eduardo Zayas to Mr. Ruben García, 18 December 2015.

²⁰ The note appears to be signed by Mr. Rosendo Gómez Hernández, former Director of Norms and Regulations for Mobility of Semovi (see R-0176, List of Requirements for “Servicios Digitales Lusad, S.A.P.I. de C.V.”, 19 January 2016).

²¹ R-0175, Email from Mr. Pancho López to Mr. Eduardo Zayas, 21 January 2016; R-0176, List of Requirements for “Servicios Digitales Lusad, S.A.P.I. de C.V.”, 19 January 2016.

²² R-0165, Email from Mr. Eduardo Zayas to Mr. Santiago León, 27 January 2016.

²³ R-0170, Email from Mr. Luis Fagoaga to Mr. Eduardo Zayas, with copy to Mr. Rubén García, 28 January 2016.

²⁴ R-0166, Email from Mr. Eduardo Zayas to Mr. Santiago León, 2 February 2016. See also R-0045, Email from Mr. Eduardo Zayas attaching a Concession of 2016, 2 February 2016. Both documents appear to be identical except that the attachments in R-0045 are in Spanish and in R-0166 in English.

152. On 4 February 2016, Mr. Fagoaga shared with Messrs. Zayas and García a draft concession agreement and several remarks on the draft. In particular, Mr. Fagoaga noted that Lusad's Project, as proposed, would grant exclusivity to the company, which would violate "competition law and the right of contractual freedom." He also noted that, regarding the admission of foreigners in a company, the provisions on the Law of Foreign Investment should be taken into account, and that the company would have to comply with the requirements of the Patrimonial Regime and Public Service Law of Mexico City ("*Ley de Régimen Patrimonial y del Servicio Público*", "**LRPSP**").²⁵
153. On 11 April 2016, Mr. Zayas sent Messrs. García and Fagoaga a draft request for an administrative concession.²⁶
154. The Parties disagree whether these consultations between Lusad and Semovi were legal and permissible under Mexican law. Claimants contend that this "open dialogue" between government officials and private businesses is not uncommon and was necessary to allow Lusad to introduce Semovi to the L1bre System, learn more about the government's specific needs in the taxi sector, and prepare the materials required to apply for the concession.²⁷ Respondent claims that the consultations were illegal and demonstrate that the L1bre Project was granted through an *ad hoc* procedure, which allowed Lusad and Semovi to discuss the particularities of the procedure to obtain a concession and exchange drafts of a declaration of necessity and a concession document "behind closed doors."²⁸

C. THE AWARD OF THE 2016 CONCESSION DOCUMENT

1. The Declaration of Necessity Procedure

155. The Parties agree that, in 2016, Semovi initiated a Declaration of Necessity procedure to eventually grant Lusad a concession. They disagree, however, whether that procedure was legal under Mexican law.
156. It is not disputed that Semovi has the power to grant concessions, permits and authorizations for passenger and cargo transportation services. The LRPSP sets out the requirements that an applicant must meet in order to obtain a concession. The procedure also requires Semovi to prepare a feasibility study containing the results of technical studies justifying the service subject of the concession, as well as issue a declaration of necessity justifying the existence of a need for a public service. The issuance of this

²⁵ R-0178, Email from Mr. Luis Fagoaga to Mr. Eduardo Zayas and Mr. Rubén García, 4 February 2016, p. 1.

²⁶ R-0180, Email from Mr. Eduardo Zayas to Mr. Rubén García, 11 April 2016.

²⁷ Reply, ¶¶ 55-56, 61.

²⁸ Counter-Memorial, ¶¶ 3, 30; Rejoinder, ¶¶ 35-36; Tr. Day 1 (ENG) 135:13-18; 146:17-20.

declaration opens a bidding process, which allows any interested third party to present a bid. The concession is awarded by an adjudication committee to the bid deemed most appropriate to fulfil the service. Furthermore, Article 85bis of the LRPSP allows any individual to submit a concession project proposal when there is a public service that can be provided by a private party at no cost to the government. Together with its proposal, the private party must file a feasibility and profitability study justifying the need for the private entity to cover the public service.²⁹

157. Respondent contends that Semovi was not authorized by law to initiate the Declaration of Necessity procedure to grant a concession for the L1bre System because, while taxis are a public service that can be the subject of a concession, digital taximeters are not as they are considered auxiliary equipment that are complementary to the public transportation service and which are regulated by permits or authorizations issued by Semovi.³⁰
158. On 22 April 2016, Lusad, formally requested Semovi, pursuant to Art. 85 bis of the LRPSP, to grant it a concession for the L1bre System after issuing the corresponding Declaration of Necessity. Lusad's request was accompanied by a feasibility, purpose and concession justification study, a profitability study, and a draft concession agreement.³¹
159. On 10 May 2016, Semovi admitted Lusad's request and formally opened a proceeding to evaluate the request.³² Consequently, Semovi presented before the Evaluation and Analysis Committee ("*Comité de Evaluación y Análisis del Gabinete Permanente de Nuevo Orden Urbano y Desarrollo Sustentable*") a draft Declaration of Necessity to be published in Mexico City's Official Gazette.³³
160. In a meeting dated 25 May 2016, the Evaluation Committee, which was comprised of representatives of the Secretary of Mobility, the Secretary of Housing and Urban Development, the Secretary of Environment and the Secretary of Public Works, unanimously authorized the Secretary of Mobility to publish the Declaration of Necessity.³⁴

²⁹ Counter-Memorial, ¶¶ 41-44; 85; Memorial, ¶ 54.

³⁰ Counter-Memorial, ¶ 40; Rejoinder, ¶¶ 70-75; Tr. Day 1 (ENG), 137:1-8.

³¹ Memorial, ¶¶ 62-66; C-0004, Request for Concession to Semovi, 22 April 2016, p. 5; C-0045, Draft of concession agreement, attached to Lusad's Request for Concession, 22 April 2016; C-0043; Feasibility, finality, and justification study, attached to Lusad's, Request for Concession, 22 April 2016; C-0044, Profitability study, attached to Lusad's Request for Concession, 22 April 2016 .

³² C-0158, Opening of Concession Proceeding No. 0001, by the Director General of Transportation, 10 May 2016.

³³ C-0046, Minutes of the session of the Evaluation Committee authorizing the issuance of the Declaration of Necessity, 25 May 2016.

³⁴ C-0046, Minutes of the session of the Evaluation Committee authorizing the issuance of the Declaration of Necessity, 25 May 2016, pp. 2-3.

161. Two days later, Semovi sent the draft Declaration of Necessity to the Legal Department of Mexico City (“*Consejería Jurídica y de Servicios Legales del D.F.*”) for its publication in the Official Gazette.³⁵
162. The Declaration of Necessity appeared in Mexico’s Official Gazette No. 82 on 30 May 2016. The Declaration informed the public that Lusad had requested a concession pursuant to Article 85 bis of the LRPSP and invited interested third parties to submit their offers to Semovi within three days from the publication of the Declaration.³⁶ The Declaration indicated that any offeror shall propose their project with “direct investment”, shall develop the project with their own resources, have the necessary federal and local authorizations and, in case of legal entities, be constituted in accordance with Mexican law.³⁷ The Declaration also included an Annex listing the technical requirements that all proposals needed to fulfill.³⁸
163. On 1 June 2016, Lusad supplemented its request for a concession to explain how its proposal complied with the technical and legal requirements specified in the Declaration.³⁹
164. In response to the Declaration, seven companies (excluding Lusad) submitted proposals.⁴⁰ These proposals were reviewed by the Legal and Regulatory General Directorate and the Information and Communication Systems General Directorate of Semovi. Each entity prepared a report on the offers, finding that Lusad’s proposal was the most “complete” one and that it fulfilled all requirements of the Declaration.⁴¹
165. The reports as well as the proposals were then submitted to the Adjudication Committee for Concessions for Public Transport (“*Comité Adjudicador de Concesiones para la Prestación del Servicio Público Local de Transporte de Pasajeros o de Carga*”), which was comprised, among others, of representatives of Semovi, the Secretary of Environment, the Secretary of Economic Development, the General Director of Transportation and the General Director of Regulation to Transportation. During a meeting dated 17 June 2016, the Adjudication Committee concluded that two of the

³⁵ C-0159, Communication from Semovi to the *Consejería Jurídica y de Servicios Legales del D.F.*, 27 May 2016.

³⁶ C-0005, Necessity Declaration issued by Semovi, 30 May 2016, p. 17.

³⁷ C-0005, Necessity Declaration issued by Semovi, 30 May 2016, p. 16.

³⁸ C-0005, Necessity Declaration issued by Semovi, 30 May 2016, pp. 18-27.

³⁹ C-0047, Supplemental concession application submitted by Lusad, 1 June 2016.

⁴⁰ C-0006, Minutes of the Adjudication Committee for Concessions for Public Transport, 17 June 2016, pp. 7-8 (unsigned version); C-0051, Minutes of the session of the Adjudication Committee, awarding the concession to Lusad, 7 June 2016, pp. 15-16 (signed version).

⁴¹ C-0160, Report from Director General Jurídico y de Regulación on bids received by Semovi, 6 June 2016, p. 4; C-0161, Report from Director Ejecutivo de Sistemas de Información y Comunicación on bids received by Semovi, 6 June 2016, p. 5.

proposals were filed extemporaneously, and that, of the remainder, only Lusad's proposal complied with the requirements of the Declaration of Necessity and was therefore the winning offer.⁴² As further discussed in the next section, the Parties disagree whether what the Adjudication Committee decided to grant Lusad was a concession or only a draft concession.

166. Mexico's Federal Economic Competition Commission ("**Cofece**") later evaluated the Declaration of Necessity procedure and concluded that it "could have inhibited competition and free access" because the concession was not granted via a public bidding process, the Declaration did not establish clear parameters for granting the concession, the procedure only gave other offerors three days to submit their competing offers, and it required offerors to use their own resources and be of Mexican nationality, which could have restricted the pool of participants. Cofece recommended that, in the future, Semovi incorporate the principles of competence and free access into all of its procedures.⁴³

2. The 2016 Concession Document

167. In either June or July 2016, Mr. Zayas visited Semovi to receive formal notification of the Adjudication Committee's decision and to sign the 2016 Concession Document.⁴⁴
168. Under the terms of the 2016 Concession Document, Lusad had the right and obligation to (i) substitute, install, and maintain the digital taximeters, which would provide GPS location and other services to Mexico City's taxi fleet; and (ii) develop and operate a

⁴² C-0006, Minutes of the Adjudication Committee for Concessions for Public Transport, 17 June 2016, p. 11 (unsigned version of the Adjudication Committee's decision submitted by Claimants); C-0051, Minutes of the session of the Adjudication Committee, awarding the concession to Lusad, 7 June 2016, p. 18 (signed version of the Adjudication Committee's decision submitted by Claimants); R-0068, Minute of the 2016 "Taximeter" session of the Adjudication Committee, 17 June 2016 (version of the Adjudication Committee's decision submitted by Respondent).

⁴³ R-0078, Technical note from Cofece, 11 May 2021, pp. 7-8.

⁴⁴ Claimants submit that on 20 June 2016, Zayas went to Semovi to formally sign the Concession on behalf of Lusad. They filed an "appearance notice" dated 20 June 2016 as Exhibit C-0052 to support their allegation. Claimants allege that this document is the same as the one included in Semovi's official records, which Mexico produced during document production, and which Claimants have filed as Exhibit C-0168 (Reply, ¶ 87). Claimants also filed Exhibit C-0129, which is a similar appearance notice but which is dated 6 July 2016, and which provides a different time-line for Lusad to sign the Concession (5 business days instead of the 3 business days provided for in Exhibit C-0052). A copy of the 6 July 2016 "appearance" is also included at pages 21-22 of Claimants' Exhibit C-0051. Respondent claims that the only document it has been able to locate in Semovi's official records is the "appearance" dated 6 July 2016, not the 20 June 2016 appearance (Counter-Memorial, ¶ 98).

remote taxi-hailing smartphone application.⁴⁵ The Concession's initial term was 10 years, with the possibility of extension if certain conditions were met.⁴⁶

169. Lusad would first undergo a trial period to demonstrate the functionality of the L1bre System. Afterwards, the installation of the taximeters would be mandatory for all licensed taxi-owners.⁴⁷ Semovi would be required to establish the necessary centers for the installation of the L1bre System and inform taxi operators about the installation procedure.⁴⁸
170. For its part, Lusad was obliged to (i) maintain the technology and its operation in good conditions of accessibility, security, convenience, hygiene, and efficiency; (ii) update the technology as required to reduce its environmental impact; (iii) bear the costs of the acquisition, installation, maintenance, reparation, and repositioning of the necessary equipment; (iv) guarantee GPS service 24 hours per day; (v) operate the service according to the technical feasibility study; and (vi) maintain the appropriate control systems to guarantee the quality of the service.⁴⁹ Pursuant to the Concession's terms, Lusad would be able to receive (i) an application fee for each time that a user hailed a taxi using the application;⁵⁰ (ii) a Wi-Fi fee;⁵¹ and (iii) a fee from the advertisement displayed on the tablets.⁵²

⁴⁵ C-0053, Concession Agreement, 17 June 2016, Article 2.1. See also, C-0007, Concession Agreement, 21 March 2017, Article 2.1. The same provision is contained in Respondent's version of the 2016 Concession Document (Article 2.1, R-0069, Draft of Concession Agreement, 17 June 2016).

⁴⁶ Concession Agreement, 17 June 2016, Articles 12 and 13. See also, C-0007, Concession Agreement, 21 March 2017, Articles 12 and 13; C-0053; R-0069, Draft of Concession Agreement, 17 June 2016, Articles 12 and 13.

⁴⁷ C-0053, Concession Agreement, 17 June 2016, Article 6(b) (which provides for a 3-month trial period). See also C-0007, Concession Agreement, 21 March 2017, Article 6(b) (which provides a 12-month trial period). Respondent's version of the 2016 Concession Document provides for a 15-month trial period (see R-0069, Draft of Concession Agreement, 17 June 2016, Article 6(b)).

⁴⁸ C-0053, Concession Agreement, 17 June 2016, Article 7(iv). See also C-0007, Concession Agreement, 21 March 2017, Article 7(a); R-0069, Draft of Concession Agreement, 17 June 2016, Article 7(a).

⁴⁹ C-0053, Concession Agreement, 17 June 2016, Articles 4.1; 4.8; 5; 5.1.1; 5.1.2; 5.3.1. See also, C-0007, Concession Agreement, 21 March 2017, Articles 4.1; 4.8; 5; 5.1.1; 5.1.2; 5.3.1; R-0069, Draft of Concession Agreement, 17 June 2016, Articles 4.1; 4.8; 5; 5.1.1; 5.1.2; 5.3.1.

⁵⁰ C-0053, Concession Agreement, 17 June 2016, Article 6.c.(i). See also, C-0007, Concession Agreement, 21 March 2017, Article 6.c.(i); R-0069, Draft of Concession Agreement, 17 June 2016, Article 6.c.(i).

⁵¹ C-0053, Concession Agreement, 17 June 2016, Article 6.e. See also, C-0007, Concession Agreement, 21 March 2017, Article 6.e; R-0069, Draft of Concession Agreement, 17 June 2016, Article 6.e.

⁵² C-0053, Concession Agreement, 17 June 2016, Article 6.d. See also, C-0007, Concession Agreement, 21 March 2017, Article 6.d; R-0069, Draft of Concession Agreement, 17 June 2016, Article 6.d. The 2017 Amendment would incorporate an additional "recuperation fee" (C-0007, Concession Agreement, 21 March 2017, Article 6.c(ii)). See also R-0069, Draft of Concession Agreement, 17 June 2016, Article 6.c(ii).

3. The 2017 Amendment

171. In September 2016, Lusad contacted Semovi to request an amendment to the Concession to incorporate a so-called “Recuperation Fee”, which would allow Lusad to charge passengers a fee of up to MXN\$12 on each ride regardless of how the taxi was hailed, and which would constitute an additional source of income for Lusad (the “**2017 Amendment**”).⁵³
172. The Parties present differing accounts on the events surrounding the 2017 Amendment. According to Claimants, at a meeting on 3 October 2016, Semovi agreed to incorporate the Recuperation Fee into the Concession Document.⁵⁴ The Concession was amended on 9 January 2017, and, on 15 March 2017, Mr. Zayas visited Semovi to receive the amended Concession and signed an “appearance notice” to that effect.⁵⁵ According to Respondent, the amendment was negotiated between Mr. Zayas and former Semovi officials through unofficial channels as shown by communications dated 29 August 2016, 11 January 2017, and 9 March 2017 between Mr. Zayas, Mr. Ruben García and Mr. Rosendo Gómez, Semovi’s then General Director of Legal and Regulatory Affairs, in which they shared draft documents on the 2017 Amendment.⁵⁶
173. On 21 March 2017, Mr. Rosendo Gómez re-issued the Concession incorporating the 2017 Amendment.⁵⁷

⁵³ Reply, ¶ 99; C-0243, Oficio No. DNRM-1943-2016 from Semovi to Lusad, 6 September 2016. Respondent contends that it did not locate Exhibit C-0243 in Semovi’s official records (see R-0188, Updated table with observations on Claimants’ attachments containing possible false, nonexistent, or unauthorized documents).

⁵⁴ Reply, ¶ 86; C-0054, Minutes of Extraordinary Internal Committee Session, approving amendment to add Recuperation Fee, 3 October 2016. Respondent contends that it did not locate Exhibit C-0054 in Semovi’s official records (see R-0188, Updated table with observations on Claimants’ attachments containing possible false, nonexistent, or unauthorized documents).

⁵⁵ C-0055, Appearance of Mr. Eduardo Zayas before Semovi to receive Concession Agreement as amended, 15 March 2017. Respondent contends that it did not locate Exhibit C-0055 in Semovi’s official records and that the document contains forged signatures (Rejoinder, ¶ 207; R-0188, Updated table with observations on Claimants’ attachments containing possible false, nonexistent, or unauthorized documents).

⁵⁶ Rejoinder, ¶ 65; R-0182, Email from Mr. Eduardo Zayas to Mr. Rubén García, 29 August 2016; R-0183, Email from Mr. Rosendo Gómez to Mr. Eduardo Zayas, 11 January 2017; R-0185, Email from Mr. Rosendo Gómez to Mr. Eduardo Zayas, 9 March, 2017.

⁵⁷ C-0010, Oficio No. DNRM-0626-2017 from Semovi reissuing Concession agreement, 21 March 2017. While in its Counter-Memorial Respondent says that Semovi located C-0010 and that this document was one of the reasons why Semovi would file a complaint against Mr. Rosendo Gomez (Counter-Memorial, ¶ 197), in its Rejoinder it says that Exhibit C-0010 is one of the documents it did not locate in Semovi’s official records and the public official who signed it did not have the power to issue the letter (Rejoinder, ¶ 65; R-0188, Updated table with observations on Claimants’ attachments containing possible false, nonexistent, or unauthorized documents).

4. The Authenticity of the 2016/2017 Concession Documents

174. The Parties have accused each other of relying on falsified documents to uphold their version of events surrounding the 2016 Declaration of Necessity procedure to award Lusad a concession.

a. Respondent's objections to Claimants' evidence

175. Respondent challenges the veracity of Claimants' version of the Adjudication Committee's decision of June 2016 (Exhibits C-51, C-6), the 2016 Concession Document (Exhibit C-53) and the 2017 Amendment (C-7/C-118, C-8), which Claimants rely on to argue that Lusad was granted a concession (and not a draft concession) in 2016.

176. Regarding the Adjudication Committee's decision of June 2016, Claimants have submitted a signed version dated 7 June 2016 as **Exhibit C-51** and an unsigned version dated 17 June 2016 as **Exhibit C-6**. According to both versions of these minutes, the Committee "*approves granting the company [Lusad] the Concession... and authorizes the Secretary of Mobility to issue the corresponding Title.*"⁵⁸ These documents do not refer to the Adjudication Committee granting a "*draft concession.*" According to Claimants, Exhibit C-6 is identical to the version of the minutes located in Semovi's official records.⁵⁹

177. Respondent contends that it has not been able to locate in Semovi's official records the versions of the Adjudication Committee's decision filed by Claimants. It alleges that the only version it has been able to find, which is dated 17 June 2016, and which it has submitted as **Exhibit R-68**, has a different wording than Claimants' documents and shows that, no matter what was agreed between Lusad and Semovi "behind closed doors", what the Adjudication Committee ultimately awarded was a draft concession, with a definitive title to be issued only after the successful completion of a trial period.⁶⁰ Respondent provides the following comparison between Exhibit C-6 and Exhibit R-68:⁶¹

⁵⁸ C-0006, Minutes of the Adjudication Committee for Concessions for Public Transport, 17 June 2016, p. 11; C-0051, Minutes of the session of the Adjudication Committee, awarding the concession to Lusad, 7 June 2016, p. 19.

⁵⁹ Reply, ¶ 82; C-0229, Minutes of the Adjudication Committee contained in the files of the Secretaría de Desarrollo, 17 June 2016.

⁶⁰ Rejoinder, ¶ 68; Tr. Day 1 (ENG), 141:11-19.

⁶¹ Counter-Memorial, ¶ 97.

Table 4: Comparison between Adjudicator Committee 003 and Annex C-0006	
R-0068	C-0006
It establishes that, “the issuance and execution of the Definitive Title will be made provided that [Lusad] satisfactorily complies with the tests and other requirements....”	It says nothing about it.
It establishes as a cause for immediate revocation to charge more than the 12 pesos per trip made through the application.	It says nothing about it.
It says nothing about it.	Authorizes advertising permits with the condition that 40% of the advertising space be destined to the City Government.
It says nothing about it.	Refers to the creation of a fund in favor of Semovi after the concessionaire recovers its investment.
Source: Own elaboration based on exhibits R-0068 and C-0006	

178. Concerning the 2016 Concession Document and its 2017 Amendment, Claimants have submitted a Concession title as **Exhibit C-53**, which is dated 17 June 2016 and signed by Mr. Héctor Serrano on behalf of Semovi and Mr. Zayas on behalf of Lusad.⁶² Claimants have also provided the 9 January 2017 addendum to the concession as **Exhibit C-8** and the amended concession, as re-issued in March 2017, as **Exhibit C-7** (as well as Exhibit C-118, which is identical to Exhibit C-7).
179. Respondent contends that it has not been able to locate Exhibits C-7, C-8 and C-53 in Semovi’s official records. Regarding Exhibit C-7, it further contends that its handwriting experts have concluded that the document contains a forged signature.⁶³ Respondent has submitted as **Exhibit R-0069** a draft document without signatures, which it says is the only concession document found in Semovi’s records and which it refers to as “*Borrador del Proyecto de Concesión*.”⁶⁴ Respondent provides the following comparison between Exhibits C-53 and R-69:⁶⁵

⁶² C-0053, Concession Agreement, 17 June 2016, p. 52.

⁶³ Rejoinder, ¶¶ 64, 225.

⁶⁴ Counter-Memorial, ¶¶ 99-100.

⁶⁵ Counter-Memorial, ¶ 101.

C-0053⁸¹ “Concession of June 17, 2016”	R-0069⁸² Concession Project
- It establishes a 12 pesos fee for the use of the application.	- It establishes a payment of 12 pesos for the use of the application and a recovery fee of 12 pesos for each taxi trip, to be paid by the taxi drivers (operators and/or concessionaires).
- Established 3 months as a trial period.	- Established 15 months as a term for installation and “testing.”
- Contains the “Folio DJ 000002 to Folio DJ 000053.”	-The folio is only numerical “000001 to 000053.”
- Annex 3 refers that 40% of advertising is in favor of the Government of Mexico City.	- There are no attachments.

180. Respondent also provides the following comparison between Exhibits C-7 and C-8 and R-69⁶⁶:

C-0007/C-0118⁸³ “Concession amended and reissued on March 21, 2017.”	R-0069 Draft Concession Project 2016
- Paragraph numbering ends at number 22.	- The numbering of the paragraphs is until paragraph 23, and establishes that the Concession Project is subject to verification once the probationary period is concluded and the concessionaire has satisfactorily complied with its obligations.
- Establishes payment of 12 pesos for use of the application and the recovery fee for each taxi trip to be paid by taxi drivers.	- Establishes payment of 12 pesos for use of the application and the recovery fee for each taxi trip to be paid by the taxi drivers.
- Contains a trial period of 12 months.	- Contains a trial period of 15 months.
- Contains the “Folio DJ 000001 to folio DJ 000106.”	- The folio is only numerical “000001 to 000053.”
-Annex 3 refers that 20% of advertising is in favor of the Government of Mexico City.	- There are no attachments.
C-0008 “Amendment to Concession dated January 9, 2017”	Non existent

b. Claimants’ objections to Respondent’s evidence

181. Claimants contend that the two key exhibits Respondent relies on, Exhibits R-68 and R-69, are the product of fraud committed by Semovi officials in 2018. They allege that these documents were drafted in 2018 and then backdated “to give the impression that what was awarded in 2016 was a Draft Concession and not a Concession at all...”⁶⁷

182. As noted above, Claimants supplemented the record with 13 Emails that were exchanged by former Semovi officials in May and June 2018. These Emails were provided by Mr. Agustín Muñana, a former Semovi official and Claimants’ witness in these proceedings.⁶⁸ One of these communications is an email dated 8 June 2018 sent by Mr. Luis Faogaga to other Semovi officials (among others, Mr. Muñana, Ms. Alejandra Balandrán and Mr. García) with the subject line “LUSAD FINAL TODO TODO”. In that email, Mr. Fagoaga attached six files regarding Lusad’s concession, among others, the “Adjudication

⁶⁶ *Id.*

⁶⁷ Tr. Closing Hearing, Day 1 (ENG) 14:18-14:5.

⁶⁸ See Second Witness Statement of Mr. Agustín Muñana Zúñiga, 12 July 2023, ¶ 6.

Committee 17 June 2016 subject to testing and ordering that a draft concession be issued” and “2016 Concession subject to testing (draft).”⁶⁹ The attached decision of the Adjudication Committee is identical to Respondent’s Exhibit R-68 and the draft Concession title attached to the email is identical to Exhibit R-69. The metadata of these documents show that they were created in 2018.⁷⁰

183. Respondent does not challenge the content of the Emails but argues that the former Semovi officials exchanging them had no formal involvement nor legal powers to exchange communications regarding Lusad’s concession.⁷¹

D. THE PERFORMANCE OF THE CONCESSION TERMS

184. During 2016 and 2017, Lusad worked to implement the Concession terms during a “trial period” to verify the proper operation of the L1bre System.⁷² During this period, Semovi was in charge of supervising Lusad’s activities as provided for in the 2016 Concession Document and the 2017 Amendment.⁷³
185. In June 2016, Lusad obtained from Semovi a certification formally registering Lusad as a taxi-hailing application provider⁷⁴ and a permit authorizing Lusad to display advertising and publicity content on the backseat tablet to be installed in each taxi.⁷⁵
186. From 11 July to 6 August 2016, Lusad conducted a first installation pilot with the purpose of installing the tablets of the L1bre System in 100 taxis.

⁶⁹ C-0341, Email from Mr. Luis Fagoaga to Mr. Agustín Muñana and other Semovi officials, 8 June 2018, “I.- Comité Adjudicador 17 de junio de 2016 (condicionada a pruebas y ordena se expida un proyecto de concesión); 2.- Concesión 2016 condicionada a pruebas (Proyecto).”

⁷⁰ C-0341, Email from Mr. Luis Fagoaga to Mr. Agustín Muñana and other Semovi officials, 8 June 2018 (A-Meta Data); C-0341, Email from Mr. Luis Fagoaga to Mr. Agustín Muñana and other Semovi officials, 8 June 2018 (B-Meta Data).

⁷¹ Tr. Day 1 (ENG), 151:11-22; 152:1-22.

⁷² Reply, ¶¶ 138-147; First Witness Statement of Mr. Eduardo Zayas, 13 September 2021, ¶ 42; Rejoinder, ¶¶ 68-80.

⁷³ Sections 16 and 17 of C-0053, Concession Agreement, 17 June 2016; Sections 16 and 17 of C-0007, Concession Agreement, 21 March 2017. See also Sections 16 and 17, R-0069, Draft of Concession Agreement, 17 June 2016, pp. 50-51.

⁷⁴ C-0012, Certificate of Registration as taxi-hailing application provider, No. 6D6C61F32327F227C-1651180691531691, 1 June 2016.

⁷⁵ C-0009, Oficio No. DGJR-001291-2016 from Semovi authorizing advertising, 29 June 2016. Respondent contends that Semovi was unable to locate the document in its files, that it contains a forged signature, and that the official did not have the faculty to issue this document (see Rejoinder, ¶¶ 229-231; R-0188, Updated table with observations on Claimants’ attachments containing possible false, nonexistent, or unauthorized documents).

187. On 11 July 2016, Semovi informed Lusad's of the "guidelines" that Semovi would implement to conduct its supervising activities of Lusad's concession.⁷⁶
188. On 20 July 2016, Semovi asked Lusad for a progress report on the installation of the L1bre System.⁷⁷
189. One week later, Semovi requested Lusad to provide several technical documents to confirm the correct functioning of the L1bre mobile application.⁷⁸
190. On 29 July 2016, Lusad informed Semovi that it had secured a bond in compliance with clause 9.1 of the 2016 Concession Document.⁷⁹ Semovi validated the bond a couple of days later.⁸⁰ Semovi would later cancel the bond, which, according to Claimants, was due to the fact that the 2017 Amendment made the bond no longer a requirement prior to the mandatory installation period.⁸¹
191. On 9 August 2016, Lusad informed Semovi of the completion of the first installation pilot.⁸²
192. Over the next months, Lusad began the installation of the tablets of the L1bre System in 1,000 additional taxis.⁸³

⁷⁶ C-0230, Oficio No. DO-1458-2016 from Semovi to Lusad, 11 July 2016.

⁷⁷ C-0231, Oficio No. DGJR-1400-2016 from Semovi to Lusad, 20 July 2016.

⁷⁸ C-0232, Oficio No. DESIC-0109-2016 from Semovi to Lusad, 27 July 2016.

⁷⁹ C-0130, Communication from Lusad to Semovi proving the issuance of a performance bond from Sofimex, 29 July 2016; C-0319, Appearance of Mr. Eduardo Zayas to deliver original bond No. 2012179, 11 August 2016. Respondent contends that it did not locate Exhibits C-0130 and C-0319 in Semovi's official records (see R-0188, Updated table with observations on Claimants' attachments containing possible false, nonexistent, or unauthorized documents).

⁸⁰ C-0131, Minute of Mr. Jesús Alberto Romero Cárdenas verifying and validating the issuance of the Sofimex performance bond, 11 August 2016; C-0326, Minute of Mr. Jesús Alberto Romero Cárdenas verifying and validating the issuance of the Sofimex performance bond, 11 August 2016. Respondent contends that it did not locate Exhibits C-0131 and C-0326 in Semovi's official records (see R-0188, Updated table with observations on Claimants' attachments containing possible false, nonexistent, or unauthorized documents).

⁸¹ R-0027, Oficio No. DNRM-000226-2017 from Mr. Rosendo Gómez to SOFIMEX, 31 January 2017; Reply, ¶ 125.

⁸² C-0013, Communication from Lusad to Semovi confirming the installation of the L1bre System in 100 Taxis, 9 August 2016.

⁸³ C-0014, Communication from Lusad to Semovi confirming installation of the L1bre System in 1,000 Taxis, 7 November 2016. Respondent contends that it did not locate Exhibit C-0014 in Semovi's official records (see R-0188, Updated table with observations on Claimants' attachments containing possible false, nonexistent, or unauthorized documents).

193. On 26 September 2016, Semovi informed Lusad of certain requirements regarding the installation of the tablets in hybrid and electric vehicles and requested a weekly report on Lusad's progress.⁸⁴
194. On 28 September 2016, Semovi convened a working group meeting at Semovi's offices to discuss Lusad's progress in the installation and operation of the L1bre System.⁸⁵
195. On 4 November 2016, Lusad shared with Semovi a progress report on the installation of the 1,000 additional units.⁸⁶
196. On 7 November 2016, Lusad informed Semovi that it had completed the installation of the 1,000 additional units.⁸⁷ In response, on 22 November 2016, Semovi informed Lusad that it had decided to temporarily suspend the deadlines for the installation of taximeters until April 2017 for the mandatory installation period to occur simultaneously with a routine inspection of taxis.⁸⁸
197. On 3 January 2017, Semovi asked Lusad to provide information on the vehicles in which the tablets of the L1bre System were installed.⁸⁹ Lusad responded with the required information on 19 January 2017.⁹⁰
198. On 1 February 2017, Lusad opened its offices in Mexico City.⁹¹
199. On 21 April 2017, Lusad engaged the Mexican company Ingram Micro Mexico S.A. de C.V.) to provide tablets, cradles, and installation kits for the L1bre System.⁹²
200. On 12 May 2017, Lusad attended a working meeting with Semovi officials during which it was discussed to update the installation of the 1,100 taxis that already had the tablets

⁸⁴ C-0233, Oficio No. DO-3220-2016 from Semovi to Lusad, 26 September 2016. Respondent contends that it did not locate Exhibit C-0233 in Semovi's official records (see R-0188, Updated table with observations on Claimants' attachments containing possible false, nonexistent, or unauthorized documents).

⁸⁵ C-0234, Oficio No. DESIC-0181-2016 from Semovi to Lusad, 28 September 2016.

⁸⁶ C-0224, Email from Mr. Luis Elechiguerra to Ms. Alejandra Baladrán, 4 November 2016.

⁸⁷ C-0014, Communication from Lusad to Semovi confirming installation of the L1bre System in 1,000 Taxis, 7 November 2016; Respondent contends that it did not locate Exhibit C-0014 in Semovi's official records (see R-0188, Updated table with observations on Claimants' attachments containing possible false, nonexistent, or unauthorized documents).

⁸⁸ C-0316, Oficio No. DGJR-2165-2016 from SEMOVI to Lusad, del 22 November 2016. Respondent contends that it did not locate Exhibit C-0316 in Semovi's official records (see R-0188, Updated table with observations on Claimants' attachments containing possible false, nonexistent, or unauthorized documents).

⁸⁹ R-0071 and C-0235, Oficio No. DO-010-2017 from Semovi to Lusad, 3 January 2017 (both exhibits are the same document).

⁹⁰ C-0200, Oficio No. DO-4982-2016, from Lusad to Semovi, Re: Request for Information, 19 January 2017. According to Respondent, Semovi was unable to locate this letter in its files (Rejoinder, footnote 95).

⁹¹ C-0059, Photos of L1bre's Mexico City office.

⁹² C-0071, Sales Agreement between Ingram Micro Mexico and Lusad, 21 April 2017.

of the L1bre System to implement updates to the application as well as to add the second, passengers' tablet.⁹³

201. On 16 May 2017, Lusad registered the L1bre Trademark.⁹⁴
202. On 22 May 2017, Ms. Alejandra Balandrán, the Operational Director of Semovi's General Directorate for Individual Public Transportation Services of Semovi, informed Mr. Rosendo Gómez that Lusad had failed to install the required updates of the tablets and the passengers' tablets within the agreed timeline and asked Mr. Gómez to inform Lusad accordingly.⁹⁵
203. On 1 June 2017, upon Semovi's request, Lusad provided Semovi with a L1bre tablet for testing.⁹⁶
204. On 19 June 2017, Lusad provided Semovi with a progress report on its installation centers, the panic button and the agreements it entered into with two telecommunications companies for providing private network.⁹⁷
205. On 14 July 2017, Semovi and Lusad met to discuss the progress on the installation of the L1bre System. Among others, Lusad provided Semovi with the data it had obtained during the trial period, and the Parties discussed the preparations for the issuance of the mandatory installation notice.⁹⁸
206. On 22 August 2017, Mr. Héctor Serrano from Semovi asked the Comptroller General of Mexico City, Mr. Eduardo Rovelo Pico, to conduct an audit on the procedure for granting Lusad a concession in light of the recent news articles that "sow suspicions on alleged irregularities" and in order to avoid any negative presumption relating to the procedure.

⁹³ C-0173 and R-0073, Work Minutes of the meeting between Semovi and Lusad, 12 May 2017 (both exhibits are the same document).

⁹⁴ C-0058, Registration of the L1bre trademark, 16 May 2017.

⁹⁵ R-0074, Oficio No. DO-1909-2017 from Semovi to the Director of Mobility Regulation and Standards (*Director de Normatividad y Regulación de la Movilidad*), 22 May 2017.

⁹⁶ C-0175, Email from Mr. Jesús Robledo to Mr. Eduardo Herrera, 12 May 2017; C-0176, Note from Mr. Horacio Sánchez Tinoco to Ms. Alejandra Balandrán Olmedo, confirming the receipt of tablet from Lusad, 1 June 2017. Respondent contends that it did not locate Exhibit C-0176 in Semovi's official records (see R-0188, Updated table with observations on Claimants' attachments containing possible false, nonexistent, or unauthorized documents).

⁹⁷ R-0075, Letters from Lusad to Semovi, 19 June 2017.

⁹⁸ C-0177, Minutes of Meeting between Semovi and Lusad, 14 July 2017. Respondent contends that it did not locate Exhibit C-0177 in Semovi's official records (see R-0188, Updated table with observations on Claimants' attachments containing possible false, nonexistent, or unauthorized documents).

Mr. Serrano also informed the Comptroller General that, to date, no concession had been delivered.⁹⁹

207. Around the same time, Semovi's Internal Control Organ ("OIC") conducted an audit on the 2016 Declaration of Necessity and the 2016 Concession Document. In response to OIC's requests for information during the audit, Ms. Balandrán informed OIC that no concession had been issued or delivered yet given that the trial period was still in effect.¹⁰⁰ On 8 November 2017, the OIC issued its conclusions in which it recommended, with regard to Lusad's "draft concession", that Semovi "adhere to the Law of Mobility" to avoid "monopolistic practices" and granting "exclusivity" to concession holders.¹⁰¹
208. On 20 December 2017, Mr. Rosendo Gómez informed Lusad that the trial period would be extended until 17 January 2018 and that Semovi would issue the mandatory installation notice shortly thereafter.¹⁰²
209. In February 2018, Semovi confirmed that the panic button connected to Mexico City's C5 was functioning properly.¹⁰³ Lusad would also receive confirmation from the National Metrology Centre ("*Centro Nacional de Metrología*", "CENAM") that the digital taximeter was an accurate measurement device and was authorized for use in commercial transactions.¹⁰⁴

⁹⁹ R-0077, Oficio No. OCSM-7-2017, Signed by Mr. Héctor Serrano, Secretary of Mobility of Mexico City, addressed to the Comptroller General of Mexico City, 22 August 2017.

¹⁰⁰ R-0192, Oficio DGSTPI-804-2017 from the General Directorate of Individual Public Transport Service (*Dirección General del Servicio de Transporte Público Individual*) to Semovi's Internal Control Organ, 31 October 2017.

¹⁰¹ R-0076, UPAX study on competitive advantages of L1bre System, July 2018, p. 13.

¹⁰² C-0191, Oficio No. DNRM-3180-2017 from Semovi to Lusad, 20 December 2017, p. 2. Respondent contends that it did not locate C-0191 in Semovi's official records (Rejoinder, ¶ 77).

¹⁰³ C-0015, Oficio No. C5/CG/DGT/132/2018 from the General Directorate of Technologies (*Dirección General de Tecnologías*) acknowledging proper functioning of the panic button, 28 February 2018. Respondent contends that it did not locate Exhibit C-0015 in Semovi's official records (see R-0188, Updated table with observations on Claimants' attachments containing possible false, nonexistent, or unauthorized documents).

¹⁰⁴ C-0060, Measurement Report from the National Metrology Centre (*Centro Nacional de Metrología*), 13 September 2018; C-0063, Verification report from the National Metrology Centre (*Centro Nacional de Metrología*), 26 September 2018; C-0064, Certification from the General Bureau of Standards (*Dirección General de Normas*), 28 September 2018.

210. In March 2018, Lusad shared with Semovi manuals for the installation centers, and continued purchasing tablets and other hardware to prepare for the mandatory installation period.¹⁰⁵ Lusad and Semovi also conducted test rides to test the L1bre System.¹⁰⁶
211. On 17 April 2018, Semovi published in the Official Gazette a Mandatory Installation Notice requiring all taxi operators to install the L1bre System in their vehicles.¹⁰⁷ Pursuant to the Mandatory Installation Notice, Semovi would (i) make an appointment system available on its website within 30 working days of the publication of the Mandatory Installation Notice; (ii) supervise and facilitate the installation of the L1bre System; and (iii) sanction drivers who failed to comply with the Mandatory Installation Notice. The Mandatory Installation Notice further required Lusad to complete the installation of taximeters by 31 March 2019.¹⁰⁸ While Claimants argue that Lusad set up the web-based scheduling system and that Semovi failed to activate the system by not placing the link on its website¹⁰⁹, Respondent submits that Semovi did enable the link for the registration of appointments.¹¹⁰
212. Months later, Ms. Balandrán from Semovi informed the OIC that the L1bre System installed in the 1,100 tablets had been working properly in accordance with the obligations stipulated in the concession, and that Semovi had made accessible the link for appointments required by the Mandatory Installation Notice, but that, to date, no taxis had made any appointment.¹¹¹
213. In late 2018, the Superior Audit Office of Mexico City conducted an audit on 18 of L1bre's taximeters and concluded that in 7 of these devices there were "deficiencies in the installation and operation of the passengers' tablet."¹¹²

¹⁰⁵ C-0074, Physical requirements for Libre installation centers, May 2018; C-0184, Minutes of the work meeting between Semovi and Lusad, 13 March 2018; C-0185, Tablet Kit Inventory Review Minutes, 20 March 2018. Respondent contends that it did not locate Exhibit C-0185 in Semovi's official records (see R-0188, Updated table with observations on Claimants' attachments containing possible false, nonexistent, or unauthorized documents).

¹⁰⁶ C-0186, Report on field tests carried out with Semovi, 23 March 2018.

¹⁰⁷ C-0016, Mandatory Installation Notice mandating the installation of the taximeters, published in the Gaceta Oficial de la Ciudad de México, 17 April 2018, pp. 6-10.

¹⁰⁸ C-0016, Mandatory Installation Notice mandating the installation of the taximeters, published in the Gaceta Oficial de la Ciudad de México, 17 April 2018, p. 9.

¹⁰⁹ Reply, ¶¶ 158-159.

¹¹⁰ Rejoinder, ¶¶ 160-168.

¹¹¹ R-0086, Oficio No. DGSTPI-2691-2018 from Semovi, 29 November 2018, p. 1.

¹¹² R-0088, Compliance Audit Report, 2017.

E. THE 2018 CONCESSION DOCUMENT

214. The Parties do not dispute that in 2018 Lusad signed another Concession document, but they disagree on the validity of that document.
215. According to Respondent, on 13 April 2018, the Adjudication Committee met with the purpose of issuing the “definitive title” to Lusad given that Semovi confirmed that “the trial period” had concluded “satisfactorily.”¹¹³ The 2018 Concession Document was executed on the same date.¹¹⁴
216. Respondent contends that, on 24 April 2018, Mr. Zayas asked Semovi about the outcome of the Adjudication Committee’s meeting¹¹⁵ and, on 25 April 2018, he visited Semovi for the same purpose.¹¹⁶
217. Respondent further submits that, on 6 November 2018, Mr. Zayas wrote to Semovi referring again to the Adjudication Committee’s decision of 13 April 2018 and requesting that the definitive Concession title “be officially handed over.”¹¹⁷
218. On 7 November 2018, Mr. Zayas appeared at Semovi’s offices, where he was delivered a hard copy of the 2018 Concession Document. According to the “appearance notice” of that date, Mr. Zayas “states that he agrees with the content” of the Concession title and the delivery of the Concession title “invalidates any other document that had been signed on a previous date.”¹¹⁸
219. Claimants dispute these facts. They rely on the email exchange between Semovi officials dated 8 June 2018 with the subject line “LUSAD FINAL TODO TODO”, which, in addition to containing the two attachments relating to the 2016 Concession Document, also included two files described in the email as “Adjudication Committee 13 April 2018 with a new composition in accordance with the reform of 4 August 2016, which orders the signing of the final document” and the “Definitive Concession 2018 of 13 April 2018 with express revocation for increase or modification of the tariff or any other condition

¹¹³ R-0079, Minute of the “Taximeter” 2018 Session of the Concession Granting Committee, 13 April 2018, p. 3.

¹¹⁴ C-0020, 2018 Concession Document, 13 April 2018. According to Respondent, Lusad breached several provisions of the 2018 Concession Document, in particular, it (i) failed to present a bond and insurance policy; (ii) failed to meet certain shareholding requirements; (iii) failed to obtain authorization from Semovi to operate as a taximeter; and (iv) failed to comply with the ‘probationary’ period (Rejoinder, ¶¶ 119-159).

¹¹⁵ R-0080, Letter from Lusad to Semovi, 24 April 2018.

¹¹⁶ C-0166, Minute of Appearance of Mr. Eduardo Zayas at Semovi, 25 April 2018.

¹¹⁷ R-0081 and C-0170, Letter from Lusad to Semovi, 6 November 2018 (both exhibits are the same document).

¹¹⁸ C-0167, Minute of Appearance of Mr. Eduardo Zayas at Semovi, 7 November 2018.

of the Title.” According to the metadata of these files, they were created in June 2018.¹¹⁹ Claimants allege that the Adjudication Committee’s meeting in April never took place, and that the 13 April 2018 decision as well as the 2018 Concession Document were fabricated by Semovi officials after their alleged date of issuance with the purpose of denying the effect of the 2016 Concession Document and, in particular, to get rid of the Recuperation Fee implemented by the 2017 Amendment.¹²⁰

220. Claimants contend that Lusad’s signature of the 2018 Concession was then procured at the 7 November 2018 meeting that Semovi officials arranged with Mr. Zayas under false pretenses. In his second witness statement, Mr. Zayas testifies that at the meeting he was asked to sign the 2018 Concession dated 13 April 2018, as well as the 24 April 2018 letter and the 6 November 2018 letter to “protect” and “shield” the Concession from the new government that would take office in the next days. He testified that he had “no opportunity to review in detail” these documents and that it was only after signing them that he learned that what he had signed was a revised concession document which removed Lusad’s preferential right to install and maintain digital taximeters in Mexico City, reduced the length of the trial period, eliminated the Recuperation Fee, eliminated Lusad’s right to charge for advertising displayed in the taxis, eliminated Lusad’s right to charge for the use of WiFi, and purported to modify Lusad’s obligations to maintain a performance bond and insurance.¹²¹ Regarding the 25 April 2018 “appearance” letter, Mr. Zayas says that although he went to Semovi’s offices on that date for an unrelated matter, he was not notified of any decision nor did he sign any “appearance” notice.¹²²

F. THE ALLEGED SUSPENSION OF THE CONCESSION

221. In July 2018, Claudia Sheinbaum was elected mayor of Mexico City. The new Mexico City government took office in December 2018.¹²³
222. During July 2018, press articles reported that the new Mexico City government would review the Lusad concession with a view to cancelling the installation of the L1bre System by December 2018.¹²⁴

¹¹⁹ C-0341, Email from Mr. Luis Fagoaga to Mr. Agustín Muñana and other Semovi officials, 8 June 2018, (F-Metadata); C-0341, Email from Mr. Luis Fagoaga to Mr. Agustín Muñana and other Semovi officials, 8 June 2018, (E-Metadata).

¹²⁰ Tr. Closing Hearing, Day 1 (ENG), 32:1-7; Tr. Closing Hearing, Day 2 (ENG), 282:4-22-283:3.

¹²¹ Second Witness Statement of Mr. Eduardo Zayas, 30 November 2022, ¶¶ 27-29.

¹²² Second Witness Statement of Mr. Eduardo Zayas, 30 November 2022, ¶ 32.

¹²³ Memorial, ¶¶ 113; 130.

¹²⁴ C-0254, Press article, “*Plantean bajar tablets para taxis*,” El Universal, 19 July 2018; C-0255, Press article, “*Sheinbaum desaparecerá tabletas electrónicas para taxis y regulará Uber*,” El Financiero, 26 July 2018.

223. Claimants submit that in 2018 Mexico suspended the Concession due to the change of government in Mexico City brought about by the 2018 elections.¹²⁵ To support their allegation, they have filed a letter from Semovi dated 30 May 2018, in which Semovi requested that Lusad suspend the installation of the L1bre System in the remaining taxis as a result of “election period” and foreseeing that the installation “could become the object of accusation as proselytizing propaganda...”. The letter specified that the suspension was not attributable to Lusad, since, to date, “the concessionaire has fully complied with its obligations and rights pursuant to its [Concession] title.”¹²⁶
224. Claimants contend that, months later, the Semovi sent Lusad another letter in which Semovi announced that the suspension of the installation of the L1bre System would continue due to the “political change” brought about by the elections and the “transition” between former and new officials. The letter specified that the suspension was not caused by Lusad.¹²⁷
225. Respondent disputes Claimants’ account of events and challenges the validity of their exhibits. It contends that the suspension is a “fabricated story for this arbitration”¹²⁸, and that it was Lusad who decided to abandon the Concession. The May and October 2018 suspension letters submitted as Exhibits C-18 and C-19 as well as C-226 and C-227 (in their alleged original copy) are forged documents as shown by the following differences between the two sets of exhibits submitted by Claimants as the digital and original hard copy versions of the same document, *i.e.*, C-0018 v C-0226, and C-0019 v C-0227:¹²⁹

¹²⁵ Reply, ¶¶ 155, 165.

¹²⁶ C-0018, Oficio No. DGSTPI-965-2018 from Semovi announcing suspension of the Concession, 30 May 2018.

¹²⁷ C-0019, Oficio No. DGSTPI-1943-2018 from Semovi announcing indefinite suspension of the Concession, 28 October 2018.

¹²⁸ Counter-Memorial, ¶ 148.

¹²⁹ Rejoinder, ¶¶ 207-208, 232-236.

Comparative Table Exhibit C-0018 v. C-0226

	C-0018	Document presented at the inspection
1	Penultimate line of the second paragraph: “oficio”.	First paragraph lines three to eight:
2	Second paragraph contains six lines.	“del”, “Ciudad”, “2018”, “taxímetros”, “aplicación”, “individual”, and “como”.
3	Second line of the third paragraph: “la fecha”	First paragraph contains 9 lines.
4	Third line of the third paragraph: “las”	Second paragraph, penultimate and last line: “gabinete” and “instalación”.
5	Signature	Third paragraph, penultimate and last line: “la” and “Fecha”.

Source: C-0018, R-0208

Comparative table exhibit C-0019 v. C-0227

	C-0019	Document presented at the inspection
1	First paragraph lines three through eight: “inicio”, “taxi”, “abril”, “gratis”, “como”, “transporte”, “los”, and “de México”.	First paragraph lines three through eight: “del”, “Ciudad”, “2018”, “taxímetros”, “aplicación”, “individual”, and “como”.
2	First paragraph contains 10 lines.	First paragraph contains 9 lines
3	Second paragraph, penultimate and last line: “el” and “la”.	Second paragraph, penultimate and last line: “gabinete” y “instalación”.
4	Third paragraph, penultimate and last line: “continuar” and “hasta”.	Third paragraph, penultimate and last line: “la” and “fecha”.
5	Signature	Signature

Source: C-0019, R-0208

226. In February 2019, Lusad met with the Mayor’s cabinet and the new Secretary of Semovi, Mr. Lajous Loaza, who joined Semovi in December 2018, to discuss the future of the L1bre System.¹³⁰ While Claimants allege that during the meeting Mr. Lajous “disclaimed the existence of the Concession” and “disavowed Semovi’s obligation, under the Concession and the Mandatory Installation Notice, to facilitate the obligatory installation of the L1bre System in all of the taxis of Mexico City,”¹³¹ in his second witness statement, Mr. Lajous testifies that he informed Lusad that he had “no knowledge of any concession granted by Semovi in 2016 nor of the alleged....suspension[s] in 2018”, that “Lusad should guarantee compliance with the requirements of the alleged concession” and that taxi drivers “could not be forced to [use the L1bre System].”¹³²

¹³⁰ Reply, ¶ 168; First Witness Statement of Mr. Andrés Lajous Loaeza, 9 May 2022, ¶ 40.

¹³¹ Reply, ¶ 168.

¹³² Second Witness Statement of Mr. Andrés Lajous Loaez, 3 March 2023, ¶¶ 10-11.

227. In June 2019, a press article reported that Semovi was “analyzing the legal strategy to follow in relation to Lusad and its concession” and that Mayor Sheinbaum had allegedly declared that, regarding the L1bre System, “you can’t license a service, enforce it in a monopolistic manner without competition”, or force taxi drivers to use an app from “a company that has no experience.”¹³³
228. During the same month, Mayor Sheinbaum announced that the Digital Agency of Public Innovation (“**DAPI**”)—a government instrumentality—was developing an application for taxis. This application would allow users to access information of registered taxis and request their service as well as present other features such as a panic button (the “**Mi Taxi System**”).¹³⁴
229. In August 2019, the government announced a pilot testing of the Mi Taxi System.¹³⁵
230. On 5 September 2019, Mr. Eduardo Clark García Dobarganes, the director of the Center of Technological Development of the DAPI, stated during a radio interview that Lusad’s Concession was no longer in effect.¹³⁶
231. On 30 September 2019, Lusad sent a letter to Semovi noting that the launch of the Mi Taxi application “constitutes a clear violation of the rights granted to Lusad” and requesting an update on the status of its concession.¹³⁷ Semovi did not respond to the letter.¹³⁸
232. In April 2020, Semovi issued a resolution in the Official Gazette formally inviting all taxi drivers to install the “Mi Taxi” application.¹³⁹

G. THE AMPARO PROCEEDINGS

233. During 2016 and 2019, several third parties instituted amparo proceedings against the 2016 Declaration of Necessity, the 2016 Concession Document and the 2018 Mandatory

¹³³ C-0248, Press article, “*Usarán aportaciones de Uber y Didi para la sustitución de taxis antiguos*,” Proceso, 13 June 2019.

¹³⁴ C-0021, Press article, “*Gobierno de la CDMX creará app para taxis concesionados*,” 14 June 2019; Witness Statement of Mr. Eduardo Clark García Dobarganes, 10 May 2022, ¶¶ 13, 19.

¹³⁵ C-0082, Press article, “*Así funciona la app del gobierno de Ciudad de México para mujeres en los taxis*,” 5 September 2019.

¹³⁶ C-0023, Interview with Eduardo Clark, General Director of the Center of Technological Development of the Digital Agency of Public Innovation of the Government of Mexico City, 5 September 2019; Witness Statement of Mr. Eduardo Clark García Dobarganes, 10 May 2022, ¶¶ 54-56.

¹³⁷ C-0105, Letter from Lusad to Semovi regarding status of the Concession, 30 September 2019.

¹³⁸ Memorial, ¶ 139.

¹³⁹ C-0032, Call to public individual transport services concessionaires to adhere to the “Mi Taxi” application, published in the Gaceta Oficial de la Ciudad de México, 16 April 2020, pp. 3-4.

Installation Notice. Amparo proceedings are constitutional proceedings that allow citizens to challenge the constitutionality of government actions for breach of fundamental rights enshrined in the Mexican Constitution or human rights provided for in international treaties signed by Mexico.¹⁴⁰

234. Some of these amparos proceedings were dismissed by Mexican courts,¹⁴¹ while at least three of them were upheld.
235. In particular, on 20 June 2016, the President of the Board of Directors of the Taximeters Manufacturers Association and the company Neotax SA de CV filed an amparo claim against Semovi and other governmental entities concerning the authorization granted by the Evaluation Committee to issue the Declaration of Necessity, the Declaration of Necessity and the 2016 Concession Document (“**Amparo 1135/2016**”). Lusad participated as an interested party in this proceeding.¹⁴² On November 10, 2016, the 7th Administrative District Court dismissed the amparo.¹⁴³ The complainants appealed the decision before the 18th Collegiate Court, which in its decision of 25 May 2017 found in Neotax’s favour by holding that the Evaluation Committee and Semovi lacked the required legal authorities to authorize and issue a declaration of necessity to grant a concession for the replacement, installation and maintenance of taximeters.¹⁴⁴
236. Following this amparo decision, and upon Lusad’s request, in April and June 2017 Semovi confirmed to Lusad that the 2016 Concession Document is valid¹⁴⁵, that the decision in Amparo 1135/2016 only has legal effects for the complainant, and that the 2016 Concession Document is fully valid and in force.¹⁴⁶
237. On 29 May 2018, a group of 254 taxi drivers filed an amparo against Semovi, other governmental entities, and Lusad, the latter in its capacity of an “individual acting as an authority”, concerning, among others, the authorization granted by the Evaluation

¹⁴⁰ Counter-Memorial, ¶ 202.

¹⁴¹ Reply, ¶ 112; C-0244, Final Ruling in Amparo case 373/2016, Auxiliar 33/2017, 2 May 2017; C-0245, Final Ruling in Amparo case 627/2018, 13 July 2018; C-0246, Final Ruling in Amparo case 633/2018-II, 5 November 2018.

¹⁴² R-0100, Amparo Ruling 1135/2016, 11 November 2016, p. 4.

¹⁴³ R-0100, Amparo Ruling 1135/2016, 11 November 2016, pp. 46-47.

¹⁴⁴ R-0101, Appeal for Review Ruling, 389/2016, 25 May 2017, pp. 35-36, 50-51.

¹⁴⁵ C-0056, Oficio No. DNRM-0673-2017 from Semovi confirming the validity of the Concession Agreement, 4 April 2017, p. 2. Respondent contends that it has not been able to locate Exhibit C-0056 in Semovi’s official records (see R-0188, Updated table with observations on Claimants’ attachments containing possible false, nonexistent, or unauthorized documents).

¹⁴⁶ C-0057, Oficio No. DNRM-1460-2017 from Semovi confirming the validity of the Concession Agreement, 19 June 2017, p. 2. Respondent contends that it has not been able to locate Exhibit C-0057 in Semovi’s official records (see R-0188, Updated table with observations on Claimants’ attachments containing possible false, nonexistent, or unauthorized documents).

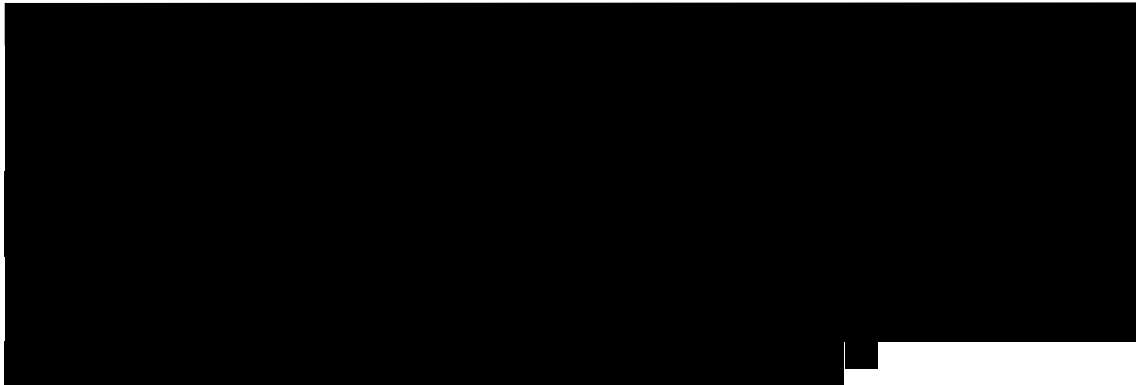
Committee to issue the Declaration of Necessity, the Declaration of Necessity, and the Mandatory Installation Notice of 2018 (“**Amparo 693/2018**”). On 9 April 2018, the 14th Administrative District Court concluded that Semovi had no legal authority to issue a declaration of necessity to grant a concession for the replacement, installation and maintenance of taximeters, nor to sign the 2018 Mandatory Installation Notice.¹⁴⁷ Lusad appealed this decision, which was dismissed.¹⁴⁸

238. On 29 May 2018, a taxi driver filed an amparo against Semovi and other governmental entities concerning the 2018 Mandatory Installation Notice (“**Amparo 622/2018**”). On 6 September 2018, the 7th District Court found that Semovi did not have the legal authority to issue the 2018 Mandatory Installation Notice because it had no legal authority to issue a declaration of necessity to grant a concession for the replacement, installation and maintenance of taximeters.¹⁴⁹ Semovi and Lusad appealed the decision, which the 18th Collegiate Court dismissed on 11 April 2019.¹⁵⁰

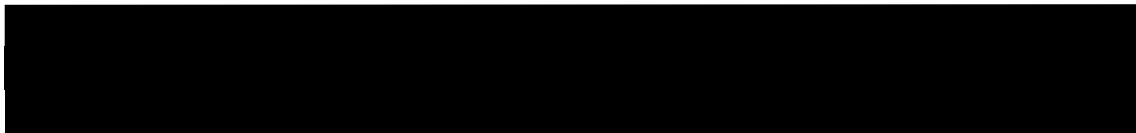
H. THE CRIMINAL INVESTIGATIONS

239. Several criminal actions were launched in relation to Lusad’s Concession and against Messrs. León and Zayas. These criminal actions were the subject of Claimants’ request for provisional measures.¹⁵¹

240.



241.



¹⁴⁷ R-0036, Amparo Ruling 693/2018, 9 April 2019, pp. 63-64, 69-77.

¹⁴⁸ R-0104, Appeal for Review Ruling 237/2019, 10 October 2019, p. 22.

¹⁴⁹ R-0105, Amparo Ruling 622/2018, 6 September 2018, pp. 49-50.

¹⁵⁰ R-0106, Appeal for Review Ruling 364/2018, 11 April 2019, p. 80.

¹⁵¹ Procedural Order No. 3.

¹⁵² Counter-Memorial, ¶¶ 251-257; C-0133,

[REDACTED]

242. [REDACTED]

243. [REDACTED]

244. [REDACTED]

245. [REDACTED]

¹⁵³ C-0139, [REDACTED]; Counter-Memorial, ¶¶ 244-250; Second Witness Statement of Mr. Eduardo Zayas, 16 December 2022, ¶¶ 43; 55-56.

¹⁵⁴ [REDACTED]

¹⁵⁵ Counter-Memorial, ¶¶ 259-260; C-0343, Criminal Complaint filed by Lusad, 6 March 2019. See also C-0119, Notice of Intent of L1bre Holding, 29 March 2019, pp. 6-7.

¹⁵⁶ C-0343, Criminal Complaint filed by Lusad, 6 March 2019, p. 19.

¹⁵⁷ C-0135, [REDACTED]; Counter-Memorial, ¶¶ 259-266.

¹⁵⁸ C-0136, [REDACTED], p. 13.

¹⁵⁹ Tr. Closing Hearing, Day 1, 225:4-14.

IV. REQUESTED RELIEF

A. CLAIMANTS

1. Memorial

Claimant submits the following requests of the Tribunal:

Requests:

(i) A declaration that Mexico breached Articles 1102, 1105, and 1110 of the Treaty;

(ii) An order directing Mexico to compensate Claimant for its losses resulting from Mexico's breaches of the Treaty and international law in an award of damages not less than USD \$2.802 billion; such compensation to be paid without delay, be effectively realizable and be freely transferrable, and bear post-award interest at a compound rate sufficient to fully compensate ES Holdings for the loss of the use of this capital as from the date of Mexico's breaches of the Treaty;

(iii) A declaration that the award of damages and interest be made net of all Mexico's taxes, and that Mexico may not deduct taxes in respect of the payment of the award of damages and interest;

(iv) An order that Respondents reimburse Claimant for all costs, expenses, expert fees, and reasonable attorneys' fees incurred or paid by Claimant in connection with this arbitral proceeding, plus interest; and

(v) An order granting any further relief as the Tribunal considers appropriate.¹⁶⁰

2. L1bre Holding Addendum:

Claimants submit the following requests to the Tribunal:

Requests:

(i) A declaration that Mexico breached Articles 1102, 1105, and 1110 of the NAFTA;

¹⁶⁰ Memorial, p. 160.

(ii) An order directing Mexico to compensate Claimants for their losses and for Lusad's losses resulting from Mexico's breaches of NAFTA and international law in an award of damages of not less than USD \$2.802 billion (reflecting preaward interest payable through 17 September 2021, and to be updated as of the date of the Award); such compensation to be paid without delay, be effectively realizable and be freely transferrable, and bear post award interest at a compound rate sufficient to fully compensate Claimants for the loss of the use of this capital as from the date of Mexico's breaches of NAFTA;

(iii) A declaration that the award of damages and interest be made net of all Mexico's taxes, and that Mexico may not deduct taxes in respect of the payment of the award of damages and interest;

(iv) An order that Respondent reimburse Claimants for all costs, expenses, expert fees, and reasonable attorneys' fees incurred or paid by Claimants in connection with this arbitral proceeding, plus interest; and

(v) An order granting any further relief as the Tribunal considers appropriate.¹⁶¹

3. Reply

Claimants submit the following requests:

Requests:

(i) A declaration that Mexico breached Articles 1102, 1105, and 1110 of the Treaty;

(ii) An order directing Mexico to compensate Claimants for their losses, and those suffered by Lusad, resulting from Mexico's breaches of the Treaty and international law in an award of

damages not less than USD \$2.109 billion; such compensation to be paid without delay, be effectively realizable and be freely transferrable, and bear post-award interest at a compound rate sufficient to fully compensate ES Holdings for the loss of the use of this capital as from the date of Mexico's breaches of the Treaty;

¹⁶¹ L1bre Holding Addendum, p. 11.

(iii) A declaration that the award of damages and interest be made net of all Mexico's taxes, and that Mexico may not deduct taxes in respect of the payment of the award of damages and interest;

(iv) An order that Mexico reimburse Claimants for all costs, expenses, expert fees, and reasonable attorneys' fees incurred or paid by Claimants in connection with this arbitral proceeding, plus interest; and

*(v) An order granting any further relief as the Tribunal considers appropriate.*¹⁶²

B. RESPONDENT

1. Counter-Memorial

*For all of the above, the Respondent asks this Tribunal to completely dismiss Claimant's claim, with the corresponding award of costs in favor of the Respondent, in accordance with the request for costs referred to supra.*¹⁶³

2. Rejoinder

*In view of the foregoing, the Respondent requests this Tribunal to dismiss Claimant's claim in its entirety, with a corresponding award of costs in favor of the Respondent, in accordance with the request for costs referred to above.*¹⁶⁴

V. JURISDICTION

A. CLAIMANTS' NATIONALITY

1. Respondent's position

246. Respondent submits that treaties like NAFTA "were not designed to allow national investors to sue their own States"¹⁶⁵ and, in this case, Claimants are "primarily Mexican nationals"¹⁶⁶ "not entitled to bring an international investment claim against Mexico."¹⁶⁷

¹⁶² Reply, pp. 178-179.

¹⁶³ Counter-Memorial, ¶ 556.

¹⁶⁴ Rejoinder, ¶ 632.

¹⁶⁵ Counter-Memorial, ¶ 374, citing RL-0063, *Phoenix Action Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 144.

247. According to Respondent, ESH (and consequently, L1bre Holding) is a dual national of Mexico, and Canada, and, under the principle of dominant and effective nationality of general international law,¹⁶⁸ and Article 25 of the ICSID Convention,¹⁶⁹ it should be considered to have predominantly Mexican nationality for the purposes of this arbitration.¹⁷⁰
248. Respondent asserts that NAFTA does not state how to determine nationality, and that there is no international law of “limited partnerships” and “limited liability companies.”¹⁷¹ Therefore, Respondent relies on the laws of the US and Canada to conclude that L1bre Holding, and ESH are not corporations but “associations”, meaning that their nationality should be that of their members, *i.e.*, Messrs. Zayas, León, and Covarrubias, who are Mexican nationals.¹⁷²
249. Respondent submits that under US law, and the findings of US courts,¹⁷³ partnerships or limited liability companies like L1bre Holding have the nationality of their members because they are not “juridical persons.”¹⁷⁴ Respondent adds that Delaware limited liability companies do not need to have a place of business in Delaware or pay federal or state taxes if they do not conduct business in the US.¹⁷⁵
250. Respondent further submits that under the laws of Alberta, Canada, in limited partnerships like ESH, which owns L1bre Holding, the partners are the ones responsible for paying taxes in their home locations and liable for the partnership’s actions.¹⁷⁶ According to Respondent, ESH has “a very minor connection to Canada” because ESH’s general partner is a limited liability company from Texas (ESTH LLC), which in turn, is managed by Mr. Zayas, a Mexican national.¹⁷⁷ Respondent concludes that “the same

¹⁶⁶ Rejoinder, ¶ 316.

¹⁶⁷ Counter-Memorial, ¶¶ 360, 367.

¹⁶⁸ Counter-Memorial, ¶ 371.

¹⁶⁹ Counter-Memorial, ¶ 370.

¹⁷⁰ Counter-Memorial, ¶ 366.

¹⁷¹ Rejoinder, ¶ 316.

¹⁷² Counter-Memorial, ¶¶ 360-361.

¹⁷³ Rejoinder, ¶ 320, citing (1) RL-0046, *Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990), 7 November 1989; (2) RL-0155, *Seaberg v. Talisman Energy, USA*, 2012 U.S. Dist. LEXIS 119624, 3-4, 23 August 2012; (3) RL-0156, *Palmiotti v. JAF Carrier L.L.C.*, 2017 U.S. Dist LEXIS 45677, 28 March 2017.

¹⁷⁴ Counter-Memorial, ¶¶ 361-362, citing (1) RL-0043, *Lincoln Benefit Life Co. v. AEI Life, LLC*, 800 F.3d 99, 105 (3rd Cir. 2015), 14 January 2015 (“[T]he citizenship of an LLC is determined by the citizenship of its members.”); (2) RL-0044, *Mutual Assignment and Indemnification Co. v. Lind-Waldock*, 364 F.3d 858 (7th Cir. 2004), 24 March 2024 (“Lind-Waldock is a limited liability company, which means that it is a citizen of every state of which any member is a citizen...”), and (3) RL-0045, *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 454 (1900), 22 March 1900 (“This Court does not hold that either a voluntary association of persons, or an association into a body politic, created by law is a citizen of a state...”).

¹⁷⁵ Counter-Memorial, ¶ 365.

¹⁷⁶ Counter-Memorial, ¶ 363.

¹⁷⁷ Counter-Memorial, ¶¶ 363-364; R-0142, Certificate of Formation, ESTH LLC, 10 November 2017.

principles” apply to L1bre Holding, a Delaware limited liability company,¹⁷⁸ subject to the Delaware Limited Liability Company Act.¹⁷⁹

251. Respondent adds that the Partnership Agreement of ES Technologies of 2017, and the transcripts of the Taxinet proceeding, confirm that the “real parties in interest” and therefore the “actual investors” and “ultimate owner[s]” of Lusad were Messrs. Covarrubias, León and Zayas.¹⁸⁰ The L1bero Partners’ general partner registered in Alberta, Canada is Mr. Covarrubias.¹⁸¹
252. Also, Respondent submits that Claimants have “unique characteristics”, such as being a limited partnership (ESH) or limited liability company (L1bre Holding) without presence in Alberta and Delaware, respectively, which, “to the best of [its] knowledge, have not been previously considered by an investment arbitration tribunal.”¹⁸² In this regard, Respondent argues that the case of *B-Mex v. Mexico*¹⁸³ is different from this case in which there is “an unusual circumstance in which Mexican nationals created ‘paper’ entities in Canada and the United States for the sole purpose of concealing their identities and evading taxes. The NAFTA Parties clearly did not intend that their own nationals could bring investment claims against them simply by registering a paper entity in another country.”¹⁸⁴
253. Lastly, Respondent argues that the issue of who legally owns a right is a matter to be decided by the laws of the State in which the investment was made, and therefore, the Tribunal must determine ownership not only by reference to the country of registration but also to the ultimate beneficiaries.¹⁸⁵

2. Claimants’ position

254. Claimants argue that they qualify as investors under NAFTA Article 1139 because ESH is a limited partnership incorporated under the laws of Alberta, Canada,¹⁸⁶ and L1bre

¹⁷⁸ Counter-Memorial, ¶ 365.

¹⁷⁹ Rejoinder, ¶ 318; R-0226, Delaware Limited Liability Company Act, Title 6, Chapter 18.

¹⁸⁰ Counter-Memorial, ¶¶ 353-354; Rejoinder, ¶ 317; R-0140, Espiritu Santo Technologies, LLC Partners Agreement (Dec. 2017); R-0224, *Taxinet Corp. et al. v. Leon*, Appeal No. 22-123335-G (11th Cir.), Appellants’ Appendix Vol. 3, Tr. of Trial Day 2, Dec. 8, 2021, p. 53, 8 December 2021.

¹⁸¹ Counter-Memorial, ¶ 364.

¹⁸² Rejoinder, ¶ 321.

¹⁸³ Rejoinder, ¶ 325.

¹⁸⁴ Rejoinder, ¶ 325.

¹⁸⁵ Rejoinder, ¶ 323, citing RL-0177, Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press, 2009, p. 52; RL-0178, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, ¶ 112; RL-0083, *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, ¶¶ 142-145, 147.

¹⁸⁶ Memorial, ¶ 151; C-0001, Certificate of Good Standing of ES Holdings, under the laws of Alberta, Canada, 21 May 2019.

Holding is a company incorporated in the US,¹⁸⁷ and therefore, they are “undoubtedly” an “enterprise of a Party” which means “an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there.”¹⁸⁸

255. First, Claimants submit that NAFTA “broadly defines” the term “enterprise” as “any entity constituted or organized under applicable law,” “expressly includ[ing] partnerships” and “any corporation”, and Respondent “does not dispute” that they are “duly ‘constituted or organized’” in Delaware, US, and Canada, Alberta.¹⁸⁹
256. Claimants contend that Respondent is attempting to “re-write the NAFTA standard” for determining whether enterprises qualify for the protection of its Chapter 11¹⁹⁰ by disregarding the ordinary meaning and plain text of NAFTA Articles 1139 and 201, under which, “the nationality of enterprises is determined by their place of incorporation.”¹⁹¹
257. According to Claimants, Respondent ignores the definition of “enterprise” in NAFTA Article 201, and “the well-treaded line of NAFTA decisions” that established the nationality of investors based on Articles 201 and 1139.¹⁹² Claimants add that “at least one prior dispute under NAFTA Chapter 11 involved claimants that were LLCs (in that case, from Colorado)—*B-Mex, LLC and others v. Mexico*,”¹⁹³ and “a claimant that was a L.P.—*Lion Mexico Consolidated LP v. Mexico*” but that Respondent did not challenge the corporate structure of the claimants in either case.¹⁹⁴ Moreover, Claimants submit that there is no issue of dual nationality in this case since that issue is “limited to certain ‘natural persons’.”¹⁹⁵
258. Second, Claimants contend that Respondent’s arguments lack factual support. L1bre Holding is not an association but a limited liability company “duly formed” in Delaware, and the US courts’ decisions referenced by Respondent are irrelevant because they concern the New York Partnership Law, not the Delaware General Corporation Law that

¹⁸⁷ Memorial’s Addendum, ¶ 14; C-0089, Certificate of Formation of L1bre Holding LLC, 7 January 2016 (stating that L1bre Holding LLC was incorporated on 7 January 2016); Exhibit C-0124, Status of L1bre Holding LLC from the State of Delaware Website, 26 October 2021.

¹⁸⁸ Memorial, ¶ 151; Reply, ¶ 206.

¹⁸⁹ Reply, ¶ 210.

¹⁹⁰ Reply, ¶ 205.

¹⁹¹ Reply, ¶ 211.

¹⁹² Reply, ¶ 212; CL-0040, *Waste Management, Inc. v. United Mexican States II*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (“*Waste Management v. Mexico II*”), ¶¶ 81, 85; CL-0045, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 79; CL-0148, *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶¶ 247-248.

¹⁹³ Reply, ¶ 216, citing RL-0158, *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019 (“*B-Mex v. Mexico*”).

¹⁹⁴ Reply, ¶¶ 216, 218; CL-0153, *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Decision on Jurisdiction, 30 July 2018.

¹⁹⁵ Reply, ¶ 213.

governs L1bre Holding, which holds a “separate and distinct legal personality.”¹⁹⁶ ESH is a limited partnership formed in Alberta, Canada, and partnerships are expressly included in NAFTA Article 201.¹⁹⁷ Claimants add that “the relevant inquiry for nationality purposes is to identify the jurisdiction in which the enterprise has been ‘constituted or organized’.”¹⁹⁸

259. Third, Claimants contend that US law applicable to court jurisdiction, and their “contacts” in US or Canada are “irrelevant” to the Tribunal’s jurisdiction *ratione personae*, and that the only relevant US law is the one that determines whether L1bre Holding was “constituted or organized” in Delaware.¹⁹⁹ According to Claimants, NAFTA is *lex specialis* and provides a framework to determine when enterprises “have standing” to bring an arbitration, thus, there are no grounds to “invoke criteria internal to NAFTA in concocting jurisdictional objections.”²⁰⁰
260. Lastly, Claimants argue that the nationalities of Messrs. Covarrubias, Zayas and León are “irrelevant to the issue of jurisdiction *ratione personae*” because “these natural persons” are not bringing this arbitration.²⁰¹ Claimants contend that the nationality of their ultimate beneficial owner is “simply irrelevant to establishing whether Claimants qualify as ‘investors’” under NAFTA Chapter 11 since they “are indisputably entities ‘constituted or organized’ under the laws of Canada and the [US].”²⁰²

3. Tribunal’s analysis

261. The Parties disagree on the nationality of Claimants for the purposes of establishing *ratione personae* jurisdiction in this arbitration and the way to determine such nationality.
262. Article 25(2)(b) of the ICSID Convention defines the concept of “national of another Contracting State” to determine the jurisdiction of the Centre. This provision establishes different concepts for natural and juridical persons, as follows:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties

¹⁹⁶ Reply, ¶ 215; CL-0150, Delaware General Corporations Law, §106.

¹⁹⁷ Reply, ¶ 217; C-0001, Certificate of Good Standing of ES Holdings, under the laws of Alberta, Canada, 21 May 2019.

¹⁹⁸ Reply, ¶ 217.

¹⁹⁹ Reply, ¶ 220.

²⁰⁰ Reply, ¶¶ 221-222; CL-0065, *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, 15 January 2008, ¶ 76; CL-0013, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007 (“*ADM v. Mexico*”), ¶ 119 (“Chapter Eleven of the NAFTA constitutes *lex specialis* in respect of its express content, but customary international law continues to govern all matters not covered by Chapter Eleven.”); CL-0040, *Waste Management v. Mexico II*, ¶ 85.

²⁰¹ Reply, ¶ 223.

²⁰² Reply, ¶¶ 224-225.

consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

*(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.*²⁰³

263. While the aforesaid provision regulates the scenario in which a juridical person holds the nationality of the Contracting State party to the dispute but is deemed to have a different, foreign, nationality “because of foreign control,” it does not contain rules for the determination of the nationality of the juridical person.
264. Hence the Tribunal must resort to the text of NAFTA, as the applicable treaty in this case. NAFTA Article 1139 provides that (i) an “investor of a Party” can be “a national or an enterprise of such Party, that seeks to make, is making or has made an investment,”²⁰⁴ and NAFTA Article 201 defines (ii) “enterprise of a Party” as “an enterprise constituted or organized under the law of a Party”, and (iii) an enterprise 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.”²⁰⁵
265. Under the aforesaid Article 1139, “enterprises” can be investors, and Article 201 defines “enterprise” in broad terms, using expressions such as “any entity” and “other association”, explicitly mentioning partnerships and associations and including them under the same blanket definition of corporations. There is no limitation under these provisions, as the ones pleaded by Respondent, resulting from the type or nature of the corporation, company or legal entity.
266. In turn, Article 201 clearly states that an “enterprise” is deemed to be “of a Party” if it was “constituted or organized under the law of a Party.” In this sense, under the ordinary meaning of Articles 1139 and 201, the nationality of an enterprise for the purposes of NAFTA is to be determined by reference to its place of constitution or organization. Again, there is no additional or specific requirement for associations, partnerships or

²⁰³ CL-0003, ICSID Convention, Article 25.

²⁰⁴ CL-0001, NAFTA, Article 1139.

²⁰⁵ CL-0001, NAFTA, Article 201.

entities to have a specific “legal personality” to qualify for protection under NAFTA, much less a requirement related to the nationality of their partners or members. If anything, the provision broadly acknowledges that an enterprise constituted *or* organized under the laws of a State has the nationality of that State.

267. In this case, there is no debate that ESH and L1bre Holding were “constituted or incorporated” under the laws of Alberta, Canada, and Delaware, US, respectively.²⁰⁶ Therefore, under the ordinary meaning of the text of NAFTA, Claimants are nationals of Canada and US, regardless of their form as a limited partnership, or a limited liability company, and the nationalities of their members or partners.
268. Further, even though Article 25 of the ICSID Convention does not specify the method to determine corporate nationality, investment tribunals have recognized that there is an implicit rule in this provision that “the nationality of a corporation is determined on the basis of its *siège social* **or place of incorporation**,” but not by reference to the “test” of control, that is, nationality of the shareholders, members, or partners, which is a different criterion.²⁰⁷

Municipal laws

269. Respondent contends that the Tribunal should look into the nationality of Claimants’ members because under the laws of US and Canada, they lack legal personality, their citizenship is determined by reference to the members or partners, and “there is no international law of ‘limited partnerships’ and ‘limited liability companies’ that overrides the domestic law under which such entities were created and operated.”²⁰⁸
270. But the issue in question is rather the opposite, that is, if domestic laws can override or modify the text of a treaty so as to add requirements that are nowhere to be found in its plain text.²⁰⁹
271. This Tribunal has the mandate to decide the issues presented before it in accordance with NAFTA and “applicable rules of international law.”²¹⁰ In this case, as noted above, the ordinary meaning of NAFTA Articles 1139 and 201 is sufficiently clear in the requirements to determine the nationality of an enterprise for the purposes of the treaty, and particularly, Chapter 11.

²⁰⁶ C-0001, Certificate of Good Standing of ES Holdings, under the laws of Alberta, Canada, 21 May 2019; C-0089, Certificate of Formation of L1bre Holding LLC, 7 January 2016.

²⁰⁷ CL-0156, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, ¶ 42 (emphasis added).

²⁰⁸ Rejoinder, ¶ 316.

²⁰⁹ CL-0161, *KT Asia Investment Group BV v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013 (“*KT Asia v. Kazakhstan*”), ¶ 117.

²¹⁰ CL-0001, NAFTA, Article 1131.

272. Other than the requirement that the enterprise be organized “under the laws of the Party”, NAFTA makes no *renvoi* or mention to municipal laws on corporations or associations to determine nationality and does not even reference the concept of “legal personality.” If the intent of the Parties to NAFTA had been to determine the nationality of enterprises by reference to other specific standards of municipal law or condition nationality to legal personality, they could have done so, as they did on “Country-specific definitions” in Annex 201.1 with respect to natural persons considered “nationals.”²¹¹ But they did not.
273. Moreover, the Tribunal notes that Respondent appears to conflate the rules governing the notion of property –on which there are no substantive rules under general international law, and therefore, requires resorting to municipal law–²¹² with the treaty definition of “investor” and the way to determine nationality, which is regulated by NAFTA.
274. In any event, the Tribunal observes that the arguments brought by Respondent under the laws of US and Canada would be insufficient to conclude that Claimants are Mexican nationals or hold dual nationality for NAFTA’s purposes. Respondent relies on decisions that concern the determination of citizenship for debates on jurisdiction among US courts and regarding entities of states other than Delaware (and Texas, for ESTH LLC),²¹³ whereas, the issue at stake in this case is corporate nationality for the jurisdiction of a tribunal under public international law.²¹⁴
275. Also, whether Claimants pay taxes in the State of incorporation and whether they “are treated as Canadian or U.S. nationals by the countries in which they are incorporated,” is not a criterion adopted by NAFTA.²¹⁵ If anything, it confirms that the treatment afforded to ES Holdings or L1bre Holding under national laws for domestic purposes does not change the fact that they were “incorporated” in the US and Canada, which is all that NAFTA requires to consider them investors.
276. Lastly, the Delaware Limited Liability Company Act recognizes that a “limited liability company formed under this chapter shall be a separate legal entity, the existence of which

²¹¹ CL-0001, NAFTA, Article 201.1.

²¹² Rejoinder, ¶ 323, citing RL-0177, Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press, 2009, p. 52. “Investment disputes are about investments, investments are about property, and property is about specific rights over tangibles and intangibles cognizable by the municipal law of the host state. General international law contains no substantive rules of property law. Nor do investment treaties purport to lay down rules for acquiring rights in rem over tangibles and intangibles. Whenever there is a dispute about the scope of the property rights comprising the investment, or to whom such rights belong, there must be a reference to a municipal law of property. Insofar as investment treaties require a territorial nexus between the investment and one of the contracting state parties, that property law is the municipal law of the state in which the claimant alleges that it has an investment.”

²¹³ R-0142, Certificate of Formation, ESTH LLC, 10 November 2017.

²¹⁴ Rejoinder, ¶ 320, citing (1) RL-0046, *Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990), 7 November 1989; (2) RL-0155, *Seaberg v. Talisman Energy, USA*, 2012 U.S. Dist. LEXIS 119624, 3-4, 23 August 2012; (3) RL-0156, *Palmiotti v. JAF Carrier L.L.C.*, 2017 U.S. Dist LEXIS 45677, 28 March 2017.

²¹⁵ Rejoinder, ¶ 322 (emphasis added).

as a separate legal entity shall continue until cancellation of the limited liability company's certificate of formation.”²¹⁶ Therefore, given that the aforementioned Act considers a limited liability company as a separate legal entity, L1bre Holding would, in any event, be considered as such.

Effective nationality under international law

277. Respondent relies on the decisions of prior investment tribunals to argue that this Tribunal should consider Claimants as having dual nationality, being Mexican their predominant nationality, and therefore should decline jurisdiction because “it would be absurd and unreasonable to accept jurisdiction over dual nationals in the first place.”²¹⁷
278. As a threshold matter, NAFTA establishes a requirement of diverse nationality, meaning that an investor cannot bring a claim against its own home State, but is silent on the issue of double nationality. Respondent relies on *Bayview v. Mexico* and *Sucesión Heemsen v. Venezuela* to argue that, in the face of this gap, “the criterion of effective nationality can be applied,” and therefore “where an individual claimant with the nationality of one Contracting State also has the nationality of the host State, the tribunal’s jurisdiction *ratione personae* extends to such individuals only if the former nationality is the dominant of the two.”²¹⁸
279. However, the cases invoked by Respondent are different from the case at hand. The discussion in *Bayview v. Mexico* referred to the territorial element of the investment not the nationality of the claimant,²¹⁹ which is the issue disputed by the Parties.
280. In *Sucesión Heemsen v. Venezuela* the debate was centered on which was the effective nationality of natural persons who had dual nationality.²²⁰ That is not the case here.
281. Respondent has not provided evidence or convincingly explained why, in its view, the “criterion of effective nationality” is a principle or a rule of customary international law applicable to the alleged dual nationality of corporations, enterprises, or entities. The cases cited by Respondent, like *Sucesión Heemsen v. Venezuela* were centered on “nationals” (individuals) rather than “enterprises” which, under NAFTA’s plain text, only

²¹⁶ R-0226, Delaware Limited Liability Company Act, Title 6 Commerce and Trade, Chapter 18 Limited Liability Company Act, §18-201.

²¹⁷ Counter-Memorial, ¶¶ 366, 370.

²¹⁸ Counter-Memorial, ¶ 371.

²¹⁹ Counter-Memorial, ¶ 368; RL-0055, *Bayview Irrigation District and others v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award (on Jurisdiction), 19 June 2007, (“*Bayview v. Mexico*”) ¶ 104 “In this case the Tribunal does not consider that the Claimants were ‘foreign investors’ in Mexico. Rather, they were domestic investors in Texas. The economic dependence of an enterprise upon supplies of goods - in this case, water - from another State is not sufficient to make the dependent enterprise an ‘investor’ in that other State.”

²²⁰ RL-0057, *Enrique Heemsen et al. v. The Bolivarian Republic of Venezuela*, CPA Case No. 2017-18, Award on Jurisdiction, 29 October 2019 (“*Sucesión Heemsen v. Venezuela*”).

appear to have one nationality in this case, since they have only one place of incorporation (US and Canada, respectively).

282. Respondent asks the Tribunal to ignore Claimants' corporate nationality, determined by their place of incorporation, and thus disregard NAFTA's text, pierce Claimants' corporate veil and determine that there is an abuse of the corporate form to access the protection of NAFTA.
283. Respondent alleges that this is possible in this "unusual case" because Claimants are shell companies or "*entidades de papel*" created and controlled by Mexican nationals to conceal their identities, and "improperly [] sue their home country in an international forum," and this "misuse of the privileges of legal personality"²²¹ would allow to consider the nationalities of Claimants' members because it goes against the intention of NAFTA's Contracting parties.²²²
284. In *Loewen*, cited by Respondent, a NAFTA tribunal found that claimant's claims had been assigned "to a Canadian corporation owned and controlled by a United States corporation,"²²³ and while it stated there was "no need to enter into"²²⁴ the debate of the piercing of the corporate veil, it ultimately went through. However, this decision differs from the case at hand because the debate was centered on the requirement of continuous nationality rather than any alleged abuse, and Article 25 of the ICSID Convention was not applicable.²²⁵
285. In the context of Article 25 of the ICSID Convention, applicable to this case, tribunals have "acknowledged the possibility of piercing the corporate veil to 'prevent the misuse of the privileges of legal personality' or where the 'real beneficiary of the business misused corporate formalities in order to disguise its true identity and to avoid liability',"²²⁶ but with a distinction between the first and second limb of Article 25(2)(b) of the ICSID Convention,²²⁷ setting a very high threshold for the first limb that does not reference ownership or control because, in principle, the claimant has the nationality of a Contracting State other than the State party to the arbitration, which is the case at hand.²²⁸

²²¹ Counter-Memorial, ¶ 354; CL-0162, *Barcelona Traction Case*, [1970] ICJ Reports 3, ¶ 56.

²²² Rejoinder, ¶ 325; Counter-Memorial, ¶¶ 352-354.

²²³ RL-0140, *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, ¶ 240 ("*Loewen v. United States of America*").

²²⁴ RL-0140, *Loewen v. United States of America*, ¶ 237.

²²⁵ RL-0140, *Loewen v. United States of America*, ¶ 235.

²²⁶ CL-0161, *KT Asia v. Kazakhstan* ¶ 134.

²²⁷ CL-0161, *KT Asia v. Kazakhstan*, ¶ 132.

²²⁸ CL-0161, *KT Asia v. Kazakhstan*, ¶ 136, citing the findings of the tribunal in *Tokios Tókeles* "On the other hand, the majority found that Article 25 of the ICSID Convention left the task of defining the nationality of juridical entities to 'the reasonable discretion of the Contracting Parties'. Accordingly, the majority went on to examine the

286. The Tribunal is not persuaded that the circumstances of this case justify departing from the clear and explicit terms of NAFTA and adopt instead the nationality of Claimants' members and partners to determine its jurisdiction *ratione personae*. The Tribunal has not been provided with evidence of abuse of Claimants' corporate structure to gain access to treaty protection. Hence, the Tribunal finds that Respondent's objections to Claimants' nationality based on incorporation lack merit.

B. THE WAIVER IN LUSAD'S ARTICLES OF INCORPORATION

1. Respondent's position

287. Respondent contends that this jurisdictional objection is part of its argument concerning Claimants' and its partners' nationalities, which Respondent says it had raised in its Counter-Memorial under its *ratione personae* objection.²²⁹

288. Respondent submits in its Rejoinder that, under Mexican investment laws, the passenger transport service is an economic activity exclusively reserved for Mexicans or Mexican corporations with a clause that excludes foreigners pursuant to Article 6 of the Foreign Investment Law.²³⁰ Respondent "explained in its [Counter-Memorial], [that the] individual public transportation service (taxi) is one of the subcategories of passenger transportation service."²³¹ According to Respondent, under Article 94 of the Mobility Law of Mexico City, corporations or legal persons like Lusad can obtain concessions for the public transport service only if they (i) have Mexican nationality and (ii) their bylaws expressly consider the provision of the public transport service, in the terms of the Foreign Investment Law.²³²

289. The Declaration of Necessity established that applicants had to be Mexican nationals or legal persons "be incorporated under Mexican law."²³³ Also, the 2018 Concession Document provided that Lusad had to preserve the "legal form" under which it was incorporated pursuant to Mexican laws with a clause of foreigners exclusion, or, in lieu of such a clause, the foreign partners had to waive the protection of their governments

BIT and concluded that the only requirement set forth in the BIT was that the entity must be 'established in the territory of the Republic of Lithuania in conformity with its laws and regulations', which requirement was met. **While not ruling out the possibility of piercing the corporate veil in principle, the majority nonetheless refused to apply the principle of real and effective nationality, even though it was not disputed that the claimant company was owned and controlled by nationals of the respondent State**" (emphasis added).

²²⁹ Respondent's response to Claimants' Application of 3 May 2023, pp. 6, 8.

²³⁰ Rejoinder, ¶ 327; R-0229, Mexican Foreign Investment Law, Article 6.

²³¹ Rejoinder, ¶ 327, citing Counter-Memorial, ¶¶ 35-36.

²³² Rejoinder, ¶ 328.

²³³ Rejoinder, ¶ 329; C-0005, Declaration of Necessity, p. 16.

before the Ministry of Foreign Affairs, as per Article 27 of the Mexican Constitution and Article 14 of the Regulation of the Foreign Investment Law.²³⁴

290. Respondent further submits that Article 3 of Lusad’s articles of incorporation include such a waiver, under which the shareholders expressly agreed with Respondent to (i) consider themselves as Mexican nationals with respect to their participation in Lusad (the alleged investment in this arbitration), the Concession itself, and all the rights and obligations arising out of it, and (ii) “not invoke the protection of [their] government[s]”, which includes bringing an investment arbitration under NAFTA.²³⁵
291. Based on the foregoing, Respondent concludes that Claimants cannot access the protection of NAFTA because, for the purposes of their investment, they agreed to consider themselves as Mexican nationals, thus, they “have dual nationality,” and Respondent cannot be liable for claims brought by their own nationals, and “in any case, they have expressly waived their right to the ‘protection of [their] Government’ with respect to their investment.”²³⁶
292. Respondent adds that the tribunal in *Sastre v. Mexico* analyzed a “waiver similar” to the one in this arbitration and rejected jurisdiction due to the claimants’ “clear and express” renunciation of their nationalities of origin, which did not merely concern “a waiver of treaty rights or a fact debate on dominant and effective nationality” but “an agreement by an investor not to invoke his/her original nationality against a sovereign State in exchange for that sovereign State accepting the investor as its own national.”²³⁷

2. Claimants’ position

293. Claimants submit that Respondent belatedly pleaded this jurisdictional objection in paragraphs 327 to 337 of its Rejoinder and, hence, it should be dismissed on the basis of ICSID Arbitration Rule 41(1).²³⁸ According to Claimants, the objection that they “waived their right to make claims against Mexico under NAFTA” is based on Lusad’s articles of incorporation and Mexican laws, both facts and evidence that “were known to Mexico at the time fixed for its Counter-Memorial.”²³⁹
294. Claimants argue that, in any case, the objection should be dismissed because they did not waive their rights under NAFTA Chapter 11.²⁴⁰ Tribunals have set a high threshold to

²³⁴ Rejoinder, ¶¶ 330-332; C-0020, Concession Agreement, 13 April 2018, p. 38; R-0168, Mexican Constitution, Article 27; R-0230, Regulation of the Foreign Investment Law, Article 24.

²³⁵ Rejoinder, ¶¶ 333-335; C-0002, Deed of Incorporation of Servicios Digitales Lusad, 15 October 2015, p. 4.

²³⁶ Rejoinder, ¶¶ 335, 337.

²³⁷ Rejoinder, ¶ 336.

²³⁸ Claimants’ Application of 3 May 2023, pp. 10-12.

²³⁹ Claimants’ Submission on Respondent’s Jurisdictional Objection, 23 July 2023, ¶¶ 1-2.

²⁴⁰ Claimants’ Submission on Respondent’s Jurisdictional Objection, 23 July 2023, ¶ 3.

make a finding of a waiver of the right to bring a claim under a treaty,²⁴¹ requiring “persuasive evidence of any such opt-out, including that the parties had in mind the possibility of future treaty claims” and “direct and convincing evidence that a party intended to do so, for example through an express waiver rather than one merely by inference or implication.”²⁴²

295. According to Claimants, Article 3 of Lusad’s articles of incorporation do not meet this “high bar” because it contains a “narrow and specific” waiver that any investor in Lusad would “not invoke the protection of its Government”, which cannot be read as encompassing NAFTA claims brought by an investor “directly against Mexico” but as referring to the investor’s right to seek the diplomatic protection of its home State.²⁴³ Claimants argue that their position aligns with doctrinal writing on Article 27 of the Mexican Constitution and Article 14 of the Regulations of the Foreign Investment Law.²⁴⁴ Claimants add that the Calvo doctrine pertains only to diplomatic protection, which is different from the “individual rights of recourse afforded to investors under investment treaties.”²⁴⁵
296. Claimants further submit that the *Sastre v. Mexico* case is entirely different from this case. In that case, the claimants were natural persons with Argentine and Portuguese nationalities who applied for Mexican nationality to make their investment. The claimants expressly renounced their original nationalities and specifically, the “rights granted to foreigners by treaties or international conventions” consistent with Article 19 of Mexico’s Nationality Law.²⁴⁶ However, Claimants in this arbitration did not waive their

²⁴¹ Claimants’ Submission on Respondent’s Jurisdictional Objection, 23 July 2023, ¶ 6, citing CL-0225, *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶¶ 159-160; CL-0214, *TSA Spectrum de Argentina, S.A.v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, 19 December 2008, ¶¶ 58-66; CL-0215, *Aguas del Tunari, S.A., v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, 21 October 2005, ¶¶ 111-123.

²⁴² Claimants’ Submission on Respondent’s Jurisdictional Objection, 23 July 2023, ¶ 6, citing CL-0224, *Nissan Motor Co., Ltd. v. The Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction, 29 April 2019, ¶ 271.

²⁴³ Claimants’ Submission on Respondent’s Jurisdictional Objection, 23 July 2023, ¶¶ 7-8.

²⁴⁴ Claimants’ Submission on Respondent’s Jurisdictional Objection, 23 July 2023, ¶ 7; CL-0216, F. Cárdenas González, *Inversión Extranjera*, Editorial Porrúa, 2015 (Sixth Edition), pp. 14, 16; CL-0217, L. Pereznieta Castro, *Derecho Internacional Privado – Parte General*, “Textos Jurídicos Universitarios”, Oxford University Press 2015 (10th edition), p. 125; CL-0222, Jacob S. Lee, “No ‘Double-Dipping’ Allowed: An Analysis of Waste Management, Inc., v. United Mexican States and the Article 1121 Waiver Requirement for Arbitration under Chapter 11 of NAFTA,” *Fordham Law Review* Vol. 69, No. 6 (2001), p. 2663.

²⁴⁵ Claimants’ Submission on Respondent’s Jurisdictional Objection, 23 July 2023, ¶ 8, p. 3, citing CL-0218, *AES Corporation v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, ¶¶ 92, 98-99.

²⁴⁶ Claimants’ Submission on Respondent’s Jurisdictional Objection, 23 July 2023, ¶ 10, citing RL-0157, *Carlos Sastre and others v. United Mexican States*, ICSID Case No. UNCT/20/2, Award on Jurisdiction, 21 November 2022 (“*Carlos Sastre v. Mexico*”), ¶¶ 214, 245.

nationalities of origin in Article 3 of Lusad's articles of incorporation but only relinquished diplomatic protection.²⁴⁷

297. Lastly, Claimants contend that Mexican laws do not prohibit their foreign investment. On the one hand, Article 6 of the Foreign Investment Law does not apply to the Concession because "Lusad never 'transported' any passengers [but] provided ancillary services for the transportation of passengers carried out by others" at a municipal level.²⁴⁸ Also, other foreign investors in other ride-hailing application companies already provide ancillary services for passenger transport,²⁴⁹ and, in any case, under principles of good faith and estoppel, Respondent cannot rely on "domestic law irregularities in connection with concessions that it signed and relied on."²⁵⁰

3. Tribunal's analysis

298. In Procedural Order No. 11, the Tribunal found that the objection in paragraphs 327 to 337 of Respondent's Rejoinder was not merely related to the objection in paragraphs 352 to 375 of the Counter-Memorial that Claimants allegedly identified as Mexican nationals through Lusad's articles of incorporation.²⁵¹ Rather, the Tribunal found that Respondent elaborated a new argument consisting on Claimants' alleged waiver of their right to bring a claim under NAFTA.²⁵² The Tribunal granted Claimants a full and fair opportunity to comment on this new legal argument which "was not openly and clearly raised or discussed during the proceeding."²⁵³
299. Respondent's objection on the basis of Article 3 of Lusad's articles of incorporation is twofold. The Tribunal must determine, first, if Claimants must be considered Mexican nationals for the purposes of NAFTA on the basis of this provision, and second, whether Claimants can be deemed to have waived the right to bring a treaty claim against Respondent under this provision.

²⁴⁷ Claimants' Submission on Respondent's Jurisdictional Objection, 23 July 2023, ¶ 11.

²⁴⁸ Claimants' Submission on Respondent's Jurisdictional Objection, 23 July 2023, ¶ 14.

²⁴⁹ Claimants' Submission on Respondent's Jurisdictional Objection, 23 July 2023, ¶ 14, citing Rejoinder, ¶ 177.

²⁵⁰ Claimants' Submission on Respondent's Jurisdictional Objection, 23 July 2023, ¶ 15, citing CL-0181, *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007 ("*Kardassopoulos v. Georgia*, Decision on Jurisdiction"), ¶ 182.

²⁵¹ Counter-Memorial, ¶ 354, footnote 404, citing C-0002, Deed of Incorporation of Servicios Digitales Lusad, 15 October 2015, p. 32 ("354. On October 15, 2015, Mr. Zayas, in his own right and on behalf of ES Investments, appeared before a notary public for the incorporation of Lusad. In said appearance, he declared that he was Mexican and domiciled in Mexico City." In the Counter-Memorial, Respondent only referenced Lusad's articles of incorporation to argue that Mr. Zayas had presented himself as a Mexican domiciled in Mexico City, but not to argue that Claimants had identified themselves as Mexican nationals and that as such they could not bring claims against Respondent for being its nationals, nor that they had waived the right to bring this arbitration).

²⁵² Procedural Order No. 11, ¶¶ 101-102.

²⁵³ Procedural Order No. 11, ¶ 102.

300. Article 3 of Lusad's articles of incorporation states:

Article 3 - Nationality

*The Company is incorporated in accordance with the laws of the United Mexican States. Any foreigner who, at the time of incorporation or at any later time, acquires an interest or social participation in the Company, agrees with the Ministry of Foreign Affairs **to consider themselves as Mexican** with respect to the shares of the Company as well as the assets, rights, concessions, participations, or interests owned by the Company, **or the rights and obligations derived from the contracts to which the Company is a party**, and therefore **agrees not to invoke the protection of their Government** in this regard, under the penalty, in case of breaching their agreement, of losing said interest or participation for the benefit of the Mexican Nation.²⁵⁴*

301. The Tribunal does not find that Article 3 of Lusad's articles of incorporation provides a basis to consider Claimants as Mexican nationals or dual nationals, and therefore, to decline jurisdiction *ratione personae*. In this regard, the Tribunal refers to its considerations elaborated in paragraphs 261-268 above. NAFTA clearly established the incorporation criterion to determine the nationality of an enterprise to qualify as an investor of a State. There is no dispute in this case as to Claimants' place of constitution or organization as per NAFTA Article 201.
302. The language in Article 3 of Lusad's articles of incorporation does not make this case comparable with the *Sastre* case invoked by Respondent. First, the provision in the articles of incorporation does not state or even suggest that Claimants are waiving their nationality or acquiring Mexican nationality, as opposed to *Sastre*, where claimants explicitly waived their nationalities of origin to obtain Mexican nationality.²⁵⁵ The reference in Article 3 is to Claimants "consider[ing] themselves as Mexicans" with respect to the shares, assets and obligations of the company and with respect to contracts entered into by the company. There is no mention of a waiver of Claimants' original nationalities or the acquisition of Mexican nationality.

²⁵⁴ C-0002, Deed of Incorporation of Servicios Digitales Lusad, 15 October 2015, Article 3 (Tribunal's translation from Spanish: "*Artículo Tres.- Nacionalidad.- La Sociedad está constituida de conformidad con las leyes de los Estados Unidos Mexicanos. Todo extranjero que en el acto de la constitución o en cualquier tiempo ulterior, adquiera un interés o participación social en la Sociedad, se obliga con la Secretaría de Relaciones Exteriores a considerarse como mexicano respecto de las acciones la Sociedad, así como de los bienes, derechos, concesiones, participaciones o intereses de que sea titular la misma, o de los derechos y obligaciones que deriven de los contratos de que sea parte la propia Sociedad y por lo mismo conviene en no invocar la protección de su Gobierno al respecto, bajo lapena, en caso de faltar a su convenio, de perder dicho interés o participación en beneficio de la Nación Mexicana.*").

²⁵⁵ RL-0157, *Carlos Sastre v. Mexico*, ¶ 62, § V(E).

303. The Tribunal reaches a similar conclusion regarding the alleged waiver of treaty claims. There is not sufficient evidence to conclude that Article 3 of Lusad's articles of incorporation was intended to waive the right to bring claims under NAFTA Chapter 11 by Claimants. The literal terms of said Article 3 do not clearly refer to investment treaty claims, where investors have their own standing and need not resort to the government of their State of origin to access protection. This independence of the investor would not seem to fall within the meaning of the expression "request the protection of their Government" in said Article 3, which would rather seem to refer to other mechanisms, such as diplomatic protection—which is not covered by NAFTA—.
304. In sum, unlike in *Sastre*, in this case there were no specific expressions or waiver regarding Claimants' nationality and no specific reference to waivers of treaty protection.
305. Lastly, this conclusion does not change with Respondent's allegation that Article 3 of Lusad's articles of incorporation must be read jointly with the "Calvo clause" in Article 27 of the Mexican Constitution, Section 12.2.1 of the Concession, Article 6 of the Foreign Investment Law, and Article 14 of the Regulations of the Foreign Investment Law,²⁵⁶ under which, national land transportation of passengers, tourism, and cargo are "reserved exclusively for Mexicans or Mexican corporations with a foreigners exclusion clause."²⁵⁷
306. In this regard, the Tribunal first notes that there is a debate between the Parties as to whether this "reservation" for nationals is applicable in this case because the right granted under the Lusad Concession does not appear to involve the transportation service but rather an ancillary service.
307. Respondent has submitted contradictory arguments. Under its "waiver" objection, Respondent first argues that the Concession involves the transportation of passengers. However, in its merits arguments and when questioning the legality of the Concession, Respondent then contends that the rights granted to Lusad to implement the L1bre System should not have been the subject matter of a concession but of permits because "taximeters are auxiliary equipment as established by the LMDF -the specific law on the matter- and are regulated through permits and authorizations and not through concessions."²⁵⁸ The Tribunal notes that the features of the L1bre System and Lusad's obligations under the Concession at no point seem to involve "transporting" passengers, or even items, thus, aligning with Respondent's second position.
308. In addition, there appear to be other businesses and platforms similar to the L1bre System that Respondent refers to, like "Uber or Didi", which apparently also involved foreigners.

²⁵⁶ C-0020, Concession Agreement, 13 April 2018, p. 38.

²⁵⁷ R-0229, Foreign Investment Law, Article 6 (Tribunal's translation from Spanish: "*están reservadas de manera exclusiva a mexicanos o a sociedades mexicanas con cláusula de exclusión de extranjeros.*").

²⁵⁸ Rejoinder, ¶¶ 112-113, 393.

This would be consistent with the understanding that these platforms are not “transport” services allegedly reserved for nationals only, but rather ancillary services.²⁵⁹

309. In any case, even if the exclusions or limitations of Mexican law applied to the Concession and to the reading of the plain text of Article 3 of Lusad’s articles of incorporation, this does not change the limited terms under which such a waiver was granted by Claimants in Article 3 of Lusad’s articles of incorporation, especially, since there is no mention to a waiver of treaty claims in such provisions.
310. Hence, the conclusion remains that if the Parties’ intention had been to waive Claimants’ right to bring a treaty claim or to waive Claimants’ nationality for the purposes of treaty claims in general or NAFTA in particular, such an intent would have had to be recorded in unequivocal, clear, and explicit terms, which is not the case at hand. Accordingly, Respondent’s objection is dismissed.

C. ESH’S OWNERSHIP OF THE INVESTMENT

1. Respondent’s position

311. Respondent submits that the Tribunal “totally lacks jurisdiction over [ESH’s] claim”²⁶⁰ because NAFTA Article 1116 provides that “the damages claimed must be suffered by the same investor identified individually. The language does not allow two investors to submit a claim for the same loss.”²⁶¹ According to Respondent, ESH has “no investment, or interest in any investment, that is independent of L1bre Holding,” given that Claimants have acknowledged that “an award of damages to L1bre Holding reflecting its 100% shareholding in Lusad would cover the damages suffered by both Claimants.”²⁶²
312. In any case, even if ESH could claim the same loss as L1bre Holding, ESH did not prove that it had ownership or control over Lusad at all relevant times, which Respondent identifies as the moment of the alleged breach and the moment of filing the RfA,²⁶³ a requirement upheld in the *B-Mex v. Mexico* NAFTA arbitration.²⁶⁴
313. According to Respondent, at the moment of the alleged breach in 2018, ESH shared its ownership over ES Technologies, and therefore over Lusad, with L1bero Partners, which in turn held a 50% share in Lusad since 2017.²⁶⁵

²⁵⁹ Claimants’ Submission on Respondent’s Jurisdictional Objection, 23 July 2023, ¶ 14; Rejoinder, ¶ 177.

²⁶⁰ Rejoinder, ¶ 338.

²⁶¹ Tr. Day 1 (ENG), 175:5-8 (Respondent’s opening statement); Rejoinder, ¶ 339.

²⁶² Rejoinder, ¶ 338, citing Reply, ¶ 200.

²⁶³ Counter-Memorial, ¶¶ 346-349; Rejoinder, ¶¶ 340-341.

²⁶⁴ Rejoinder, ¶ 341, citing RL-0158, *B-Mex v. Mexico*, ¶¶ 145-147.

²⁶⁵ Rejoinder, ¶¶ 340, 343.

314. Similarly, at the moment of the RfA's filing, ESH's 100% ownership over Lusad was being disputed in a commercial arbitration concerning ESH's "attempt to cancel" L1bero Partners' equity in ES Technologies, and a related emergency request filed by ESH before the courts of the State of New York in 2019.²⁶⁶ Respondent contends that the settlement agreement reached in 2021 in the commercial arbitration does not change the legal chain of ownership in force at the relevant times.²⁶⁷
315. Based on the foregoing, Respondent argues that ESH only had a limited and indirect participation in Lusad at the relevant times, and therefore, cannot bring claims on behalf of Lusad as per Article 1117 of NAFTA, or over Lusad's Concession and any related rights.²⁶⁸ In any event, "even if the Tribunal were to assert jurisdiction over ES Holding's claim, it could only be awarded a limited share based on its actual, and non-controlling interest." However, Claimants have not provided an assessment of ESH's separate and limited damages.²⁶⁹

2. Claimants' position

316. Claimants argue that Respondent's objection over ESH's participation in Lusad "is moot" because of the presence of L1bre Holding as the second claimant, which undisputedly has owned 100% of Lusad's shares at all relevant times, and note that "L1bre Holding and ES Holdings both suffered damages in the same amount as a result of the same unlawful measures, and given their undertaking **not to pursue double recovery**, an award of damages to L1bre Holding reflecting its 100% shareholding in Lusad would cover the damages."²⁷⁰
317. In any case, Claimants contend that there are no grounds to reduce ESH's ownership of Lusad to 50% because evidence shows that it held a 100% indirect interest at all times.²⁷¹
318. Claimants submit that, since 22 November 2017, ESH owns 100% of ES Technologies, which, in turn, owns Lusad since 2016.²⁷² ESH explains that it agreed to sell 50% of ES Technologies to L1bero Partners, a Canadian company in which Mr. Salinas allegedly "represented" to have participation, through a "Unit Purchase Agreement."²⁷³ However,

²⁶⁶ Rejoinder, ¶ 342, citing R-0231, *Espiritu Santo Holdings LP v. L1bero Partners and Espiritu Santo Technologies, LLC*, Case No. 19-cv-03930, ECF No. 1, Emergency Petition for Injunctive Relief in aid of Arbitration, 2 May 2019, ¶ 4.

²⁶⁷ Rejoinder, ¶¶ 343-344.

²⁶⁸ Counter-Memorial, ¶ 349; Rejoinder, ¶ 344.

²⁶⁹ Rejoinder, ¶ 344.

²⁷⁰ Reply, ¶ 200 (emphasis added).

²⁷¹ Reply, ¶ 204.

²⁷² Memorial, ¶¶ 26-27, 101-102; C-0069, Lusad's Corporate Structure since November 2017.

²⁷³ Witness Statement of Mr. Santiago León Aveleyra, 14 September 2021, ¶ 65; C-0099, Unit Purchase Agreement between L1bero Partners, LP, ES Technologies, and ES Holdings, 23 November 2017; Memorial, ¶ 104.

Mr. Salinas “never became a partner” in L1bero Partners, which was a “condition precedent” to the sale that thus “never had legal effect.”²⁷⁴ Accordingly, on 10 October 2019, ESH terminated the Partners Agreement it had entered into with L1bero Partners.²⁷⁵

319. Claimants further explain that “a legal dispute” followed between ESH and L1bero Partners in an arbitration under the rules of the International Chamber of Commerce (“ICC” and “ICC Arbitration”), which concluded with a consent award on 24 May 2021, stating that the parties agreed that “the conditions precedent” of the Unit Purchase Agreement had not been satisfied and, thus, that ESH was “deemed to have been the owner of 100% of the units of ES Technologies at all time[s].”²⁷⁶ According to Claimants, that the ICC Arbitration was resolved after the filing of the RfA is irrelevant because the commercial award “merely confirmed the status quo,” that is, that ESH had 100% indirect ownership in Lusad at all relevant times.²⁷⁷

3. Tribunal’s analysis

320. Respondent has brought two arguments as jurisdictional objections over ESH’s claims, *i.e.*, that ESH cannot claim the same loss as L1bre Holding under NAFTA Article 1116, and even if it could, that ESH did not own the investment at all relevant times because it shared ownership with L1bero Partners.
321. The Tribunal is faced with a situation where two entities, part of the same corporate chain, are bringing claims for the “same breaches”²⁷⁸ and the “same unlawful measures”²⁷⁹ as investors under NAFTA.
322. As stands out from Respondent’s arguments, the first objection pertains to the issue of double recovery. However, it is unclear why double recovery would change the conditions met by both Claimants for the Tribunal to have jurisdiction, that is, that they made an investment in Respondent’s territory, which they owned or controlled, as nationals of another contracting State (Canada and the US), and that they have consented to arbitrate under NAFTA Article 1122(1).
323. In this sense, Respondent’s objection on the basis of a risk of double recovery pertains rather to the damages stage and, in any case, such a risk has ceased to exist since

²⁷⁴ Memorial, ¶ 105.

²⁷⁵ Memorial, ¶ 105; C-0025, Letter from ES Holdings to L1bero Partners terminating the Partners Agreement, 10 October 2019; R-0140, Partners Agreement between Espiritu Santo Technologies, LLC, L1bero Partners, LP and Espiritu Santo Holdings, LP, 6 December 2017.

²⁷⁶ Memorial, ¶ 106; Witness Statement of Mr. Santiago León Aveleyra, 14 September 2021, ¶ 67.

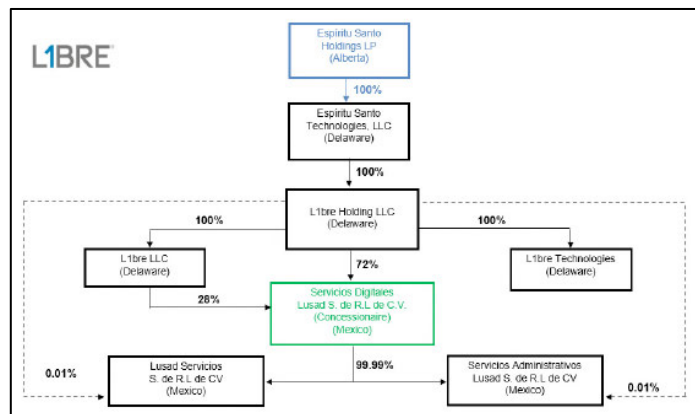
²⁷⁷ Reply, ¶ 203.

²⁷⁸ Reply, ¶ 196.

²⁷⁹ Reply, ¶ 200.

Claimants have explicitly undertaken “not to pursue double recovery” in this arbitration.²⁸⁰

324. Respondent’s second objection concerns ESH’s chain of ownership over the investment, and the Tribunal’s jurisdiction under NAFTA Article 1116. Claimants in this arbitration are ESH (Espiritu Santo Holdings LP), and L1bre Holding (L1bre Holding LLC), which indirectly own Lusad under the following corporate structure:²⁸¹



325. There is no dispute that at all relevant times, that is, at the moment of the breach and of the filing of the RfA, one of Claimants, L1bre Holding, held 100% indirect ownership over Lusad.²⁸² Claimants assert that “Mexico has not disputed that L1bre Holding held 100% of Lusad’s shares at all relevant times,”²⁸³ a point that Respondent does not rebut.²⁸⁴
326. Therefore, the dispute lies on whether ESH also held 100% ownership at all relevant times.²⁸⁵ As noted above, Respondent submits that at the moment of the breach in 2018, ESH only owned 50% of the shares in ES Technologies, and thus in the investment, a situation that continued when the claim was filed since there was an ongoing arbitration between ESH and L1bero Partners as to their ownership. Claimants do not debate the existence of the share transfer in 2018, and the controversy that followed until 2021,²⁸⁶ but rather the effects of the ICC consent award with respect to the chain of ownership at the relevant times.

²⁸⁰ Reply, ¶ 200.

²⁸¹ Memorial, ¶ 26; C-0001, Certificate of Good Standing of ES Holdings, under the laws of Alberta, Canada, 21 May 2019; C-0069, Lusad’s Corporate Structure since November 2017.

²⁸² Reply, ¶ 200.

²⁸³ Reply, ¶ 200.

²⁸⁴ Rejoinder, ¶ 339.

²⁸⁵ RL-0158, *B-Mex v. Mexico*, ¶¶ 145-147.

²⁸⁶ Reply, ¶ 203.

327. The evidence available in the record does not allow to conclude that ESH owned 100% of the shares in ES Technologies, and hence that it indirectly “owned” 100% of Lusad at all relevant times.
328. ESH did not provide sufficient explanation and evidence of the specific terms in which the “share transfer” was “cancelled”²⁸⁷ on the basis of the ICC “consent award” that recognized that “the share transfer never became effective, and as a result, L1bero Partners never owned any part of ES Technologies.”²⁸⁸ It is not clear on what basis said “cancellation” can be considered to have retroactive effects on the chain of ownership of an investment, while it appears clear that factually the investment was not 100% owned by ESH, a point confirmed by the fact that, in addition to the ICC arbitration, ESH had to resort to New York courts to recover its shares, reinforcing the concern that it did not fully own and/or control them at the time.²⁸⁹
329. Notwithstanding the foregoing, the Tribunal observes that the debate on ESH’s ownership of Lusad does not preclude its jurisdiction and rather concerns the merits and/or the extent of, and the right of ESH to claim damages.
330. Respondent referred to the *B-Mex v. Mexico* case to argue that ESH must demonstrate a 100% ownership in Lusad at two moments, *i.e.*, when the breach occurs and when the claim is filed.²⁹⁰ However, the 100% ownership requirement was discussed in that case in the context of NAFTA Article 1117 and the second relevant moment, *i.e.*, the filing of the claim, was only so for claims brought on behalf of the enterprise under NAFTA Article 1117, not for claims brought by an investor on its own behalf under Article 1116.²⁹¹
331. In this case, ESH has brought a claim only on the basis of NAFTA Article 1116, thus its 100% or 50% ownership at the relevant time would not necessarily preclude the Tribunal’s jurisdiction to decide its claims in this arbitration, pursuant to NAFTA Article 1117(3).

²⁸⁷ Memorial, ¶ 106, footnote 193; Reply, ¶ 203, footnote 334. Claimants only cite Mr. León’s Witness Statement.

²⁸⁸ Memorial, ¶ 106, footnote 192.

²⁸⁹ Reply, ¶ 202; RfA, ¶ 13 n. 3 (“L1bero Partners disputes this share cancellation, and ES Holdings is seeking a **declaration of the validity of the cancellation** in an arbitration under the Rules of the International Chamber of Commerce.”); R-0231, *Espiritu Santo Holdings LP v. L1bero Partner, LP and Espiritu Santo Technologies, LLC*, Case No. 19-cv-03930, ECF No. 1, Emergency Petition for Injunctive Relief in aid of Arbitration, 2 May 2019, 2 May 2019, ¶ 4.

²⁹⁰ RL-0158, *B-Mex v. Mexico*, ¶ 203 “As the facts of this case show, the requisite share ownership that confers the legal capacity to control is not necessarily 50% + 1 of the outstanding stock. What that threshold is will vary for each enterprise, depending on what its by laws and/or the governing law provide for. The only equity holding that will always, independently of the circumstances, confer the legal capacity to control is ownership of all or virtually all of the outstanding stock. Contextual analysis therefore suggests that by ‘ownership’ of an enterprise, the NAFTA Parties contemplated ownership of all the outstanding shares of that enterprise.” (emphasis omitted)

²⁹¹ RL-0158, *B-Mex v. Mexico*, ¶¶ 152-153.

332. Under this provision, a non-controlling investor can bring a claim on its behalf under Article 1116 without its percentage of ownership being an obstacle to the tribunal's jurisdiction if brought jointly with another investor allowed to bring a claim under Article 1117:

*3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.*²⁹²

333. This case can be framed into this provision, as follows:

(i) A controlling investor in the enterprise, L1bre Holding, has made a claim both under Articles 1116 and 1117.²⁹³

(ii) a noncontrolling investor, ESH, has also made a claim under Article 1116.

(iii) the claims “arise [] out of the same events.”

(iv) both claims have been “submitted to arbitration under Article 1120.”²⁹⁴

(v) and, as agreed by the Parties, the claims are being heard together.

334. Consequently, ESH's 100% or 50% ownership at the relevant times would not preclude the Tribunal's jurisdiction. The debate on ESH's participation would, at best, be relevant for the assessment of liability and/or damages.²⁹⁵

D. LEGALITY REQUIREMENT IN NAFTA ARTICLE 1139

1. Respondent's position

335. According to Respondent, the legality of an investment is a condition for the consent to access the protection of an investment treaty, even in the absence of express language to

²⁹² CL-0001, NAFTA, Article 1117(3).

²⁹³ L1bre Holding Addendum, ¶¶ 1-2.

²⁹⁴ Reply, p. 3 (“Claimants Espiritu Santo Holdings, LP (“ES Holdings”) and L1bre Holding LLC (“L1bre Holding” and together with ES Holdings, “Claimants”) serve this Memorial on the United Mexican States (“Mexico” or “Respondent”) pursuant to Article 1120 of the North American Free Trade Agreement (...”).

²⁹⁵ Counter-Memorial, ¶ 351.

that effect in the relevant treaty.²⁹⁶ Hence, an investment can only benefit from NAFTA's protection if it was made in accordance with the laws of the host State.²⁹⁷ This position has been endorsed by the US in the *Sastre v. Mexico* arbitration.²⁹⁸

336. Respondent argues that Claimants' core investment was the Concession because "without a valid concession, the relevance of Lusad and the Claimants' participation in it is innocuous," and that the Concession was (i) granted in breach of Mexican law;²⁹⁹ (ii) procured through the unlawful conduct of Lusad and its representatives;³⁰⁰ and (iii) contrary to the principle of good faith.³⁰¹
337. First, Respondent submits that Mexican courts and authorities have confirmed that the Concession "derives from illegal acts,"³⁰² and that Claimants were aware of the illegality of their investment "at least since 2017, through the rulings of amparo lawsuits against the Declaration of Necessity," which were confirmed in the 2018 amparo trials.³⁰³
338. Second, Respondent identifies the following evidence to demonstrate that the Concession was "illegally" procured and granted in contravention of applicable laws as "confirmed" by its experts:³⁰⁴
- (a) The questioned veracity of multiple documents presented by Claimants, including the 2016 Concession Project of which Respondent claims to have no record,³⁰⁵ and of which there appears to be other versions, such as that of February 2016, which was sent to Accendo Holdings.³⁰⁶ Also, the fact that the February 2016 Concession was sent to Accendo Holdings before the 2016 Concession Document was actually granted.³⁰⁷
 - (b) The procedure for granting the Concession was irregular and contrary to Mexican laws:

²⁹⁶ Counter-Memorial, ¶ 377; Rejoinder, ¶ 346.

²⁹⁷ Counter-Memorial, ¶ 380.

²⁹⁸ Rejoinder, ¶ 346.

²⁹⁹ Counter-Memorial, ¶¶ 379-384.

³⁰⁰ Counter-Memorial, ¶¶ 385-388.

³⁰¹ Counter-Memorial, ¶¶ 389-392.

³⁰² Counter-Memorial, ¶ 384; Rejoinder, ¶ 350, § II.B.

³⁰³ Counter-Memorial, ¶ 382; R-0036, Amparo Ruling 693/2018, 9 April 2019, o, pp. 63-65; Counter-Memorial, §II.F.1 "El Amparo 1135/2016 and the Appeal for Review 389/2016"; R-0100, Amparo Ruling 1135/2016, 11 November 2016, pp. 15-16.

³⁰⁴ Counter-Memorial, ¶¶ 381, 385, 387; First DLG Report, ¶ 278.

³⁰⁵ Rejoinder, ¶ 349.

³⁰⁶ R-0045, Email dated 2 February 2016 from Mr. Eduardo Zayas along with a concession dated January 2016. *Taxinet, Corp. v. León*, Case No. 16-24266-CIV, ECF No. 155-15 (submitted on 18 October 2019, see R-0166).

³⁰⁷ Rejoinder, ¶ 351.

- (i) Messrs. Zayas and León met with Mr. Serrano and Semovi officials in 2015 prior to the granting of the Concession.³⁰⁸
- (ii) In the meetings, Lusad and the Semovi officials privately agreed on (i) the legal and technical conditions to grant the concession, (ii) the process to grant the concession, (iii) the outcome of the process, and (iii) the text of the terms and conditions of the concession.³⁰⁹ According to Respondent, “in Mexico it is not permitted to agree on the terms and requirements of a concession and its award procedure through prior meetings between public servants and private parties.”³¹⁰
- (iii) The minutes of the Adjudication Committee meeting of 17 June 2016 included the decision to grant the Concession to Lusad but was exchanged between Lusad and Semovi’s officials 5 months before the meeting actually took place.³¹¹
- (iv) During the procedure, Lusad was granted an advantage contrary to the principles of equality and publicity in the adjudication of contracts.³¹²
- (v) Other participants were granted only 3 days to submit offers in the bidding process, which, in addition, lacked the required publicity.³¹³
- (vi) The Concession was granted by authorities who lacked the required authority to grant it and to issue the Declaration of Necessity itself.³¹⁴
- (vii) The Concession (i) violates Article 28 of the Mexican Constitution which provides that concessions are only to be granted for public property and public services covered by law, which do not include taximeters or taxi hailing applications, and (ii) did not meet the conditions in the LRSPS and LMDF for the direct adjudication.³¹⁵

³⁰⁸ R-0044, *Taxinet, Corp. v. Santiago León*, Plaintiff’s Statement of material facts in response to Leon’s Statement of Undisputed material Facts in Support of his Motion for Summary Judgment, CASE NO. 16-CV-24266-FAM, United States District Court Southern District Florida, 18 October 2019, ¶ 61 (“On September 25, 2015, Leon told Domit they “closed in Mexicooooooooo!!!!!!” and also told Noboa they “closed.” The Secretary of Mobility “already announced” the government had agreed to award the concession to Leon and Taxinet”).

³⁰⁹ Counter-Memorial, ¶ 387, Rejoinder, ¶ 349, citing Second DLG Report, ¶¶ 248-249 (a Concession project proposal was filed before the Declaration of Necessity).

³¹⁰ Rejoinder, ¶ 351.

³¹¹ Rejoinder, ¶ 351; R-0170, Email from Mr. Luis Fagoaga to Mr. Zayas, with copy to Mr. García, 28 January 2016.

³¹² Counter-Memorial, ¶ 381.

³¹³ Counter-Memorial, ¶ 89.

³¹⁴ Counter-Memorial, ¶ 38; Rejoinder, ¶ 349, citing First DLG Report, ¶¶ 128, 189, 199, 209, 216, 219-220, 248, 252 and 274.

³¹⁵ Rejoinder, ¶ 349, citing Second DLG Report, ¶¶ 13, 247.

- (viii) Mr. Muñana’s declarations about the date of issuance of the Concession are self-contradictory.³¹⁶
 - (ix) Mr. Zayas did not have the power to sign the Concession on behalf of Lusad because he did not consult the company’s Managing Council.³¹⁷
 - (x) The irregularities consisting of the “alleged modification of the 2017 Concession” and Lusad’s hiring of Mr. Rosendo Gómez, a former Semovi official, as legal advisor after the amendment.³¹⁸
- (c) There are ongoing criminal and administrative investigations against Semovi officials for possible crimes in connection with the Concession.³¹⁹ Also, Messrs. Zayas and León have a record of legal proceedings in Mexico and the US that put into question their behavior, some of which, bear a relationship with the investment.³²⁰ Respondent points to criminal investigations [REDACTED] for potential crimes related to the Concession.³²¹
- (d) Lusad breached the 2018 Concession by (i) failing to submit a bond and an insurance policy, (ii) changing Lusad’s shareholding despite this being prohibited in the Concession, (iii) failing to obtain Semovi’s authorization to operate as a taximeter service, as required by Article 169 of the Mobility Law of the Federal District (“**LMDF**”), and (iv) failing to satisfy the trial period.³²²
339. Respondent concludes that Claimants cannot benefit from false documents and illicit or illegal acts to bring their claim, and that “the Tribunal must be wary of even the slightest doubt about the legality of the information and documentation that forms the basis of the Claimants’ claim.”³²³
340. Respondent adds that investments made in violation of good faith,³²⁴ for instance, by involving corruption or fraud, are not protected under international law as found by the

³¹⁶ Rejoinder, ¶ 351.

³¹⁷ Rejoinder, ¶ 351; Counter-Memorial, ¶ 183; R-0017, Commercial Litigation 191/2019191/2019, pp. 35-36.

³¹⁸ Rejoinder, ¶ 351, § II. B.3.

³¹⁹ Rejoinder, ¶¶ 199-202; C-0135, Excerpts of Investigation 645/2021, pp. 10-17.

³²⁰ Counter-Memorial, ¶ 387; Rejoinder, ¶¶ 351-352, citing Second DLG Report, ¶¶ 136-138.

³²¹ Rejoinder, ¶ 195, footnote 249 citing C-0119, Notice of Intent of Libre Holding, 29 March 2019, C-0133, [REDACTED], C-0135, [REDACTED], C-0136, [REDACTED]; Rejoinder, ¶ 351, citing C-0136, [REDACTED], pp. 13-18.

³²² Rejoinder, ¶¶ 359-362.

³²³ Counter-Memorial, ¶ 388; Rejoinder, ¶ 353, citing RL-0171, *Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v. The Government of Mongolia and MonAtom LLC.*, PCA Case No. 2011-09, Decision on Jurisdiction, July 25, 2012, ¶ 383 (“*Khan Resources*”).

³²⁴ Rejoinder, ¶¶ 359-360.

tribunals in *Hamester*, *Phoenix*, *Inceysa* and *Plama*. According to Respondent, the evidence of the “lack of legality and good faith of the Claimants’ investment” include “i) the falsification of documents; ii) the improper use of powers by former Semovi officials in the award of the Lusad Concession and all aspects related to the Concession Project 2016; iii) irregularities in the procedure for the Declaration of Necessity and the award of the Lusad Concession, and iv) the lack of technical and economic capacity of Lusad — and Messrs. Zayas and León— to carry out the L1bre Project.”³²⁵ For the foregoing reasons, Respondent submits that the Tribunal lacks jurisdiction over Claimants’ investment.³²⁶

341. Lastly, Respondent submits that the *estoppel* or legitimate expectations principles cannot override the legality of the investment as a condition for the State’s consent to arbitrate. In *Achmea* the tribunal found that “jurisdiction cannot here be created, continued or extended by arguments based on the possible operation of doctrines of acquiescence, waiver or estoppel in respect of acts or omissions of Respondent,” and a similar finding was upheld in *Besserglik*.³²⁷

2. Claimants’ position

342. Claimants submit that their “investments were lawful, well-documented, and in good faith” and, in any case, NAFTA does not impose a legality requirement for investments to receive protection.³²⁸
343. According to Claimants, they obtained “a valid and binding” Concession through a transparent and lawful process, which was “fully compliant with Mexican law.”³²⁹ Claimants allege that Respondent “consistently” told Lusad “that the Concession remained valid,” and that they relied on “Mexico City’s consistent actions that gave every indication that Lusad held a lawful and valuable Concession that Mexico was working with Lusad to implement.”³³⁰
344. Claimants contend that Respondent’s allegations that their documentation is forged are “simply false.” While their authenticity has been verified through the testimonies of Messrs. León, Herrera and Muñana, Respondent has not submitted any witness testimony from the individuals involved in the Concession.³³¹

³²⁵ Counter-Memorial, ¶ 390.

³²⁶ Counter-Memorial, ¶ 391.

³²⁷ Rejoinder, ¶¶ 355-356.

³²⁸ Reply, ¶¶ 226, 229.

³²⁹ Reply, ¶ 229; Expert Report of Mr. Marco Antonio de la Peña (Cuatrecasas), 3 November 2022, ¶¶ 7.1-8.1, 9.1.

³³⁰ Reply, ¶ 230.

³³¹ Reply, ¶¶ 231-232, § II.

345. According to Claimants, the fact that documents are missing from Semovi’s official files does not challenge their authenticity and rather proves Respondent’s “poor record-keeping and failed cover-up attempts.”³³² Moreover, Claimants submit that this case is different from *Churchill* and *Inceysa*, where there was actual proof of the existence of false documents or information to obtain concessions.³³³
346. Claimants further contend that the *amparo* cases are irrelevant because their effects were limited to the particular litigants in each case and did not involve Lusad.³³⁴ In addition, after such decisions, Semovi issued “legal opinions” in April and June 2017 confirming that the Concession remained valid and enforceable.³³⁵ Also, the letters suspending the Concession in 2018 never referenced the *amparo* cases as grounds for the suspension, and were rather issued for political reasons, recognizing the Concession and Lusad’s compliance with its obligations.³³⁶
347. In any case, Claimants argue that Respondent’s jurisdictional objection has no legal basis because there is no dispute that they “have made qualifying investments” under NAFTA Article 1139, and Chapter 11 does not expressly require investments to be made in accordance with the laws of the host State to qualify for protection under the treaty.³³⁷
348. According to Claimants, there is no record of tribunals interpreting NAFTA as imposing a legality requirement to find jurisdiction *ratione materiae*.³³⁸ Claimants refer to *Bear Creek Mining* where the tribunal found that “under international law, the Tribunal may not import a requirement that limits its jurisdiction when such a limit is not specified by the parties,” as opposed to the applicable treaty in the case of *Inceysa*.³³⁹
349. Claimants further argue that even in cases that have analyzed the legality of an investment as a condition for jurisdiction, tribunals have set a high threshold, requiring a finding of serious, or manifest violations of the host State’s laws to “rise to the level of the severe punishment of losing protections of a treaty.”³⁴⁰ In addition, Claimants argue that the

³³² Reply, ¶ 232, § II.D.

³³³ Reply, ¶ 233.

³³⁴ Reply, ¶ 234; Expert Report of Mr. Marco Antonio de la Peña (Cuatrecasas), 3 November 2022, ¶ 15.1.

³³⁵ Reply, ¶ 234; C-0056, Oficio No. DNRM-0673-2017 from SEMOVI confirming the validity of the Concession Agreement, 4 April 2017 (Disputed document); C-0057, Oficio No. DNRM-1460-2017 from Semovi confirming the validity of the Concession Agreement, 19 June 2017.

³³⁶ Reply, ¶ 234.

³³⁷ Reply, ¶¶ 236-238.

³³⁸ Reply, ¶¶ 238-239.

³³⁹ Reply, ¶ 240.

³⁴⁰ Reply, ¶ 242; CL-0172, *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, ¶¶ 408 *et seq*; CL-0173, *HOCHTIEF Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014, ¶ 199; CL-0174, *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, ¶ 483; CL-0175, *Álvarez y Marín Corporación S.A. and others v. Republic of Panama*, ICSID Case

State's endorsement of the illegality or its failure to detect it must be taken into account because "the State's complicity in illegality prohibited the State from invoking illegality as a jurisdictional objection."³⁴¹

350. Lastly, Claimants submit that legitimate expectations created by the State can defeat an illegality objection because, if the State ignores such an illegality, it is estopped from later invoking it as an objection in the arbitration, despite involving *ultra vires* acts.³⁴² In this regard, Claimants reference the findings of *Fraport I v. Philippines*, *Kardassopoulos v. Georgia*, *Arif v. Moldova*, and *Convial Callao v. Peru*.³⁴³

3. Tribunal's analysis

351. As a starting point, the Tribunal observes that the Parties do not appear to dispute that Claimants' alleged investment consists of their indirect ownership interest in Lusad and the Concession,³⁴⁴ and that it fits within the definition of the term investment in NAFTA Article 1139, specifically, subsections (a), (b), (e), (g), and (h).³⁴⁵

No. ARB/15/14, Award, 12 October 2018, ¶ 156; RL-0076, Caline Mouawad and Jessica Beess Chrostin, "The illegality objection in investor-state arbitration", Arbitration International, 2021, p. 87.

³⁴¹ Reply, ¶ 243, citing CL-0176, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010 ("*RDC v. Guatemala*"), ¶ 146 –citing to CL-0177, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (I)*, ICSID Case No. ARB/03/25, Award, 16 August 2007 ("*Fraport v. Philippines*"), ¶ 346–; CL-0178, *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Trading Ltd. v. Republic of Kazakhstan (I)*, SCC Case No. 116/2010, Award, 19 December 2013 ("*Stati v. Kazakhstan*"), ¶ 812 –regarding the "failure to detect" the illegality–; CL-0179, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017 ("*Karkey Karadeniz v. Pakistan*"), ¶ 624; CL-0180–, *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018 ("*Gavrilovic v. Croatia*"), ¶ 384.

³⁴² Reply, ¶ 243-244.

³⁴³ Reply, ¶ 244; CL-0177, *Fraport v. Philippines*, ¶ 346; CL-0181, *Kardassopoulos v. Georgia*, Decision on Jurisdiction, ¶¶ 152 et seq.; CL-0182, *Sr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013 ("*Arif v. Moldova*"), ¶¶ 374-376; CL-0168, *Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Final Award, 21 May 2013 ("*Convial Callao v. Peru*"), ¶ 410.

³⁴⁴ Reply, ¶ 237: "First of all, Mexico does not dispute that Claimants invested in Mexico under the definitions contained in NAFTA Article 1139."

³⁴⁵ Memorial, ¶ 154 "Claimant's investment includes, without limitation: (a) 'an enterprise' (Lusad); (b) 'an equity security' (ES Holdings' indirect shareholding in Lusad); (e) 'an interest in an enterprise that entitles the owner to share in income or profits of the enterprise' (ES Holdings' indirect shareholding in Lusad); (e) 'an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution' (ES Holdings' indirect shareholding in Lusad); (g) 'intangible property' (the technology developed by Lusad); (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' (the Concession granted to Lusad and related commitment of capital and resources in Mexico); and 'Claims to money' arising from the interests detailed sections (a) to (h) of NAFTA Article 1139 (claims to money arising from the Concession)."

352. The Parties disagree on whether the Concession was made in breach of Mexican laws and the good faith principle, the effects of any illegality or bad faith on the Tribunal's *ratione materiae* jurisdiction under NAFTA, and the effects of Respondent's conduct, if any.
353. First, as regards the effects of any potential illegality, the Tribunal observes that the plain text of NAFTA does not state that a general condition for the Contracting Parties' consent to arbitrate and for the Tribunal's jurisdiction is that the investment complies with the host State's regulations. Respondent has submitted no specific record of a NAFTA tribunal upholding such a conclusion, and the cases it invokes concern other treaties with a different wording. If States want to impose "special formalities" for the establishment of an investment like they "be legally constituted" under its laws, this has to be adopted as part of the language of the treaty but cannot generally be assumed to be part of NAFTA's standards.³⁴⁶
354. However, investment tribunals are increasingly considering, based on the principle of good faith, and its derivative clean hands doctrine, that an investment made in violation of the home State laws may render a claim inadmissible or affect the finding of a breach on the merits,³⁴⁷ and that the inadmissibility of a claim has the same practical effects as a finding of lack of jurisdiction.³⁴⁸
355. The Tribunal considers that even under Respondent's case that a finding of illegality under NAFTA is sufficient to deny jurisdiction, the Tribunal must, in the first place, determine the standard and burden of proof, and then analyze the conduct of both Claimants and Respondent.
356. Respondent did not engage with the standard of proof. For the Tribunal, the finding of an illicit or bad faith conduct in this case demands a heightened standard of proof since it is being invoked to preclude the right to claim protection under a treaty.³⁴⁹ The Tribunal has some discretion with respect to the standard of proof it can apply in the face of serious allegations such as challenges to the authenticity of documents or the commission of illegal acts. However, it cannot simply accept to apply a low standard and conclude that the "slightest doubt about the legality of the information"³⁵⁰ is sufficient to consider that there is an illegality sufficient to ban an investor from accessing the protection under the NAFTA.³⁵¹ To the contrary, the party raising such serious allegations must provide clear

³⁴⁶ CL-0001, NAFTA, Article 1111.

³⁴⁷ CL-0030, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, ¶ 324.

³⁴⁸ CL-0102, *Ioannis Kardassopoulos v. Georgia* ICSID Case No. ARB/05/18, Award, 3 March 2010, ¶ 258.

³⁴⁹ CL-0100, *Chevron Corp. (USA) and Texaco Petroleum Co. (USA) v. Ecuador*, (UNCITRAL) PCA Case No. 34877, Partial Award on the Merits, 30 March 2010, ¶ 348.

³⁵⁰ Counter-Memorial, ¶ 388.

³⁵¹ RL-0157, *Carlos Sastre v. Mexico*, ¶¶ 148-150.

and convincing evidence to prove its allegations, especially, if they are being invoked to preclude a party's right to bring a claim under a treaty.³⁵²

357. If Respondent discharges this high burden and proves the existence of illegalities, violations of Mexican laws, and/or alteration of documents, the Tribunal must still assess not only the extent of such violations,³⁵³ but also Respondent's conduct. A State cannot invoke the investor's illegal conduct as a defense against a treaty claim when the State has participated in such illegalities.³⁵⁴
358. On the basis of the above, the Tribunal will assess the allegations and evidence submitted by the Parties to determine whether the Concession awarded to Lusad was validly and legally obtained, or if there were illegalities, as Respondent claims, and if so, what was the conduct of Respondent and if the outcome is to preclude Claimants' right to bring this arbitration under NAFTA.
359. As a threshold matter, the Tribunal must analyze the different versions of the Concession invoked by the Parties in this arbitration.
360. Claimants assert that the "valid" Concession was the one granted in 2016 and amended in 2017, and that the Concession signed in 2018 was altered and signed by inducing Mr. Zayas into an error. Further, Claimants rely on the 13 Emails attached to Mr. Muñana's second testimony and submit that such mails evidence that the so called 2018 Concession was a fabrication by officials of Respondent.³⁵⁵ By contrast, Respondent contends that (i) the 2016 Concession never existed and was only a project, and in any case was procured illegally, violating Mexican procedural and substantive laws for the adjudication of Concessions, (ii) the 2017 Amendment was also illegally procured; and (iii) the Concession granted in 2018 is valid and was never suspended.
361. In the following subsections, the Tribunal will refer to the different versions of the Concession submitted by the Parties.

The 2016 Concession Document

362. Respondent disputes the authenticity of the documents submitted by Claimants to demonstrate that it was granted the Concession on 17 June 2016. Respondent argues that

³⁵² RL-0064, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014, ¶ 479.

³⁵³ RL-0074, *Álvarez y Marín Corporación S.A. and others v. Republic of Panama*, ICSID Case No. ARB/15/14, Award, 12 October 2018, ¶ 135.

³⁵⁴ CL-0176, *RDC v. Guatemala*, ¶ 146, citing to Exhibit CL-0177, *Fraport v. Philippines*, ¶ 346; CL-0178, *Stati v. Kazakhstan*, ¶ 812; CL-0179, *Karkey Karadeniz v. Pakistan*, ¶ 624; CL-0180, *Gavrilovic v. Croatia*, ¶ 384; CL-0181, *Kardassopoulos v. Georgia*, Decision on Jurisdiction, ¶¶ 152 *et seq.*; CL-0182, *Arif v. Moldova*, ¶¶ 374-376; CL-0168, *Convial Callao v. Peru*, ¶ 410.

³⁵⁵ Letters from Claimants to the Tribunal dated 5 June 2023; 13 June 2023; 13 July 2023 and 4 August 2023.

it was unable to find such documents in Semovi's official records, while Claimants contend that the mere allegation that a document is not in Semovi's files is not sufficient to conclude that a document is fake.

363. Claimants were unable to produce the original paper version of several of the documents related to the concession that it submitted in copies in this arbitration. This limited Respondent's possibility to conduct a complete graphology assessment as additional evidence to support its challenge to the documents' authenticity.
364. Respondent claims that it did not find the documents of the 2016 Concession in Semovi's files and that Claimants did not submit the original of those documents, which circumstance affected the ability of the experts to make a more accurate graphology assessment on the available documents. However, Respondent had other alternatives to substantiate its authenticity challenge but chose not to resort to them. For example, it could have requested the appearance as witnesses of the individuals who signed the document or at least request their appearance for the graphology assessment. Although Respondent explained that these individuals were no longer employees of the Mexican government, there is no evidence that this precluded it from making real efforts to contact them and seek their cooperation.
365. But independently of any debate of the Parties as to the accuracy of the forensic/graphology reports on the contested documents, other evidence in the record is sufficient to show that Claimants were, in fact, "granted" a Concession under the 2016 Declaration of Necessity, and not merely a "project" as Respondent claims.
366. It is undisputed that, on 17 June 2016, the Adjudication Committee held session 003, and that in such session a right was "granted" or "*otorgado*" to Lusad and no other bidder. The issue in debate is whether during session 003 (i) a final concession was fully granted in the terms stated in the signed,³⁵⁶ and unsigned³⁵⁷ minutes submitted by Claimants, and the identical unsigned version of the minute found in Semovi's files,³⁵⁸ or (ii) "the issuance and execution of the Definitive Title" was subject to further requirements and conditions, as stated in the minutes produced by Respondent.³⁵⁹

³⁵⁶ C-0051, Minutes of the session of the Adjudication Committee, 7 June 2016, pp. 19-20. ("*aprueba otorgar*" "*la concesión*").

³⁵⁷ C-0006, Minutes of the Adjudication Committee for Concessions for Public Transport, 17 June 2016, p. 11. ("*aprueba otorgar*" "*la concesión*").

³⁵⁸ C-0229, Minutes of the Adjudication Committee contained in the files of the Secretaría de Desarrollo, as produced by Mexico, 17 June 2016, p. 16. ("*aprueba otorgar*" "*la concesión*").

³⁵⁹ R-0068, Minute of the 2016 "Taximeter" session of the Adjudication Committee, 17 June 2016 (version of the Adjudication Committee's decision submitted by Respondent); C-0168, Semovi file submitted by Mexico, pp. 485-486.

367. Other uncontested documentary evidence suggests that in 2016, a Concession and not a mere project was “granted.”
368. First, Mr. Zayas was served with the agreement reached by the Adjudication Committee in session 003. Documents submitted by Respondent or produced by it and submitted by Claimants both show that Mr. Zayas went to Semovi to be served with the outcome of session 003 on June or July 2016.³⁶⁰
369. Second, there were no further declarations of necessity nor a new complete process, including invitations to other participants, for the 2018 Concession that Respondent claims to be the final or definitive title that followed the 2016 “project.” Respondent claims that there was a meeting of adjudication of the 2018 Concession on 13 April 2018. Claimants challenge this allegation and submit that the 13 Emails submitted by Mr. Muñana in his second witness statement indicate that the minutes of the meeting were doctored by Semovi officials.
370. Third, after the 2016 session of the Adjudication Committee, Lusad took steps to implement the Concession and further develop its investment. From 11 July to 6 August 2016, Lusad conducted the first installation pilot within the Trial Period, for 100 taxis using one installation center (*El Coyol*).³⁶¹ From August to November 2016, a second installation pilot took place, in which tablets were meant to be tested in 1,000 additional taxis.³⁶²
371. Lusad continued to implement the Concession through 2017. By 21 April 2017, Lusad had engaged a Mexican company (Ingram Micro Mexico S.A. de C.V.) to provide tablets, cradles, and installation kits for the L1bre System.³⁶³ Also, by 16 May 2017, Lusad registered the L1bre Trademark and opened its offices in Mexico City.³⁶⁴
372. Respondent claims that these activities were part of a “trial period” required to obtain the definitive title to the concession. However, nothing in the record evidences that the

³⁶⁰ C-0129, Correspondence to Mr. Eduardo Zayas, 6 July 2016; R-0068, Minute of the 2016 “Taximeter” session of the Adjudication Committee, 17 June 2016 (version of the Adjudication Committee’s decision submitted by Respondent), p. 16; C-0168, Semovi file submitted by Mexico, pp. 485-486; Rejoinder, ¶¶ 88-89.

³⁶¹ C-0013, Communication from Lusad to Semovi confirming installation of the L1bre System in 100 Taxis, 9 August 2016; Memorial, ¶ 93; Reply, ¶ 425; Counter-Memorial, ¶ 104.

³⁶² C-0014, Communication from Lusad to Semovi confirming installation of the L1bre System in 1,000 Taxis, 7 November 2016 (Respondent claims not to have located a copy of this document within Semovi’s files but does not submit that the document is forged, *see* Counter-Memorial, p. 56; Rejoinder, ¶ 86. Moreover, there are other contemporary documents in the record that refer to the development or “*avance*” of the 1,000 units or “*1,000 unidades*” referred to in exhibit C-0014, *see* C-0180, Compendium of communications between Lusad and Semovi between 2016 and 2018 regarding the process of installation of tablets, 2016-2018, p. 1, email of 4 November 2016; and C-0224, Email from Luis Elechiguerra to Alejandra Balandrán, 4 November 2016).

³⁶³ C-0071, Sales Agreement between Ingram Micro Mexico and Lusad, 21 April 2017.

³⁶⁴ C-0058, Registration of the L1bre trademark, 16 May 2017; C-0059, Photos of L1bre’s Mexico City office.

granting of the 2016 Concession was subject to the condition of Claimants having complied with the trial period. On the contrary, the trial period under the 2016 Concession was part of the implementation of the concession as evidenced by the tasks required to be completed by Claimants (supply and installation of tablets, cradles and installation kits, for 1000 taxis and a further test on 100 additional taxis). Nothing in the documentation submitted in this arbitration supports the allegation of Respondent that these tasks and the time, cost and effort required to implement them were merely a “test” to determine whether or not to grant the concession.

373. Also, the conduct of the members of Respondent’s Executive Branch between 2016 and 2017 seem to confirm that Lusad was implementing the Concession before 2018, when, according to Respondent, the “definitive title” was actually granted.
374. As shown in Exhibit C-0056, on 4 April 2017, Semovi sent a letter to Lusad indicating that “there is no possibility of granting a concession additional to that granted under the Declaration of Necessity of 30 May 2016, since the Adjudication Committee has deemed such necessity satisfied and fulfilled” and therefore “there is no possibility of issuing a new declaration of necessity” with the same characteristics.³⁶⁵
375. While Respondent disputes the contents of this exhibit,³⁶⁶ in a subsequent and undisputed letter of 7 April 2017, Semovi required Lusad to present the executive project of the “Program to Update Digital Taximeters installed in Toyota Prius vehicles” “to conduct the administrative proceedings before the General Legal Directorate and the feasibility of the operation before the Operative Directorate.”³⁶⁷ The latter document would confirm that, in any case, the Concession was being implemented.
376. Respondent submitted the minutes of a work meeting of 12 May 2017 regarding the installation of new tablets, during which Lusad participated as the “concessionaire” or “*empresa concesionaria*.”³⁶⁸ If no concession had been granted at the time, as Respondent

³⁶⁵ C-0056, Oficio No. DNRM-0673-2017 from Semovi confirming the validity of the Concession Agreement, 4 April 2017. (Disputed document). (Tribunal’s translation from Spanish: “*No existe la posibilidad de otorgar una concesión adicional a la ya expedida al amparo de la Declaratoria de Necesidad del 30 de mayo de 2016, pues el Comité Adjudicador de Concesiones para la Prestación del Servicio Público Local de Transporte de Pasajeros o de Carga, ha tenido por satisfecha y cumplida dicha necesidad [y por tanto] no existe posibilidad de expedir nueva declaratoria de necesidad.*”)

³⁶⁶ Respondent claims not to have located a copy of this document within Semovi’s files (Counter-Memorial, ¶ 197). Respondent did locate another letter referring to a different matter with the same registration number but a different date, 29 March 2017 (C-0094).

³⁶⁷ R-0072, Oficio of 7 April 2017 from Semovi in which information is required from Lusad (letter from Ms. Balandrán) (Tribunal’s translation from Spanish: “*Programa de Actualización de Taxímetros Digitales instalados en vehículos de la amrca Toyota tipo Prius [...] con la finalidad de gestionar ante la Dirección General Jurídica y de Regulación los trámites administrativos y la factibilidad de operación ante esta Dirección Operativa.*”).

³⁶⁸ R-0073, Work Minutes of the meeting between Semovi and Lusad, 12 May 2017.

alleges, it is unclear why an official minute of Semovi would refer to Lusad as a concessionaire and not as a candidate, or potential concessionaire.

377. On 22 May 2017, Ms. Balandrán sent a letter to Mr. Rosendo Gómez, indicating that Lusad had not complied with the program for the substitution of taximeters under the “administrative concession SEMOVI/DGSTPI/001/2016”, which had to occur between 22 and 31 May 2017.³⁶⁹ The letter refers to an administrative concession in place by 2017, not to a Concession “project.”³⁷⁰ This further confirms that the Concession was not granted in 2018, as Respondent submits, but earlier.
378. Fourth, it is true, as claimed by Respondent, that Semovi did not recognize that the Concession had been granted in 2016 in the course of the *amparo* proceedings brought against the Declaration of Necessity,³⁷¹ and that Lusad did not contest Semovi’s conduct at the time.
379. However, Semovi’s conduct was adopted towards a Mexican judicial authority in a process with *inter partes* effects, in which the *amparo* was only granted to the specific plaintiff in that case.³⁷² Notably, the conclusion of the *amparo* judgments was that the Declaration of Necessity in itself was not sufficient to “credit” the “existence” of (i) the “commandment” of the concession project, (ii) the granting of the concession, and (iii) the implementation of the project through the app and the tablets,³⁷³ and such a conclusion was supported only on the evidence presented to the competent Mexican courts by the plaintiff in that case.³⁷⁴ This is different from this arbitration, where Claimants have been able to submit evidence accessed through Lusad.
380. In sum, even though the *amparo* judgments, with limited effects, found that Semovi was not competent to issue a concession for the implementation of taximeters, since it could have presumably been done through an authorization,³⁷⁵ this does not change the fact that

³⁶⁹ R-0074, Oficio No. DO-1909-2017 from Semovi to the Director of Mobility Regulation and Standards (*Director de Normatividad y Regulación de la Movilidad*), 22 May 2017 (Letter from Ms. Balandrán).

³⁷⁰ Counter-Memorial, ¶ 438.

³⁷¹ R-0100, *Amparo* Ruling 1135/2016, 11 November 2016; R-0101, Appeal for Review Ruling 389/2016, 25 May 2017.

³⁷² R-0101, Appeal for Review Ruling 389/2016, 25 May 2017, p. 57 (The Declaration of Necessity “cannot subsist nor produce effects towards the plaintiff” (Tribunal’s translation from Spanish: “*no puede subsistir ni producir efectos respecto de la quejosa*.”)).

³⁷³ R-0101, Appeal for Review Ruling 389/2016, 25 May 2017, pp. 30-31 (“*es inexacto que a partir de la declaratoria de necesidad se puede tener por acreditada la existencia de la encomienda del proyecto del modelo de concesión, así como el otorgamiento y adjudicación directa de la concesión para la sustitución, instalación y mantenimiento de taxímetros del servicio de transporte de pasajeros público individual (taxi) de la Ciudad de México, con el sistema de geolocalización satelital; así como del diseño, operación y explotación de la aplicación de contratación remota del taxi en la Ciudad de México, a favor de la empresa.*”).

³⁷⁴ R-0101, Appeal for Review Ruling 389/2016, 25 May 2017, p. 55.

³⁷⁵ R-0101, Appeal for Review Ruling 389/2016, 25 May 2017, pp. 50-51.

in 2017 the Semovi referred to Lusad as the concessionaire and requested compliance of Lusad's obligations under such a concession.³⁷⁶

The 2018 Concession Document

381. The Parties do not dispute that in 2018 a formal installation notice was issued³⁷⁷ and that Lusad also signed a document corresponding to the Concession. The Parties debate whether the 2018 document corresponds to a valid concession.
382. Claimants hold that on 7 November 2018, Lusad and its representatives were summoned to a meeting at Semovi's offices allegedly about a project unrelated to the L1bre System (permits for privately chauffeured vehicles),³⁷⁸ and that, at the meeting, Mr. Zayas signed a document that apparently corresponded to the Concession. Claimants claim that Mr. Zayas was induced under false pretenses to sign "an altered Concession" that was different from the Concession allegedly amended in January 2017. The "altered Concession" did not include, among others, the Recuperation Fee of MXN \$12.00 for each time a user hailed a taxi with the L1bre System, and the fee Lusad could charge for providing WiFi. Claimants hold that Mr. Zayas only found out about this difference after he signed the document.³⁷⁹ Respondent disputes that an amendment to the Concession was validly issued in 2017 and submits that the 2018 Concession was validly signed by Mr. Zayas.
383. Claimants further contend that the 13 Emails submitted with Mr. Muñana's second witness statement evidence how, between May and June 2018, Mexico's officials altered the concession file by replacing entire key documents and backdating new ones. The 13 Emails proposed deleting key sections of the Concession documents.³⁸⁰ In particular, Respondent modified the existing concession (that is to say the 2016 Concession) with the fraudulent concession by changing the language to eliminate the idea associated with

³⁷⁶ R-0074, Oficio No. DO-1909-2017 from Semovi to the Director of Mobility Regulation and Standards (*Director de Normatividad y Regulación de la Movilidad*), 22 May 2017 ("De acuerdo a las actividades de supervisión que esta unidad administrativa ejerce con respecto a la instalación y mantenimiento de tabletas digitales con aplicación de taxímetro que la empresa Servicios Digitales Lusad, S. de R.L. de C.V. **debe realizar bajo el amparo de la concesión administrativa SEMOVI/DGSTPI/001/2016**, se informa que el programa de sustitución (taxímetro digital) e instalación (tableta usuario) proyectado para 1100 dispositivos, no se cumplió en el tiempo comprendido del 22 al 31 de mayo del presente año." Emphasis added).

³⁷⁷ Memorial, ¶¶ 13, 15, 109; C-0016, Mandatory Installation Notice mandating the installation of the taximeters, published in the *Gaceta Oficial de la Ciudad de México*, 17 April 2018. In April 2018 Semovi issued a formal notice in the official gazette of Mexico City requiring all taxi drivers to bring their taxis in to one of Lusad's installation centers by no later than 31 March 2019 so that Lusad could install the L1bre System in their vehicles ("2018 Notice"). The installations were to be organized using an electronic appointment system in Semovi's website, which had to be available within the "30 business days" following the formal notice.

³⁷⁸ First Witness Statement of Mr. Eduardo Zayas, 13 September 2021, ¶ 61; Memorial, ¶¶ 127-129.

³⁷⁹ Memorial, ¶ 128; First Witness Statement of Mr. Eduardo Zayas, ¶ 61; C-0020, Concession Agreement, 13 April 2018.

³⁸⁰ Tr. Closing Hearing Day 1 (ENG), 14:6-15.

the recuperation fee.³⁸¹ Therefore, the 13 emails prove that there was a fraudulent concession.³⁸²

384. The 2018 Concession refers to a meeting of the Adjudication Committee of April 2016; however, according to Claimants, the text of that meeting was fabricated on the 8th of June 2018. This is proven by the 13 Emails which show that these documents were fabricated in June 2018.³⁸³
385. Mexico not only challenges the manner and timing in which the 13 Emails were produced, but argued that none of the former Semovi officials who appear in the mails submitted by Mr. Muñana had the authority to exchange mails in connection with the concession and that what the mails evidence is that Mr. Muñana was coordinating the institutional position of Semovi with Mr. Zayas to favor Lusad.³⁸⁴
386. The majority of the Tribunal first observes that there is no convincing evidence in the record to conclude that Respondent forced or induced Mr. Zayas to sign the 2018 Concession under false pretenses.
387. The “*nota de comparecencia*” or appearance notice, clearly and explicitly indicates that Mr. Zayas, on behalf of Lusad, agreed with the contents of the document, signed and delivered the same, and that the text of such a document would prevail over any previous documents.³⁸⁵ It seems unlikely that an experienced business person would simply sign the most important title (the concession) without reading it or agreeing to its terms. Even though there is a criminal complaint filed by L1bero and Lusad in connection with the process of signing the “altered Concession”, there does not appear to be a finding of fraud by Mexican courts so far.³⁸⁶
388. As for the 13 Emails submitted by Mr. Muñana, the Tribunal has serious doubts as to the timing and manner in which they were produced by the Mr. Muñana.
389. First, the detailed testimonies of Mr. Muñana, both in writing and during the hearing, suggest a person with a sharp memory for past events. Thus, it is difficult to reconcile with his explanation that he had forgotten that emails pertaining to important tasks during his career at Semovi were in his personal email and filed in his personal computer.

³⁸¹ Tr. Closing Hearing Day 1 (ENG), 31:7-33:2.

³⁸² Tr. Closing Hearing Day 2 (ENG), 303:5-11.

³⁸³ Tr. Closing Hearing, Day 2 (ENG), 281:10-22.

³⁸⁴ Tr. Day 1 (ENG), 151:17-152:6; Tr. Day 1 (ENG), 153:15-22.

³⁸⁵ C-0168, Semovi file submitted by Mexico, pp. 490-496, 501-504.

³⁸⁶ C-0343, Criminal Complaint filed by Lusad; Tr. Closing Hearing, Day 2 (ENG), 285:10-18.

390. Second, the Tribunal is not persuaded by the explanations of Mr. Muñana as to the reasons why he did not mention the Lusad concessions as part of his duties when he transferred the files to his successor. Why he did not deliver to Mr. Zepeda the entire correspondence related to his duties upon termination of his work as a public official. Why he kept, long after his departure as a public official, emails related to his duties in his personal computer; and how and why Mr. Muñana selected the emails that he delivered to Claimants.
391. Third, there is no convincing evidence that Mr. Muñana was directly involved with the concessions or had the authority to coordinate or direct amendments to the concessions. On the contrary, the emails, together with the unsatisfactory explanations of Mr. Muñana, raise serious concerns about the reasons why Mr. Muñana was involved in discussions not pertaining to his duties, failed to report his alleged involvement in the concessions to the officials of Respondent and then submitted selected emails to this Tribunal.
392. But even if the emails were evidence of a forgery, as alleged by Claimants, the conclusion of the Tribunal would not vary given that, as explained in the Merits Section, the Tribunal will find that there is neither evidence that the concession – be it the 2016 or the 2018 Concession – was suspended, nor evidence that at the time of the alleged suspension Claimants were ready to complete the project.
393. The next issue to determine is whether the 2018 Concession was illegal, as claimed by Respondent, and therefore, if this Tribunal cannot be a forum to “vest” Claimants’ investments with legality after multiple Mexican courts allegedly declared them illegal.
394. The Tribunal observes that Respondent did not pursue the annulment of the Concession before Mexican courts, nor did it seek a judicial declaration that Lusad had breached its obligations under the 2018 Concession or failed the trial period of what Respondent calls the 2016 Concession “project.” Also, the other bidders could have requested the annulment but apparently, they did not.³⁸⁷
395. Moreover, while the 2018 Notice was challenged and declared unconstitutional in *amparos* Nos. 693/2018, and 622/2018, there is no dispute that the 2018 Notice was issued and that the 2018 Concession existed. Also, as noted above, the amparo trials have

³⁸⁷ R-0100, Amparo Ruling 1135/2016, 11 November 2016, p. 42: Tribunal’s translation from Spanish: “Furthermore, it should be considered that those who are not granted the concession in question remain entitled to file the remedy provided for in the Administrative Procedure Law of the Federal District or, alternatively, to initiate an annulment proceeding, requesting the suspension of the corresponding award pursuant to Article 84 of the Law on the Patrimonial Regime and Public Service of the Federal District.” (“*Además, debe considerarse que quienes no fueren beneficiadas con la concesión de que se trata, quedan en posibilidad de promover el recurso previsto en la Ley de Procedimiento Administrativo del Distrito Federal o bien, instar el juicio de nulidad, solicitando la suspensión de la adjudicación correspondiente en términos del artículo 84 de la Ley del Régimen Patrimonial y del Servicio Público del Distrito Federal.*”).

very limited *inter partes* effects,³⁸⁸ and therefore the Tribunal cannot, on their basis, make a general finding that the Concession was an illegal investment under international law.

The 2017 Amendment

396. Lastly, whether there was an amendment to the Concession in 2017 is not relevant. The Tribunal has already determined that a Concession was originally issued in 2016, that the Concession was re-issued in 2018 with certain amendments, and that there is no evidence that this 2018 document is not authentic or was obtained through undue pressure from Respondent.

Conclusion on the Concession Documents

397. Overall, the evidence in the record suggests that a Concession was granted in 2016 and that the Concession was re-issued in 2018 with certain amendments.
398. However, the majority of the Tribunal has serious doubts about the authenticity of some of the documents submitted in this arbitration, including the documents containing the terms and conditions of the Concessions, and the legality of the process for the issuance of the Concessions both in 2016 and 2018.
399. First, regardless of the debate concerning Exhibit C-38, it is not disputed that representatives of Lusad and Claimants met with Mexican officials in charge of issuing the concession before the public bidding process started and exchanged documents.³⁸⁹ Claimants allege that it is not unusual for an investor to meet with Mexican authorities. However, during those meetings, Claimants' representatives and Mexican authorities discussed and agreed on the terms and conditions of the bid and the Concession and drafted the documents for the bid. No other potential bidder participated in these meetings or was allowed to discuss the terms and conditions of the bid prior to its issuance.
400. Second, the terms and conditions of the bid contained highly specialized and complex requirements, including government permits and the entering into a services contract with a specific provider. Lusad had both the government permits and the contract, and the Mexican government knew or should have known that.³⁹⁰

³⁸⁸ R-0101, Appeal for Review Ruling, 389/2016, 25 May 2017, p. 57.

³⁸⁹ Reply, ¶¶ 58-62; Rejoinder, ¶ 40; Tr. Closing Hearing, Day 1 (ENG), 36:10-37:3.

³⁹⁰ C-0005, Declaration of Necessity, 30 May 2016, PDF p. 21, Tribunal's translation from Spanish: "The system shall operate through the provider NullData, which shall supply the updated information and maintain constant communication with the Secretariat of Mobility (SEMOVI) to ensure full (100%) integration with the operation of the licensed taxis," p. 23. "The hardware required for the device or tablet must be preconfigured by the provider NullData. The required configurations ensure proper settings for the optimal functioning needed for the service" ("*El sistema deberá operar mediante el proveedor NullData que proporcione la información actualizada y estas*

401. Third, obtaining the permits and the services contract with a specific provider required time, and the terms and conditions of the bid provided only three days for the participants to comply with the requirements.³⁹¹ Therefore, only Lusad was able to comply. All other bidders were disqualified.
402. Fourth, Claimants were at odds to explain the mechanism and legal process to grant the Concession for the L1bre System under Mexican laws, particularly the reasons for undertaking a complex bidding process in which third parties were invited to submit competing offers if, as claimed by Claimants, the Concession could have been awarded directly to Lusad without a bid;³⁹² and while Respondent now alleges that this mechanism was irregular, it participated in it, and did not challenge the process or the Concession after its issuance before the competent Mexican courts.³⁹³
403. Fifth and last, the entire process is tainted with serious allegations from both Parties concerning the alteration of documents and the production of documents by former Mexican officials in apparent violations of Mexican law regarding the keeping of official files.
404. The Tribunal is therefore in the presence of a delicate situation where both the investor and the State seem to have incurred in serious irregularities.
405. However, as noted in the prior subsections, the evidence on the record suggests that members of Respondent's Executive Branch consented to and participated with Claimants in the process of issuing, granting and implementing the Concession. While Respondent now claims that these acts were tainted by irregularities and illegalities, it cannot rely on breaches of its own laws to excuse its international responsibility or to bar Claimants from accessing the protection of NAFTA when Respondent participated in and acquiesced to such breaches.³⁹⁴
406. In sum, the Tribunal concludes that notwithstanding the irregularities described above, Claimants had a Concession in 2016, which was re-issued in 2018, and which Lusad

mantengan la comunicación constante con la Secretaría de Movilidad (SEMOVI) para una integración al 100% con la operación de los taxis concesionados”), p. 23 (“El hardware requerido en el equipo o tableta deberá estar previamente configurado por el proveedor NullData. Las configuraciones requeridas mantienen una configuración adecuada para el funcionamiento óptimo que se requiere para el servicio.”).

³⁹¹ C-0005, Declaration of Necessity, 30 May 2016, PDF pp. 15, 17, 20, 22, 23 and 25.

³⁹² Tr. Day 2 (ENG), 409:15-411:3; Rejoinder, ¶ 40.

³⁹³ Rejoinder, ¶ 41: “The change of narrative of the Claimants confirms the position of the Respondent, the Lusad Concession and the whole procedure around it was carried out under **highly questionable practices of both Lusad and the public servants at that time**” (emphasis added).

³⁹⁴ CL-0176, *RDC v. Guatemala*, ¶ 146, citing to Exhibit CL-0177, *Fraport v. Philipines*, ¶ 346; CL-0178, *Stati v. Kazakhstan*, ¶ 812; CL-0179, *Karkey Karadeniz v. Pakistan*, ¶ 624; CL-0180, *Gavrilovic v. Croatia*, ¶ 384; CL-0181, *Kardassopoulos v. Georgia*, Decision on Jurisdiction, ¶¶ 152 et seq.; CL-0182, *Arif v. Moldova*, ¶¶ 374-376; CL-0168, *Convial Callao v. Peru*, ¶ 410.

obtained with Respondent's participation. Accordingly, Claimants have an investment covered by the protection of NAFTA that provides a basis for this Tribunal's jurisdiction.

VI. MERITS

407. Claimants have raised three breaches of Respondent's obligations under NAFTA and international law: (1) the prohibition against unlawful expropriations in Article 1110;³⁹⁵ (2) the protection of the Minimum Standard of Treatment, including Fair and Equitable Treatment ("FET") in Article 1105;³⁹⁶ and (3) the National Treatment obligation in Article 1102.³⁹⁷ The Tribunal first summarizes the Parties' positions on these claims and then deals with them in the subsections that follow.

A. INDIRECT EXPROPRIATION: NAFTA ARTICLE 1110

1. Claimants' position

408. Claimants submit that Respondent, through the conduct of Mexico City and Semovi, as organs of the State under general international law, and NAFTA Articles 105 and 201(2), breached the protection against unlawful and indirect expropriations embedded in NAFTA Article 1110.³⁹⁸ According to Claimants, Respondent indirectly expropriated their investment by taking State measures that, despite not seizing or directly taking physical property, harmed their investment with the same practical effect as a direct expropriation, that is, a substantial deprivation of the use, or the economic benefit of their investment.³⁹⁹

409. Claimants argue that Mexico City awarded Lusad the Concession under which it had a right to "install and maintain" the technology of the Libre System in 138,000 taxis in Mexico City, which included the in-taxi tablets with a custom software, and the smartphone taxi-hailing application, for a 10-year term, automatically renewable for 10 more years, and with the option for renewal for another 10 additional years.⁴⁰⁰ Under the

³⁹⁵ Memorial, § V.A, p. 80.

³⁹⁶ Memorial, § V.B, p. 99.

³⁹⁷ Memorial, § V.C, p. 125; Reply, ¶ 246.

³⁹⁸ Memorial, ¶¶ 162-166.

³⁹⁹ Memorial, ¶¶ 167-172, citing, *inter alia*, CL-0013, *ADM v. Mexico*, ¶ 240; CL-0012, *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶ 103 ("*Metalclad v. Mexico*"); CL-0014, United Nations Conference on Trade and Development, Taking of Property, UNCTAD/ITE/IIT/15, 2000, pp. 3-4, 20; CL-0016, *S.D. Myers, Inc. v. Government of Canada*, (UNCITRAL) Partial Award, 13 November 2000, ¶ 283; CL-0021, *Southern Pacific Properties (Middle East) Limited. v. Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, ¶ 164.

⁴⁰⁰ Memorial, ¶ 173.

Concession, Claimants allege to have developed and tested technology, purchased hardware, and hired employees.⁴⁰¹

410. According to Claimants, after a trial period in which it “successfully tested” “its concept” in over 1,100 taxis,⁴⁰² Lusad, after months of preparation, was “ready to install its technology in Mexico City’s entire taxi fleet of 138,000 taxis.”⁴⁰³ In April 2018, Semovi issued the formal installation notice requiring all taxis in Mexico City to install the L1bre System by March 2019.⁴⁰⁴ Claimants add that “Mexico City’s government at [that] time was publicly celebrating the benefits of Lusad’s investments and technology for the city.”⁴⁰⁵
411. However, the mandatory installation coincided with Mexico City’s mayoral elections, and the Concession became the target of political attacks.⁴⁰⁶ Claimants submit that, in this context, on 30 May 2018, Semovi announced the suspension of the Concession until after the elections were to take place in July 2018. Thereafter, Semovi extended the suspension indefinitely by a communication of 28 October 2018.⁴⁰⁷ According to Claimants, after the elections “Lusad’s representatives met with Mayor Sheinbaum and with Semovi in January 2019 to attempt to have the suspension lifted”, without success.⁴⁰⁸
412. Claimants argue that the suspension was only politically motivated, had no relation to the legality of the Concession or its performance,⁴⁰⁹ and ultimately deprived them from a way to monetize the Concession, rendering Lusad’s rights and Claimants’ investment “valueless.”⁴¹⁰ Moreover, in April 2020, Mexico City launched “Mi Taxi”, an application

⁴⁰¹ Memorial, ¶ 174.

⁴⁰² Memorial, ¶ 174, footnote 352, citing C-0010, Oficio No. DNRM-0626-2017 from Semovi reissuing Concession Agreement, 21 March 2017; C-0011, Oficio No. DGN.312.01.2016.1534 from the Secretaría de Economía, authorizing Lusad’s digital taximeter, 18 April 2016.

⁴⁰³ Memorial, ¶ 175, citing C-0013, Communication from Lusad to Semovi confirming the installation of the L1bre System in 100 Taxis, 9 August 2016, p. 1; C-0014, Communication from Lusad to Semovi confirming installation of the L1bre System in 1,000 Taxis, 7 November 2016, p. 1; C-0073, L1bre installation centers operations manual, 24 August 2018; C-0074, Physical requirements for Installation Centers, May 2018; C-0075, Photos from installation centers.

⁴⁰⁴ Memorial, ¶ 176; C-0016, Mandatory Installation Notice mandating the installation of the taximeters, published in the Gaceta Oficial de la Ciudad de México, 17 April 2018.

⁴⁰⁵ Reply, ¶ 258.

⁴⁰⁶ Memorial, ¶ 176.

⁴⁰⁷ Memorial, ¶ 176; C-0018, Oficio No. DGSTPI-965-2018 from Semovi announcing suspension of the Concession, 30 May 2018; C-0019, Oficio No. DGSTPI-1943-2018 from Semovi announcing indefinite suspension of the Concession, 28 October 2018.

⁴⁰⁸ Memorial, ¶ 178; Witness Statement of Mr. Santiago León Aveleyra, ¶ 84; Witness Statement of Mr. Eduardo Zayas, ¶ 63.

⁴⁰⁹ Reply, ¶¶ 260-261.

⁴¹⁰ Memorial, ¶ 177; Expert Report of Mr. Howard Rosen (Secretariat Advisors), 17 September 2021, ¶ 163.

that Claimants allege to have “copied” all hallmark features of the L1bre System, thereby “supplanting” it.⁴¹¹

413. Claimants conclude that the “indefinite suspension of the Concession and replacement of the L1bre System with Mi Taxi” “separately and when taken altogether” are tantamount to an indirect expropriation in violation of NAFTA Article 1110 because they “deprived” Claimants of the benefit of their investment, “made sure that there would be no revenues whatsoever earned under the Concession,”⁴¹² “fully and irrevocably destroyed” [Lusad’s] ‘economic and commercial operations’,” and frustrated Claimants’ “legitimate expectation to operate and profit from a 10-year Concession that was subject to renewal.”⁴¹³
414. According to Claimants, this indirect expropriation is unlawful because it was not done for a public purpose but for political reasons, it was discriminatory because it favored the government-owned app, “Mi Taxi”, violated due process and was not done in exchange of fair and prompt compensation.⁴¹⁴ Claimants contend that they met their obligations under the Concession, were ready to start implementing it, and acted legally, as confirmed by Mr. Muñana.⁴¹⁵ Even if there were “errors” in the performance of the Concession, this “would not erase the expropriation claim.”⁴¹⁶
415. Lastly, as regards the alleged suspension communications of 2018, Claimants argue that the two suspension letters submitted as Exhibits C-0018 and C-0019 “are authentic and have been supported by the introduction of originals,” *i.e.*, Exhibits C-0226 and C-0227, and by sworn declarations from Messrs. Zayas, León, Herrera, and Muñana, without “a credible rebuttal” from Respondent to the “plain fact” of the suspensions.⁴¹⁷
416. Claimants add that Semovi never took action against Lusad for the alleged performance issues that it now invokes,⁴¹⁸ and that Lusad continued its work after the temporary suspension of May 2018 because it “was given every impression that the suspension was

⁴¹¹ Memorial, ¶ 179; C-0032, Call to public individual transport services concessionaires to adhere to the “Mi Taxi” application, published in the Official Gazette of Mexico City, 16 April 2020; C-0108, Video of press conference of Claudia Sheinbaum regarding Mi Taxi, 9 September 2020.

⁴¹² Memorial, ¶ 180; CL-0011, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶ 107.

⁴¹³ Memorial, ¶¶ 193-194; CL-0010, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003; CL-0012, *Metalclad v. Mexico*; CL-0028, *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, 18 April 2013; CL-0008, *Odyssey Marine Exploration, Inc. v. United Mexican States*, ICSID Case No. UNCT/20/1, Mexico’s Counter Memorial, 23 February 2021, ¶¶ 551-553, 566.

⁴¹⁴ Memorial, ¶¶ 184-185, 187-189.

⁴¹⁵ Reply, ¶ 259.

⁴¹⁶ Reply, ¶¶ 254, 269-270 (citing the Witness Statement of Mr. Eduardo Herrera De Juana, 25 October 2022), 281-285.

⁴¹⁷ Reply, ¶ 264.

⁴¹⁸ Reply, ¶ 272.

temporary.” Accordingly, Lusad proceeded to develop eight installation centers by September 2018 “to install the L1bre System in all of Mexico City’s taxis within a year’s time.”⁴¹⁹

417. Claimants further note that there is no dispute between the Parties that Lusad “at one time had significant value, but no longer has any value” and that Respondent has never alleged that the L1bre System could “suddenly be able to be installed,” thus, confirming the expropriation.⁴²⁰

2. Respondent’s position

418. Respondent first submits that Claimants had no property that could be expropriated because they have failed to identify specific rights that are valid under Mexican law.⁴²¹ In particular, Lusad failed to meet the requirements of the Concession that included (i) presenting a bond and an insurance policy, which was a “cause for revocation of the Lusad Concession,” (ii) maintaining the same shareholders and number of shares for 5 years as required by clause 11 of the 2018 Concession, (iii) completing the replacement, installation, and maintenance of taximeters, (iv) fulfilling the trial period of the digital taximeters, including the installation and operation of the devices installed,⁴²² (v) obtaining the permits for the manufacture and market of the tariff collection device,⁴²³ (vi) submitting the annual reports of digital taximeters,⁴²⁴ and (vii) having the authorization to sign the Lusad Concession.⁴²⁵
419. Respondent further submits that illegal rights cannot be expropriated because they did not exist in the first place, as found in *Infinity Gold v. Costa Rica*, and *Arif v. Moldova*,⁴²⁶ and that, in this case, the Declaration of Necessity of 2016, the 2018 Notice and the 2018 Concession were declared illegal by Mexican courts in the three *amparo* proceedings and

⁴¹⁹ Reply, ¶ 270, citing the Witness Statement of Mr. Eduardo Herrera De Juana, 25 October 2022, ¶ 46-47.

⁴²⁰ Reply, ¶ 262.

⁴²¹ Counter-Memorial, ¶ 395.

⁴²² Counter-Memorial, ¶ 398; DLG Expert Report, ¶¶ 265-267; R-0088, Compliance Audit Report, 2017; R-0074, Oficio No. DO-1909-2017 from Semovi to the Director of Mobility Regulation and Standards (*Director de Normatividad y Regulación de la Movilidad*), 22 May 2017.

⁴²³ Counter-Memorial, ¶ 398.

⁴²⁴ Counter-Memorial, ¶ 398; R-0089, Oficio DGN.312.01.2016.3771 of 18 October 2016 from the General Bureau of Standards to Lusad.

⁴²⁵ Counter-Memorial, ¶ 398.

⁴²⁶ RL-0084, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021, ¶¶ 708-710; RL-0089 / CL-0182, *Arif v. Moldova*, ¶ 175.

their appeals for review,⁴²⁷ and by Mexican authorities in criminal investigations.⁴²⁸ Respondent contends that the fact that Semovi has not started a *juicio de lesividad* to challenge the Concession does not validate the Concession, since the Mexican authorities remain empowered to initiate such a proceeding but have not done so to “maintain the *status quo*.” In any event, the *amparo* judgments suggest that the Mexican courts would determine that Lusad’s Concession was illegal.⁴²⁹

420. Second, Respondent contends that Semovi did not locate the 2018 suspension letters submitted by Claimants as Exhibits C-0018 and C-0019, but found other unrelated documents with the same official registration numbers, which suggests that the aforementioned exhibits “are false.”⁴³⁰ Respondent further argues that its experts analyzed the hard copies submitted by Claimants as originals of the suspension letters (C-0226 and C-0227) and concluded that both were fake because Ms. Balandrán’s signature in these documents presented irregularities, like the number of moments that the author of the signature took when drafting the signature, the manner in which the signature was initiated and terminated, and the speed of execution. The document itself has different fonts and resolution of Semovi’s logo when compared to the equivalent document presented by Respondent (R-0096).⁴³¹ Respondent’s expert also identified as an anomaly the fact that they found the same differences in Exhibits C-0226 and C-0227 with respect to their originals.⁴³² Also, contrary to Claimants’ allegations, there is nothing in Claimants’ witness statements evidencing that the exhibits are authentic.⁴³³
421. Moreover, Claimants did not challenge the alleged suspension of the Lusad Concession before Mexican authorities,⁴³⁴ and rather continued to implement it after the alleged suspension.⁴³⁵ Respondent affirms that “Semovi has not suspended the Lusad Concession, regardless of the fact that there are irregularities surrounding its granting to

⁴²⁷ Counter-Memorial, ¶¶ 402, 405, 408; R-0100, Amparo Ruling 1135/2016, 11 November 2016 (R-0101, Appeal for Review Ruling, 389/2016, 25 May 2017); R-0036, Amparo Ruling 693/2018, 9 April 2019, (R-0104, Appeal for Review Ruling 237/2019, 10 October 2019); R-0105, Amparo Ruling 622/2018, 6 September 2018 (R-0106, Appeal for Review Ruling 364/2018, 11 April 2019); C-0245, Final Ruling in Amparo case 627/2018, 13 July 2018; C-0246, Final Ruling in Amparo case 633/2018-II, 5 November 2018; C-0244, Final Ruling in Amparo case 373/2016, Auxiliar 33/2017, 2 May 2017.

⁴²⁸ Counter-Memorial, ¶¶ 402, 409; C-0133, Excerpts from Case No. CI-FSP/B/UI-3C/D/04494/11-2018, opened 22 November 2018, pp. 14-17; C-0136, Excerpts from Case No. CI-FIDCSP/B/UI-B-1 C/D/01258/O4-2021, opened 29 April 2021, pp. 13-18.

⁴²⁹ Rejoinder, ¶¶ 388, 395.

⁴³⁰ Counter-Memorial, ¶ 399; R-0096, Oficio DGSTPI-965-2018 of 2 May 2018 signed by the General Director of the Individual Public Transport Service; R-0097, Oficio DGSTPI-1943-2018 of 8 October 2018 signed by the General Director of the Individual Public Transport Service; R-0094, Oficio SM/SP/0054/2022 of 26 April 2022 from Semovi to the DGCJCI.

⁴³¹ Rejoinder, ¶ 370; Armenta-Bartolo Report, ¶¶ 7, 102, 109, 112.

⁴³² Rejoinder, ¶ 371; Armenta-Bartolo Report, ¶ 135.

⁴³³ Rejoinder, ¶ 372.

⁴³⁴ Counter-Memorial, ¶ 400.

⁴³⁵ Counter-Memorial, ¶ 148; R-0086, Oficio No. DGSTPI-2691-2018 from Semovi, 29 November 2018.

Lusad,” and concludes that it has not taken any measure equivalent to expropriation. As a result, Respondent argues that Claimants cannot now hold Mexico liable for their own negligence.⁴³⁶

422. Third, Respondent argues that it never took Lusad’s rights by implementing “Mi Taxi” because they are “substantially different” apps and Semovi never adopted measures to replace the taximeters or establish a new payment system. Furthermore, contrary to Claimants’ position, Semovi did enable the website for the appointments to install the L1bre System under the 2018 Notice. The issue was with Lusad’s website.⁴³⁷ Respondent submits that there is evidence that in May 2018, the group of taxi drivers who brought *Amparo* 693/2018 accessed the L1bre webpage, and that in November 2018, Semovi confirmed the installation appointments webpage.⁴³⁸ Also, Respondent contends that the platform *Internet Archive* does not allow to determine the exact moment that content was uploaded to a website, but at best the approximate dates in which this platform obtained a copy of the website, and in fact, there are not even records of Claimants’ L1bre website.⁴³⁹

B. MINIMUM STANDARD OF TREATMENT: NAFTA ARTICLE 1105

1. Claimants’ position

423. Claimants argue that under NAFTA Article 1105(1) they are entitled to fair and equitable treatment (“FET”), which reflects the “minimum standard of treatment,”⁴⁴⁰ and is an “umbrella concept” that includes transparency, protection of legitimate expectations, freedom from coercion, due process and good faith.⁴⁴¹ According to Claimants, the “indefinite suspension of Lusad’s Concession and subsequent replacement of Lusad’s L1bre System with Mexico’s own government-owned and operated Mi Taxi business” violated the FET obligation encompassed in the “sufficiently broad” legal standard in NAFTA Article 1105,⁴⁴² by (i) contradicting commitments and assurances that formed their legitimate expectations; (ii) engaging in unfair, unpredictable, arbitrary,

⁴³⁶ Counter-Memorial, ¶ 401.

⁴³⁷ Rejoinder, ¶¶ 373-374; Counter-Memorial, ¶¶ 146-147, footnote 131.

⁴³⁸ Rejoinder, ¶ 375; R-0102, *Amparo* Complaint 693/2018, p. 154; R-0086, Oficio No. DGSTPI-2691-2018 from Semovi, 29 November 2018.

⁴³⁹ Rejoinder, ¶ 375.

⁴⁴⁰ Memorial, ¶¶ 206-208; CL-0039, NAFTA Free Trade Commission, Note of Interpretation of Certain Chapter 11 Provisions, 31 July 2001; CL-0040, *Waste Management v. Mexico II*, ¶ 98.

⁴⁴¹ Memorial, ¶¶ 206, 209, 210; CL-0043, *Mobil Investments Canada Inc. and Murphy Oil Corporation. v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, ¶ 152.

⁴⁴² Memorial, ¶ 233; Reply, ¶ 309.

inconsistent, non-transparent, inequitable activity or bad faith behavior; and (iii) violating due process.⁴⁴³

424. First, Claimants argue that they made their investment based on legitimate expectations created by Respondent, including that it would not violate Mexican law, arbitrarily and unreasonably interfere with the investment, and compromise Claimants' "guaranteed revenues," and would rather uphold its obligations under the Concession, supporting the L1bre System.⁴⁴⁴
425. Lusad developed and prepared for the implementation of the L1bre System and received approvals from the government.⁴⁴⁵ When the Concession was granted in 2016, and amended in March 2017, Mexico City and Semovi had to "facilitate Lusad's installation of the L1bre System" and "inform taxi operators about the mandatory installation procedure."⁴⁴⁶ In August 2016, Lusad "began to install" the L1bre System "[h]aving already worked to develop the smartphone application, tablet software, and with an experienced team to implement both software and hardware solutions."⁴⁴⁷ Respondent "reaffirm[ed] Lusad's rights under the Concession" through communications, and the Mandatory Installation Notice of 17 April 2018.⁴⁴⁸ Even after the suspension of May 2018, Respondent "continued throughout the summer of 2018 to support Lusad in preparing for the implementation of the mandatory installation procedure."⁴⁴⁹
426. Despite the foregoing, without "signs of what was soon to come,"⁴⁵⁰ in October 2018, Respondent changed its position and, in violation of the Concession, Mexican law, and the Declaration of Necessity, adopted an indefinite suspension of the Concession due to

⁴⁴³ Memorial, ¶¶ 212, 233.

⁴⁴⁴ Memorial, ¶ 235.

⁴⁴⁵ Memorial, ¶¶ 237-238, citing C-0005, Necessity Declaration issued by Semovi, 30 May 2016; C-0046, Minutes of the session of the Evaluation Committee authorizing the issuance of the Declaration of Necessity, 25 May 2016; C-0065, L1bre software technical specifications from NullData, 11 January 2016; C-0011, Oficio No. DGN.312.01.2016.1534 from the Secretaría de Economía, authorizing Lusad's digital taximeter, 18 April 2016; C-0012, Certificate of Registration as taxi-hailing application provider, No. 6D6C61F32327F227C-1651180691531691, 1 June 2016; C-0043, Feasibility, Finality, and Justification Study, 22 April 2016; C-0044, Profitability study, attached to Lusad's Request for Concession (containing preliminary projections on profitability), 22 April 2016.

⁴⁴⁶ Memorial, ¶ 241; C-0007, Concession Agreement, 21 March 2017, Article 7.

⁴⁴⁷ Memorial, ¶ 242.

⁴⁴⁸ Memorial, ¶ 242; C-0056, Oficio No. DNRM-0673-2017 from SEMOVI confirming the validity of the Concession Agreement, 4 April 2017, pp. 2-3 (Disputed document); C-0057, Oficio No. DNRM-1460-2017 from Semovi confirming the validity of the Concession Agreement, 19 June 2017, p. 2; C-0016, Mandatory Installation Notice mandating the installation of the taximeters, published in the Gaceta Oficial de la Ciudad de México, 17 April 2018.

⁴⁴⁹ Memorial, ¶ 245; C-0060, Measurement Report from the National Metrology Centre (*Centro Nacional de Metrología*), 13 September 2018; C-0063, Verification Report from the National Metrology Centre (*Centro Nacional de Metrología*), 26 September 2018; C-0064, Certification from the General Bureau of Standards (*Dirección General de Normas*), 28 September 2018; Reply, ¶ 320.

⁴⁵⁰ Memorial, ¶ 248.

the coming of a new administration.⁴⁵¹ After a “limbo”, in January 2019, Claimants contend that “representatives of the Sheinbaum administration confirmed to Lusad’s representatives that the 28 October 2018 indefinite suspension meant that the Concession would never be honored by the government.”⁴⁵²

427. Claimants add that Lusad could only implement the L1bre System if the government compelled taxi drivers to install it but Semovi “never activated the electronic appointment platform,” thus, making it impossible to obtain the promised revenue from its investment.⁴⁵³ This, notwithstanding that the L1bre System was “self-enforcing” not requiring “the type of police enforcement Mexico presupposes.”⁴⁵⁴
428. Second, Respondent’s sudden change towards Claimants’ investment in October 2018, after having supported Lusad since April 2015, was arbitrary and unpredictable.⁴⁵⁵ Only a month had elapsed after the Mandatory Installation Notice when Respondent first suspended the Concession in May 2018.⁴⁵⁶ Claimants submit that Respondent’s arbitrary conduct continued in November 2018, only days after the indefinite suspension of October 2018, when “senior government officials attempted to dupe Lusad’s representatives into signing a back-dated and amended version of the Concession to amend post hoc the rights and obligations under the Concession,” at a “nighttime meeting.”⁴⁵⁷ Such a conduct was compounded with the development of Mi Taxi to replace the L1bre System.⁴⁵⁸
429. Third, Claimants also submit that Mexico violated NAFTA by attempting, during a November 2018 meeting, to dupe Lusad’s representative into signing a back dated version of the concession - the 2018 Concession that Mexico claims as the valid concession- which stripped out guaranteed revenue streams to which Claimants were entitled.⁴⁵⁹ Claimants also find arbitrariness, and therefore violation of the fair and equitable treatment standard, in that Mexican officials forged the file relevant to the Concession. According to Claimants the 13 Emails submitted with Mr. Muñana’s second witness statement evidence how officials of the Respondent manipulated and introduced forged documents into the file of the concession two years after it had been granted.⁴⁶⁰

⁴⁵¹ Memorial, ¶ 246.

⁴⁵² Memorial, ¶ 247, citing Witness Statement of Mr. Santiago León Aveleyra, 14 September 2021, ¶ 83; Witness Statement of Mr. Eduardo Zayas, 13 September 2021, ¶ 63.

⁴⁵³ Memorial, ¶ 249.

⁴⁵⁴ Reply, ¶ 311.

⁴⁵⁵ Memorial, ¶ 255.

⁴⁵⁶ Memorial, ¶ 256.

⁴⁵⁷ Memorial, ¶ 260; Witness Statement of Mr. Eduardo Zayas, 13 September 2021, ¶ 61.

⁴⁵⁸ Memorial, ¶ 263.

⁴⁵⁹ Memorial, ¶¶ 260-261.

⁴⁶⁰ Tr. Day 1 (ENG), 37:2-43:8; Tr. Closing Hearing, Day 1 (ENG), 14:6-15.

430. Lastly, Claimants argue that Respondent breached due process because they were not afforded any substantive administrative procedure before Respondent “unilaterally suspend[ed] the Concession” through one-page letters that only referenced political reasons as the grounds of the suspensions.⁴⁶¹

2. Respondent’s position

431. Respondent submits that the FET standard in NAFTA Article 1105(1) is limited to the treatment of investments not investors, and to the minimum standard of treatment, as classically understood under customary international law.⁴⁶² Thus, NAFTA has “a more limited range of obligations than FET as a treaty standard open to arbitral interpretation, and one with a relatively higher threshold for breach.”⁴⁶³

432. In this vein, Respondent submits that the breach of legitimate expectations cannot form the basis of a freestanding FET violation under customary international law and under NAFTA, but is only a factor to be considered,⁴⁶⁴ and that such expectations are narrow and cannot merely derive from laws in place but require specific representations made by the host State.⁴⁶⁵

433. Hence, Respondent submits that it did not generate reasonable and justifiable expectations in connection with the L1bre Project, considering that Respondent did not invite Claimants to invest in 2015 (the letter submitted by Claimants was never signed by Mr. León Tovar and is a false document), and the meetings between April and December 2015 rather raise concerns as to irregularities in the granting of the Concession.⁴⁶⁶ Also, the implementation of the project was impractical under the circumstances since forcing drivers to use the L1bre System would have been equivalent to modifying the concession of all taxi drivers in the city,⁴⁶⁷ and the *amparo* judgments demonstrate that the Concession was illegal.⁴⁶⁸

434. Respondent further argues that a breach of contract does not violate FET,⁴⁶⁹ and that legitimate expectations accommodate to the host State’s features and demand due diligence from the investor, which was lacking in this case because since 2015 various mobility service providers faced challenges entering the Mexico City.⁴⁷⁰

⁴⁶¹ Memorial, ¶¶ 267-268.

⁴⁶² Counter-Memorial, ¶¶ 410-412.

⁴⁶³ Counter-Memorial, ¶ 416.

⁴⁶⁴ Counter-Memorial, ¶ 419.

⁴⁶⁵ Counter-Memorial, ¶¶ 420-421.

⁴⁶⁶ Counter-Memorial, ¶¶ 422-423.

⁴⁶⁷ Counter-Memorial, ¶¶ 424-425.

⁴⁶⁸ Counter-Memorial, ¶ 426.

⁴⁶⁹ Counter-Memorial, ¶ 428.

⁴⁷⁰ Counter-Memorial, ¶¶ 432-435.

435. Respondent adds that Lusad had a “problematic” situation because it did not have a contract in 2016 and when it obtained the Concession in 2018 it failed to fulfill its obligations, including the trial period.⁴⁷¹ Moreover, Respondent argues that Claimants have failed to explain why if they had the Concession since 2016 with a 12-month trial period, it took them 38 months to finish it.⁴⁷² In any case, if the 2018 suspensions were authentic and real, Respondent finds it “highly questionable” that Claimants did not challenge such acts before the Mexican courts.⁴⁷³
436. Respondent also argues that it met its obligations to publish the Mandatory Installation Notice and enable the installation appointments website. Rather, it was Lusad who failed to enable its website. Furthermore, the 2018 notice was challenged and declared unconstitutional in Amparos 693/2018 and 622/2018, and thus, there could be no “legitimate expectations” on the Concession.⁴⁷⁴
437. Respondent further submits that NAFTA Article 1105 does not establish a free-standing, substantive obligation of good faith, which is rather a principle to assist the application of the FET standard. Moreover, the prohibition of arbitrary treatment has a high threshold that has not been met in this case since failure to comply with the country’s own laws does not amount to arbitrary conduct unless it is an outright and unjustified repudiation.⁴⁷⁵
438. In this regard, Respondent argues that it did not act in bad faith nor did it unjustifiably request Lusad to suspend the Concession due to the elections. No suspension existed and, even if it had, there was no political motivation since the suspensions were allegedly implemented before the elections of July 2018 and before the new administration took office.⁴⁷⁶
439. Respondent contends that, in any case, the Concession allowed for modifications by Semovi under sections 3 and 15.⁴⁷⁷ Also, section 14 of the Concession provides that the Concession would expire if Lusad did not start operations within the term of the Concession. In this regard, (i) Lusad has failed to explain why it did not enforce the Concession in the face of the alleged 2018 suspensions; and (ii) there is evidence that Lusad’s software was not functional and did not meet the standards of the Concession.⁴⁷⁸ Similarly, section 14 of the Concession allows for its revocation due to Lusad’s failure to

⁴⁷¹ Counter-Memorial, ¶¶ 436, 438.

⁴⁷² Counter-Memorial, ¶ 439.

⁴⁷³ Counter-Memorial, ¶¶ 439, 442; C-0053, Concession Agreement, 17 June 2016 (with a 3-month trial); C-0007, Concession Agreement, 21 March 2017 (with a 12-month trial).

⁴⁷⁴ Counter-Memorial, ¶¶ 440-441.

⁴⁷⁵ Counter-Memorial, ¶¶ 446-450.

⁴⁷⁶ Counter-Memorial, ¶¶ 454-455; Rejoinder, ¶¶ 398, 399.

⁴⁷⁷ Rejoinder, ¶ 413.

⁴⁷⁸ Rejoinder, ¶¶ 415-419.

meet certain obligations under the 2018 Concession, thus, defeating any legitimate expectation.⁴⁷⁹

C. NATIONAL TREATMENT: NAFTA ARTICLE 1102

1. Claimants' position

440. Claimants submit that Respondent discriminated against their investment “in favor of the government-owned service Mi Taxi,” thereby violating its National Treatment obligation in NAFTA Article 1102.⁴⁸⁰
441. As a threshold matter, Claimants contend that the “carve-out” from Article 1102 found in Article 1108(7)(a) is not applicable in this case because the Concession does not involve the act of “procurement”, understood as the purchase or sale of goods or services “by a governmental agency” “in return for money paid (...) to the investor or its affiliates.”⁴⁸¹ There is no mention to procurement in the Concession and the government did not “pay nor promise to pay Lusad anything” and rather gave it “the right to install digital taximeters (...) and earn revenue based on the services provided to the people in Mexico City.”⁴⁸² In any event, Article 1108(7)(a) would not preclude the Tribunal from finding that Respondent discriminated against Claimants’ investment under Article 1105.⁴⁸³
442. In this sense, Claimants argue that L1bre and Mi Taxi are in “similar” circumstances as required by NAFTA Article 1102 because they both fulfilled similar functions in the same market, that is, update the taxi fleet through technology to enhance safety and user experience.⁴⁸⁴
443. Claimants submit that despite the additional hardware benefits of Mi Taxi, their expert examined the source code of both apps and concluded that “the two services are comparable” on the nine features outlined in the Concession, that is, “real-time tracking information; login data; online storage of travel history; relevant information on passengers, drivers, and units; real-time route generation with traffic filtering; monitoring, security, and alerts by the Mexico City command center; pricing of trips

⁴⁷⁹ Rejoinder, ¶¶ 421-422.

⁴⁸⁰ Reply, ¶ 322.

⁴⁸¹ Reply, ¶ 325; CL-0197, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, ¶ 161.

⁴⁸² Reply, ¶ 326.

⁴⁸³ Reply, ¶ 327.

⁴⁸⁴ Reply, ¶¶ 328-330.

based on the official fares set for taxis in Mexico City; specifying the origin and destination of a trip; and payment using credit and debit cards or cash.”⁴⁸⁵

444. Claimants add that Respondent’s officials confirmed that Mi Taxi “was intended to replace the L1bre System.”⁴⁸⁶ Even if the government’s intended purpose for Mi Taxi was only security, this does not change its similarities with the L1bre System because it can in practice exceed that purpose and operate in the market of taxi technology services similar to the L1bre System.⁴⁸⁷ The alleged lack of profits of Mi Taxi also does not change the similarities because it ultimately takes the fees that Lusad would have received and gives them to the drivers.⁴⁸⁸
445. Claimants contend that Respondent’s control of Mi Taxi does not diminish the close similarities with the L1bre System because, under NAFTA Articles 1139 and 201, “government-owned enterprises can be comparable investors, and government ownership simply does not matter for the ‘in like circumstances’ test.”⁴⁸⁹
446. Lastly, Claimants submit that nationality-based discrimination only requires treating a domestic investment more favorably than a foreign investment in like circumstances, and no additional “targeting” or “discriminatory intent” is needed to find a breach of NAFTA Article 1102.⁴⁹⁰

2. Respondent’s position

447. Respondent contends that there was no violation of the National Treatment obligation under NAFTA Article 1102 because it does not apply to “purchases made by a Party or by a State enterprise” as per NAFTA Article 1108(7).⁴⁹¹ Also, NAFTA Article 1105 is not an alternative legal basis to Article 1102 for discrimination claims, it does not preclude differentiations between nationals and aliens in general,⁴⁹² and in any case, Article 1105 does not encompass discrimination in the way invoked by Claimants, which must be due to “racial or regional prejudice,” which is not the case.⁴⁹³

⁴⁸⁵ Reply, ¶ 334; Expert Report of Mr. Joshua Mitchell (Kroll), 3 November 2022, Section 4.

⁴⁸⁶ Reply, ¶ 330; C-0023, Interview with Eduardo Clark, General Director of the Center of Technological Development of the Digital Agency of Public Innovation of the Government of Mexico City, 5 September 2019.

⁴⁸⁷ Reply, ¶ 335.

⁴⁸⁸ Reply, ¶ 336.

⁴⁸⁹ Reply, ¶ 331.

⁴⁹⁰ Reply, ¶ 337.

⁴⁹¹ Counter-Memorial, ¶¶ 15, 458-472.

⁴⁹² Rejoinder, ¶¶ 431-432; RL-0128, *Mercer International Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018 (“*Mercer v. Canada*”), ¶¶ 7.58-7.60 (the Tribunal observes that this document was cited as RL-0048 in footnote 590 of Respondent’s Rejoinder). (This document was also submitted as RL-0166).

⁴⁹³ Rejoinder, ¶ 431.

448. In any case, the requirements to find a breach of the National Treatment standard in NAFTA Article 1102 have not been met.
449. First, the subjects or objects identified by Claimants are not comparable or “in like circumstances” to an investor or investment of the Respondent State.⁴⁹⁴ The government of Mexico City is not an investor or an enterprise since it is a State organ and its purpose is to provide public services rather than engaging in profit-making activities.⁴⁹⁵ Also, Mi Taxi focuses on providing security not competing with mobility service providers, it has its own source code different from L1bre’s, and it does not require a digital taximeter nor does it calculate the route or cost of the trip.⁴⁹⁶
450. Second, there is no evidence of discrimination based on nationality given that Respondent did not take any action “*because* the Claimants were –at least on paper– investors of the United States and Canada.”⁴⁹⁷ Respondent argues that NAFTA’s Contracting States and multiple tribunals have acknowledged that the objective of Article 1102 is to protect against nationality-based discrimination.⁴⁹⁸
451. Third, Semovi and the Government of Mexico City did not grant less favorable treatment to the L1bre System, and the government actions were carried out in accordance with rational and nondiscriminatory policies.⁴⁹⁹ Respondent merely deployed its own application to enhance the safety and efficiency of a public service, it did not take any measure that discriminated against foreigners, and even if there was any measure that had an effect less favorable for Claimants with respect to other comparable companies –of which there is no evidence– such effects were related to rational policies.⁵⁰⁰
452. Lastly, Respondent contends that the fact that Lusad was unable to implement the L1bre System, which included very different features from those of Mi Taxi, does not mean that Semovi was permanently banned from taking measures to improve the safety of taxi passengers under NAFTA Article 1102.⁵⁰¹

⁴⁹⁴ Counter-Memorial, ¶ 466.

⁴⁹⁵ Rejoinder, ¶ 434.

⁴⁹⁶ Counter-Memorial, ¶ 467; Witness Statement of Mr. Eduardo Clark García Dobarganes, ¶ 28; Quandary Expert Report, ¶¶ 69-76, 72, 171.

⁴⁹⁷ Counter-Memorial, ¶ 470.

⁴⁹⁸ Rejoinder, ¶ 437; Counter-Memorial, ¶ 463, footnote 619; RL-0141, *Archer Daniels Midland Company y Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007, ¶ 205; RL- 0092, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶ 220; RL-0166, *Mercer v. Canada*, ¶ 7.7; RL-0087, *Marvin Feldman v. Mexico*, ¶ 181; RL-0167, *The Loewen Group Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, ¶ 139.

⁴⁹⁹ Counter-Memorial, ¶¶ 471-472.

⁵⁰⁰ Rejoinder, ¶¶ 444-446.

⁵⁰¹ Rejoinder, ¶ 441; Quandary Expert Report, ¶¶ 70-71.

D. TRIBUNAL'S ANALYSIS

453. The Tribunal observes that Claimants rely on two main conducts of Respondent to invoke the breach of three NAFTA obligations: Minimum Standard of Treatment in Article 1105, the protection against unlawful expropriations in Article 1110, and the National Treatment standard in Article 1102. Such conducts are: 1) the suspension of the Concession in 2018 by Semovi, and 2) the implementation of Mi Taxi.
454. The Tribunal will address first the conducts invoked by Claimants and then determine if such conducts result in the breaches alleged by Claimants.

1. The suspension of the 2018 Concession

455. The Tribunal observes that the Parties disagree on whether the Concession was suspended. Claimants submitted exhibits C-18, C-19, C-226, and C-227 as the suspension letters as well as the witness statements of Messrs. Zayas, León, Herrera, and Muñana as evidence of the suspensions that allegedly took place in May and October 2018.⁵⁰²
456. Respondent contends that it never suspended the Concession in 2018. According to Respondent, the suspension letters introduced by Claimants are forged documents. Respondent claims not to have located these documents in Semovi's records,⁵⁰³ and argues that there are significant differences between the two sets of exhibits submitted by Claimants as the digital and original hard copy versions of the same document, *i.e.*, C-18 v C-226, and C-19 v C-227,⁵⁰⁴ showing that the suspension letters submitted by Claimants are not authentic.⁵⁰⁵
457. The majority of the Tribunal considers that the evidence submitted by Claimants as to the existence of the 2018 suspensions, which are the basis for the alleged breaches, has serious flaws and inconsistencies, particularly: (a) inconsistencies in Claimants' exhibits corresponding to the suspension letters, and (b) contradictory conduct of Respondent and Lusad's representatives after the alleged suspensions. Moreover, the evidence in the record shows that not only is there no convincing evidence of a suspension but also that absent the alleged suspensions, (c) Claimants were not in a position to fully install the L1bre System and complete the project in accordance with the terms of the Concession.

⁵⁰² Reply, ¶ 264.

⁵⁰³ Counter-Memorial, ¶ 399; R-0096, Oficio DGSTPI-965-2018 of 2 May 2018 signed by the General Director of the Individual Public Transport Service; R-0097, Oficio DGSTPI-1943-2018 of 8 October 2018 signed by the General Director of the Individual Public Transport Service; R-0094, Oficio SM/SP/0054/2022 of 26 April 2022 from Semovi to the DGCJCI.

⁵⁰⁴ Rejoinder, ¶¶ 211 *et seq.*

⁵⁰⁵ Rejoinder, ¶ 371; Armenta-Bartolo Report, ¶ 135.

a. The inconsistencies in Claimants' exhibits

458. The record indicates that the dispute was plagued with mutual allegations of falsification of documents and both Parties submitted expert reports to support the authenticity of certain documents and challenge the authenticity of others.
459. In view of the differences between the experts, the Tribunal requested the graphology experts of both Parties to prepare a joint expert report. However, there were almost no areas of agreement between them, not even on the technical approach.⁵⁰⁶
460. Nevertheless, it is undisputed that there are clear visual discrepancies between the digital and hard copy versions of what is meant to be the same document, corresponding to the May and October 2018 suspension letters. Claimants themselves stated that they “cannot explain” such differences:

*Exhibits C-0018 and C-0019 attached to Claimants' Memorial, and the original (wet ink) versions of Oficio DGSTPI-965-2018 and DGSTPI-1943-2018 produced for inspection, contain the **same wording**, in the **same order**, the **same date**, the **same oficio number**, the **same subject line**, are **addressed to the same person**, and are **signed by the same SEMOVI representative**, Lic. Alejandra Balandrán Olmedo, whose signature appears the same in both the exhibits and the original documents produced.*

The only difference between Exhibits C-0018 and C-0019 and the documents inspected is the line spacing. For example, the sentence highlighted below contains the same wording, in the same order in both documents, and only the spacing is different: (...)

Claimants, unfortunately, cannot explain the difference in the line spacing between the copies filed as C-0018 and C-0019 and the originals in Claimants possession. Both sets of documents are derived from the DGSTPI, which is the acronym for the Dirección General del Servicio de Transporte Público Individual, an administrative unit within SEMOVI. Claimants have been attempting to obtain the complete DGSTPI file from Mexico, yet Mexico has refused, requiring Claimants to file their Motion to Compel dated 24 October 2022.⁵⁰⁷

461. In this regard, the Tribunal notes that the “spacing” difference mentioned by Claimants is not a minor element. Rather, it shows that exhibits C-226 and C-227 are not identical to C-18 and C-19, and therefore, cannot be their hard copy versions:

⁵⁰⁶ Tr. Closing Hearing, Day 1, 214:16-19, 215:1-7 (Ms. Toxqui's Presentation, “Mr. Corral ignored any comment to the questioned exhibits when that was the main function of the Joint Report but also an essential step in the graphoscopic examination.”)

⁵⁰⁷ R-0209, Claimants' letter, 10 November 2022 (emphasis in original).

C-18

CDMX
CIUDAD DE MÉXICO

Ciudad de México, 30 de mayo de 2018.

OFICIO N°: DGSTPI-965-2018

ASUNTO: Solicitud de suspensión del inicio del periodo instalación de taxímetros digitales.

LIC. EDUARDO ZAYAS DUEÑAS,
Representante legal de la empresa
Servicios Digitales Lusad S. de R.L. de C.V.
Calle Montes Urales Núm. 632, 3er piso
Col. Lomas de Chapultepec, Delegación Miguel
Hidalgo, Ciudad de México, C.P. 1100

PRESENTE

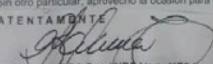
Con fundamento en el artículo 95 Quinquies del Reglamento Interior de la Administración Pública del Distrito Federal (ahora Ciudad de México), solicito suspender el inicio del periodo de instalación de taxímetros digitales en las unidades concesionadas taxi de la Ciudad de México, de conformidad a la Publicación de la Gaceta de fecha 17 de abril de 2018 del "Aviso por el que se da a conocer el procedimiento para la instalación gratuita de taxímetros digitales con sistema de geolocalización satelital integrado, así como una aplicación tecnológica (app) para la contratación remota del servicio de transporte público individual de pasajeros "taxi" de la Ciudad de México y sustitución de los taxímetros actuales como parte del mejoramiento del transporte público en la Ciudad de México".

Lo anterior se solicita de conformidad al periodo de elecciones que atraviesa la Ciudad de México y en absoluto respeto a la jornada electoral, previendo que estas instalaciones pudieran ser objeto de señalamientos como propaganda proselitista es que se ha decidido suspender la instalación de taxímetros digitales a partir de la notificación del presente oficio y hasta pasado el día de las elecciones se le notifique oficialmente que pueda reanudarlas.

No omito manifestar que esta suspensión no es atribuible a su representada, pues hasta la fecha en que se emite el presente oficio, la concesionada ha cumplido a cabalidad con las obligaciones y derechos que derivan del título que detenta.

Sin otro particular, aprovecho la ocasión para enviarle un cordial saludo.

ATENTAMENTE



LIC. ALEJANDRA BALANDRAN OLMEDO,
DIRECTORA GENERAL DEL SERVICIO DE TRANSPORTE PÚBLICO INDIVIDUAL
C.P. María del Carmen Rodríguez Flores, Secretaria de Movilidad de la Ciudad de México. Para su conocimiento.
C.P. José Roberto Romero Cardenas, Subsecretario del Transporte. Para su conocimiento.
ABD/04

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C-226

CDMX
CIUDAD DE MÉXICO

Ciudad de México, 30 de mayo de 2018.

OFICIO N°: DGSTPI-965-2018

ASUNTO: Solicitud de suspensión del inicio del periodo instalación de taxímetros digitales.

LIC. EDUARDO ZAYAS DUEÑAS,
Representante legal de la empresa
Servicios Digitales Lusad S. de R.L. de C.V.
Calle Montes Urales Núm. 632, 3er piso
Col. Lomas de Chapultepec, Delegación Miguel
Hidalgo, Ciudad de México, C.P. 1100

PRESENTE

Con fundamento en el artículo 95 Quinquies del Reglamento Interior de la Administración Pública del Distrito Federal (ahora Ciudad de México), solicito suspender el inicio del periodo de instalación de taxímetros digitales en las unidades concesionadas taxi de la Ciudad de México, de conformidad a la Publicación de la Gaceta de fecha 17 de abril de 2018 del "Aviso por el que se da a conocer el procedimiento para la instalación gratuita de taxímetros digitales con sistema de geolocalización satelital integrado, así como una aplicación tecnológica (app) para la contratación remota del servicio de transporte público individual de pasajeros "taxi" de la Ciudad de México y sustitución de los taxímetros actuales como parte del mejoramiento del transporte público en la Ciudad de México".

Lo anterior se solicita de conformidad al periodo de elecciones que atraviesa la Ciudad de México y en absoluto respeto a la jornada electoral, previendo que estas instalaciones pudieran ser objeto de señalamientos como propaganda proselitista es que se ha decidido suspender la instalación de taxímetros digitales a partir de la notificación del presente oficio y hasta pasado el día de las elecciones se le notifique oficialmente que pueda reanudarlas.

No omito manifestar que esta suspensión no es atribuible a su representada, pues hasta la fecha en que se emite el presente oficio, la concesionada ha cumplido a cabalidad con las obligaciones y derechos que derivan del título que detenta.

Sin otro particular, aprovecho la ocasión para enviarle un cordial saludo.

ATENTAMENTE



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C-19

CDMX
CIUDAD DE MÉXICO

Ciudad de México, 28 de octubre de 2018.

OFICIO N°: DGSTPI-1943-2018

ASUNTO: Solicitud de suspensión del inicio del periodo instalación de taxímetros digitales por transición de gobierno.

LIC. EDUARDO ZAYAS DUEÑAS,
Representante legal de la empresa
Servicios Digitales Lusad S. de R.L. de C.V.

PRESENTE

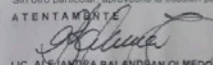
Con fundamento en el artículo 95 Quinquies del Reglamento Interior de la Administración Pública del Distrito Federal (ahora Ciudad de México), solicito continúe suspendido el inicio del periodo de instalación de taxímetros digitales en las unidades concesionadas taxi de la Ciudad de México, de conformidad a la Publicación de la Gaceta de fecha 17 de abril de 2018 del "Aviso por el que se da a conocer el procedimiento para la instalación gratuita de taxímetros digitales con sistema de geolocalización satelital integrado, así como una aplicación tecnológica (app) para la contratación remota del servicio de transporte público individual de pasajeros "taxi" de la Ciudad de México y sustitución de los taxímetros actuales como parte del mejoramiento del transporte público en la Ciudad de México".

Lo anterior se solicita de conformidad a que de las elecciones celebradas el 01 de julio de 2018, se indicó un cambio político en el mandato de la Jefatura de Gobierno de la Ciudad de México, con lo que se dio inicio a un procedimiento administrativo de transición entre los servidores públicos actuales que están laborando en la Administración Pública de la Ciudad de México, con aquellos que ya han sido anunciados y la integrarán; en ese orden de ideas esta dependencia ha comenzado intercambio de información y documentos con el gabinete que asumirá funciones, quienes han solicitado que continúe la suspensión de la instalación gratuita de taxímetros digitales en tanto asuman el cargo y funciones.

Esta suspensión de instalación de taxímetros digitales continuará a partir de la notificación del presente oficio, y se reanudarán en tanto se le notifique oficialmente que podrá continuar la misma, sin que esto se atribuya a responsabilidad a la concesionaria, quien hasta la fecha ha cumplido satisfactoriamente con lo que se le ha requerido.

Sin otro particular, aprovecho la ocasión para enviarle un cordial saludo.

ATENTAMENTE



LIC. ALEJANDRA BALANDRAN OLMEDO,
DIRECTORA GENERAL DEL SERVICIO DE TRANSPORTE PÚBLICO INDIVIDUAL
C.P. María del Carmen Rodríguez Flores, Secretaria de Movilidad de la Ciudad de México. Para su conocimiento.
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ABD/04

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C-227

CDMX
CIUDAD DE MÉXICO

Ciudad de México, 28 de octubre de 2018.

OFICIO N°: DGSTPI-1943-2018

ASUNTO: Solicitud de suspensión del inicio del periodo instalación de taxímetros digitales por transición de gobierno.

LIC. EDUARDO ZAYAS DUEÑAS,
Representante legal de la empresa
Servicios Digitales Lusad S. de R.L. de C.V.

PRESENTE

Con fundamento en el artículo 95 Quinquies del Reglamento Interior de la Administración Pública del Distrito Federal (ahora Ciudad de México), solicito continúe suspendido el inicio del periodo de instalación de taxímetros digitales en las unidades concesionadas taxi de la Ciudad de México, de conformidad a la Publicación de la Gaceta de fecha 17 de abril de 2018 del "Aviso por el que se da a conocer el procedimiento para la instalación gratuita de taxímetros digitales con sistema de geolocalización satelital integrado, así como una aplicación tecnológica (app) para la contratación remota del servicio de transporte público individual de pasajeros "taxi" de la Ciudad de México y sustitución de los taxímetros actuales como parte del mejoramiento del transporte público en la Ciudad de México".

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Sin otro particular, aprovecho la ocasión para enviarle un cordial saludo.

ATENTAMENTE

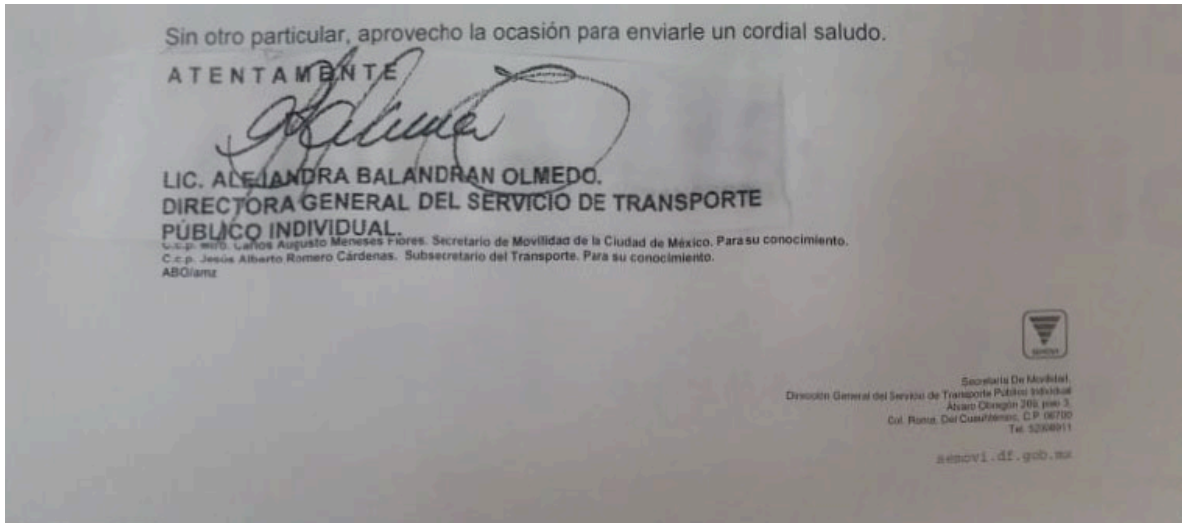


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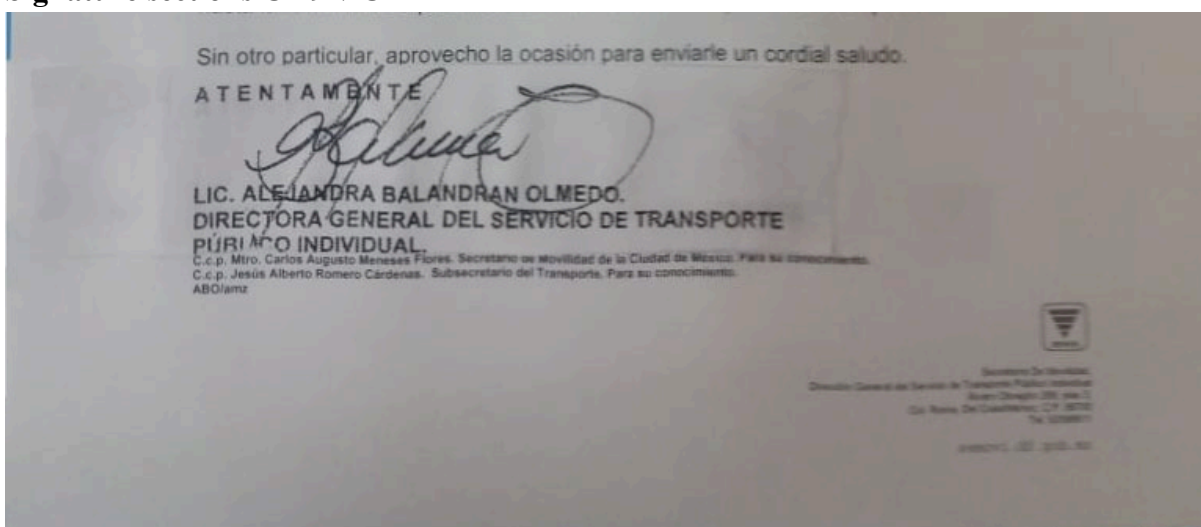
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462. Furthermore, the spacing is not the only difference. There are other visual differences in the signature section of both sets of documents. The signatures themselves are clearly not identical. There is a noticeable difference at the end of the signature in the final circular trace. There is also a blurred and overlapped text in exhibits C-18 and C-19 in the words “*público individual*” not found in exhibits C-226 and C-227:

Signature sections C-18 v C-226



Signature sections C-19 v C-227



Sin otro particular, aprovecho la ocasión para enviarle un cordial saludo.

ATENTAMENTE

LIC. ALEJANDRA BALANDRAN OLMEDO.
DIRECTORA GENERAL DEL SERVICIO DE TRANSPORTE
PÚBLICO INDIVIDUAL

C.c.p. Mtro. Carlos Augusto Meneses Flores. Secretario de Movilidad de la Ciudad de México. Para su conocimiento.
C.c.p. Jesús Alberto Romero Cárdenas. Subsecretario del Transporte. Para su conocimiento.
ABO/amz


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semovi.df.gob.mx

463. Claimants alleged that they had “confirmatory evidentiary support” for the documents challenged by Respondent⁵⁰⁸ consisting of the sworn declarations from Messrs. Zayas, León, Herrera, and Muñana.⁵⁰⁹ However, none of the testimonies explain the clear inconsistencies between the exhibits presented by Claimants. Moreover, there is no persuasive explanation as to why Claimants did not submit, from the outset, the digital versions of exhibits C-0226 and C-0227 and did not produce the hard copies of exhibits C-0018 and C-0019.
464. In sum, the alleged suspension letters of 2018 are key documents to determine the relevant conduct of Respondent. Yet in the view of the majority of the Tribunal, the Claimants produced some questionable documents and were not able to explain why they submitted substantially different versions of documents they should have on hand given their importance at different stages of the proceedings.

⁵⁰⁸ Reply, ¶ 19.

⁵⁰⁹ Reply, ¶ 264.

b. Contemporary behavior of the Parties' representatives

465. The concern over the existence of the 2018 suspension, rooted in the documentary inconsistencies outlined above, is further confirmed by the contemporary conduct of Mr. Zayas and Mexico's officials.
466. In April 2018, Mr. Zayas requested "information on the outcome" of the Adjudication Committee's session and, in November 2018, he requested "the delivery of the definitive concession title SEMOVI/DGSTPI/001/2016" or to be served with the concession title. He did not allege, dispute or even mention the suspensions of the Concession, despite the fact that the letters purportedly suspending the Concession were issued in May and October 2018.⁵¹⁰ Mr. Zayas claims that he did not sign these documents on the date that appear therein – April 2018 – but in November 2018 when he allegedly was ambushed to sign a different concession.⁵¹¹ However, whether the documents were signed by Mr. Zayas in April or November, they were signed after the date of the alleged suspension and none of the documents mentions that the concession had been suspended. Had the concessions been suspended, as alleged by Claimants, one would have expected Mr. Zayas to make some statement related to the suspension.
467. A letter dated 29 November 2018, from Ms. Balandrán to the OIC stated that the testing phase was ready, and that the appointments link, and website had been enabled but that "to date there is no registry of a concessionaire having generated any appointments."⁵¹² It is unclear why Semovi would insist on the implementation of the Concession if Respondent had supposedly suspended it.
468. In the criminal complaint filed by Lusad in 2019 (after the purported letters of suspension)⁵¹³ there is no mention whatsoever of the alleged suspension of the concession, despite the fact that the complaint addresses the 7 November 2018 meeting and the surrounding events.
469. In sum, the majority of the Tribunal reaches the conclusion that the clear inconsistencies in the exhibits submitted as the 2018 suspension letters, the lack of explanation for such inconsistencies, and the conduct of Mr. Zayas, and the Mexican government after the purported letters of suspension, indicate that it is more likely than not that Respondent did not impose an indefinite suspension of the Concession, as Claimants allege.

⁵¹⁰ C-0168, Semovi file submitted by Mexico, pp. 497 and 500 (Tribunal's translation from Spanish: "*el resultado y acuerdo tomado en el mismo*" ... "*sea ENTREGADA de manera oficial la concesion definitiva número SEMOVI/DGSTPI/001/2016*").

⁵¹¹ Second Witness Statement of Mr. Eduardo Zayas, 30 November 2022, ¶¶ 27-29. Tr. Day 2 (ENG), 345: 5-9.

⁵¹² C-0168, Semovi file submitted by Mexico, p. 523 (Tribunal's translation from Spanish: "*sin que a la fecha se tenga registro de que algún concesionario haya generado cita alguna.*").

⁵¹³ C-343, Lusad's Criminal Complaint of 2018.

c. Status of the L1bre System at the time of the alleged suspensions

470. The majority of the Tribunal further observes that the expert and factual evidence in the record not only shows that there is no convincing evidence of the alleged suspension, but also that, even in the absence of the alleged suspensions, Claimants were not ready to implement the Concession by 2018.

(i) Mr. Mitchell's expert evidence

471. The L1bre System, according to Claimants' own description, was not merely a replacement of the traditional taximeter system. It was an integrated system to update Mexico City's taxi fleet using new technology, including, in particular, a smartphone application that would enhance users' experience and improve safety.⁵¹⁴

472. The foregoing means that a functional taximeter or equivalent measurement instrument – in other words the tablets installed in the taxis - was only half of the infrastructure required to provide the service. The other half of the service was a functioning app to hail taxis, which, under Appendix 5 of the Concession was to have nine general features:⁵¹⁵

1-Login data

2-Real-time tracking information

3-Online storage of travel history

4-Relevant information on passengers, drivers, and units (vehicles)

5-Real-time route generation with traffic filtering

6-Monitoring, security, and alerts by the Mexico City command center

7-Pricing of trips based on the official fares set for taxis in Mexico City

8-Specifying the origin and destination of a trip

9-Payment using credit and debit cards or cash

473. The technical evidence in the record does not support Claimants' allegation that the app was functioning by 2018, and therefore, that the L1bre System was ready to be implemented, and was frustrated by Respondent's actions.

⁵¹⁴ Reply, ¶ 330.

⁵¹⁵ C-0007, Concession Agreement, 21 March 2017, Appendix 5, Features and technical elements of Digital Taximeters, pp. 71-72.

474. The majority of the Tribunal is of the opinion that Claimants' expert, Mr. Mitchell, was not able to conclude that the app was working at the time of the alleged suspension or at any time thereafter. He only concluded that hypothetically it "would work."⁵¹⁶ However, it is different to hold a mere hypothesis that an app *would* work if further developed and enhanced during an unspecified timeframe, than to hold that the app *actually* worked and was ready for the implementation of the L1bre System.

475. The main limitation Mr. Mitchell faced in concluding that the app worked was the inability to conduct live testing due to the lack of access to a backend server at the time of his review:

19. At this point, I could not proceed with live testing of the application due to the nature of the software requiring connectivity with backend servers. This obstacle was to be expected because authentication into the application would be handled by remote servers and not locally on the device. I am instructed that Lusad no longer maintains backend servers associated with the application. (...)

21. I concluded the application presents a screen for the user, whether a driver or passenger, and appropriately begins the login authentication process. Due to the nature of the application, I could not further test live functionality in the application; consequently, I proceeded to my second approach, i.e., analysis of the application functionality by reference to the raw source code.

476. Claimants did not provide the source code of the backend server to the experts, or even a similar alternative to test the app and perform the functionality analysis of the L1bre source code.⁵¹⁷ Therefore, the expert adopted the following procedure:

*22. (...) I assessed the L1bre Android source code to determine if the required functionality was present. I performed this analysis using a variety of industry-standard software analysis tools and techniques. These included automated mapping of code hierarchy to identify areas of activity as well as manual review of the source code within an integrated development environment ("IDE") to explore which functions were implemented and how the application flowed.*⁵¹⁸

477. The lack of a backend server proved fatal to the assessment of Mr. Mitchell because there are at least two fundamental features that he could not test under his approach, that is, the online storage of travel history, and the real-time route generation.

⁵¹⁶ Tr. Day 4 (ENG), 1261:16-21.

⁵¹⁷ Quandary Expert Report, ¶ 127 (d).

⁵¹⁸ Mitchell Report, ¶ 22.

The Online Storage of Travel History

478. The expert affirms that he:

*reviewed the L1bre source code for functionality pertaining to travel history. [He] understood this feature to mean that trip information for the user is recorded and stored on the backend server. (...) [He] identified many functions related to this feature that reference trip actions, beginning with hailing a ride through to acknowledging that the destination has been reached. Table 1 presents the functions [he] noted that are related to the travel history feature. Figure 12 shows how one of these functions named SendGetTripSummary operated (...) Figure 12 shows the retrieval of the trip details through the fetchTripSummary function which leverages the SendGetTripSummary function. The code snippet in Figure 13 shows the implementation of how the trip summary is captured and subsequently sent to the backend server.*⁵¹⁹

479. This excerpt reveals compelling flaws in the analysis. The fact that there are functions “related to” a feature does not necessarily mean that the feature itself was tested and demonstrated to work. The expert simply did not test the feature. Also, a trip summary is not necessarily the same as storing travel history. Similarly, it is not clear how a “code snippet” demonstrates that the “fetchTripSummary” function worked and effectively sent the history to the backend server, when the expert could not –and did not– test it due to the lack of a backend server.

The Real-Time Route Generation

480. Similar issues arise with the real-time route generation feature. The expert holds that:

[he] reviewed the L1bre source code for functionality pertaining to real-time route generation with traffic filtering. [He] understood this feature to mean that when an origin and destination are inputted, the application generates and provides a route between the two locations based on real-time traffic conditions. For this feature, [he] noted that the software leverages the Google Maps application programming interface (“API”) (Figure 16). This feature was likely implemented on the server side of the application, which would not be reviewable from the client-side source code. Given the unavailability of the servers, [he] was unable to review how this was implemented on the server side. In [his] experience, this style of implementation would allow for more up-to-date map and traffic data to be used when generating the route. It also would significantly reduce the storage and computational requirements on the local device because the route calculation would be performed on the server-

⁵¹⁹ Mitchell Report, ¶¶ 31-32.

*side. [He] observed the L1bre source code does have line items associated with this API in a manner consistent with requesting and retrieving data from Google Maps that would likely be used for a route based on near-real-time conditions (Figure 17). [He] also noted this implementation was consistent with the technical outline detailed in the Concession.*⁵²⁰

481. Again, without the backend server, this functionality could not be fully tested, and the expert's analysis was limited to "the client-side source code." There is only evidence of "the source code interaction with the Google Maps API"⁵²¹ but not of its functionality.
482. The limited conclusions of Mr. Mitchell's analysis due to the lack of a backend server, and thus, a complete functionality assessment, is confirmed by the way in which he divides his conclusions between "functionality" and "features." Mr. Mitchell only recognizes the "visual functionality" of some of the features that could be executed without access to a backend server, acknowledging that he could not test "the proper usage of all of the code":

5.1 L1bre Android Functionality

*44. Based on the available evidence, I successfully compiled the L1bre source code into an Android application. I executed this application on an Android phone and documented that visually, the application presented users with a login interface. **Further live testing of the various functions within the application could not be performed due to the nature of the software requiring connectivity with backend servers.***

5.2 L1bre Android Features

45. Based on the available evidence, I assessed with high confidence that the L1bre application contained source code corresponding to all nine of the general features outlined in the Concession. [...]

*46. **While the proper usage of all of the code could not be tested in a live environment due to the nature of the software requiring connectivity with backend servers, I found no clear indication of malformed code. Finally, I have documented the features and how they map to the Concession features.***⁵²²

483. Notably, during Mr. Mitchell's cross-examination at the Hearing, he was asked if a "static" method allows "testing the functionality of code standard,"⁵²³ and he recognized

⁵²⁰ Mitchell Report, ¶ 34. (emphasis added).

⁵²¹ Mitchell Report, ¶ 35.

⁵²² Mitchell Report, ¶¶ 44-46 (emphasis added).

⁵²³ Tr. Day 4 (ENG), 1260:6-7.

that such a method “is not a testing procedure,”⁵²⁴ but only allows to check how “the software works, or **is supposed** to work.”⁵²⁵ Following this line of questions, Mr. Mitchell admitted that he “understood” that “it would work”⁵²⁶ which, as noted above, is different from finding that something effectively worked and was ready to be deployed.

484. In this regard, the majority of the Tribunal recalls that it recognized the evidentiary relevance of the source code of the app, which includes the backend source code, during the document production phase when it granted both Parties’ requests to produce the source codes of Mi Taxi and L1bre:

However, at the essence of the Claimants’ claim is the allegation that the Respondent created ‘Mi Taxi’ based on and using the program and technology developed by the Claimants for ‘L1bre’. Therefore, the Tribunal considers that each Party should be able to obtain and review the source codes of the program of its Counterparty. If only one of the Parties were granted that possibility merely for procedural reasons related to the form of a request, the equality of the Parties will be breached, and the Tribunal will be deprived of evidence that it deems relevant to decide the case. Therefore, the Tribunal orders the simultaneous production of the source codes of both ‘L1bre’ and ‘Mi Taxi’, subject to a protocol to be agreed upon by the Parties or, in the absence thereof, to be established by the Tribunal.⁵²⁷

485. Overall, the lack of access to the backend server by Claimants’ own expert for his analysis in this arbitration confirms the concerns that existed at the time of the Concession regarding the stage of development of the app and the functionality of the servers.⁵²⁸ Such a concern is only exacerbated by the L1bre source code revealing that three additional features were not fully implemented (access data, passenger, driver, and vehicle information, and payment).⁵²⁹

⁵²⁴ Tr. Day 4 (ENG), 1260:9.

⁵²⁵ Tr. Day 4 ENG, 1260:11 (emphasis added).

⁵²⁶ Tr. Day 4 (ENG), 1261:7-8.

⁵²⁷ Procedural Order No. 4, ¶ 12.

⁵²⁸ R-0222, Oficio No. C5/CG/216/2017 from the Mexico City Command, Control, Computing, Communications, and Citizen Contact Center (C5) (*Centro de Comando, Control, Cómputo, Comunicaciones y Contacto Ciudadano de la Ciudad de México*) to the Undersecretary of Transportation of Mexico City (*Subsecretario del Transporte de la Ciudad de México*), 10 November 2017; R-0223, Oficio No. C5/CG/DGT/621/2017 from the Director General of Technology (*Director General de Tecnologías*) to the Undersecretary of Transportation at the Ministry of Mobility (*Subsecretario de Movilidad*), 6 December 2017 (“In this regard, I inform you that on November 29, new tests were conducted, and the results were unsatisfactory due to connection problems between the L1bre and C5 servers. L1bre offers to conduct new tests showing the status of the connections via videoconference.” Tribunal’s translation from Spanish: “*Al respecto, le informo que con fecha 29 de noviembre se realizaron nuevamente pruebas, siendo el resultado de las mismas no satisfactorias, debido a que se presentaron problemas de conexión entre los servidores de L1bre y de C5. L1bre ofrece realizar nuevas pruebas mostrando estatus de la conexiones vía videoconferencia.*”).

⁵²⁹ Quandary Expert Report, ¶¶ 129-131.

(ii) Mr. Edwards' expert evidence

486. Lastly, the majority of the Tribunal observes that the expert evidence submitted by Respondent confirms the deficiencies of Claimants' expert evidence outlined above. In the Quandary Expert Report, Mr. Edwards concluded that the L1bre System's source code was not complete by 2018.⁵³⁰
487. Mr. Edwards found that the app lacked the rider or "taxi hailing" source code, and that the existent source code had bad quality.⁵³¹ At the Hearing, Mr. Mitchell stated that he had not "discussed a ride-hailing feature in [his] Report," but he had only opined on the "nine primary features" that "could function as a taxi-hailing" despite the fact that he had been asked to determine whether the L1bre System could function as a taxi-hailing application in Android devices.⁵³²
488. Moreover, Mr. Edwards confirmed that he and Mr. Mitchell had reached the "same conclusion" that the app's functionality could not be tested without a backend server, and that neither expert had been provided with evidence of a backend server source code.⁵³³ Mr. Edwards adds that the lack of access to a backend server also meant that they could not test whether the app, if functional, could be sufficiently reliable, scalable, and safe enough to be used by millions of users.⁵³⁴
489. This conclusion was not rebutted by Claimants or their expert, and it is fatal to their claim because it means that not only is there no evidence that the app's features worked, but also that even if the app was individually functional, it could not have worked for millions of users, as required to fulfill the terms of the Concession.

(iii) Valuation by Goldman Sachs

490. Claimants allege that there is evidence of the value of the Concession at the time of the alleged suspension because Goldman Sachs issued a valuation of the Concession for USD 2.43 billion on 4 October 2018,⁵³⁵ that is, when the Concession was, according to Claimants, temporarily suspended, and before the final suspension.
491. However, the evidence that Claimants rely on does not support their case and rather confirms that the L1bre System was not ready to be implemented by 2018.

⁵³⁰ Tr. Day 1 (ENG), 167:6-12.

⁵³¹ Quandary Expert Report, ¶¶ 48, 127.

⁵³² Tr. Day 4 (ENG), 1245:2-4, 1246:8-13.

⁵³³ Quandary Expert Report, ¶ 52.

⁵³⁴ Quandary Expert Report, ¶ 55.

⁵³⁵ C-0079, Goldman Sachs Report, Pre-Marketing Recap & Potential Next Steps, 4 October 2018, pp. 14-15, 18-20.

492. Goldman Sachs' valuation was made for the exclusive purposes of advising a transaction to potentially sell L1bre.⁵³⁶ Given the purpose and contents of this valuation, it cannot be taken as an independent assessment of the state of the Concession in 2018, much less as a recognition that the app was ready and functional. In its engagement letter, Goldman Sachs notes that:

*The Company recognizes that, in providing our services pursuant to this letter, we will rely upon and assume the accuracy and completeness of all of the financial, legal, regulatory, accounting, tax and other information provided to, discussed with or reviewed by us for such purposes, and we do not assume any liability therefor or responsibility for the accuracy, completeness or independent verification thereof. Goldman Sachs will have no obligation to conduct any independent evaluation or appraisal of the assets or liabilities (including any contingent, derivative or off-balance sheet assets and liabilities) of the Company or any other party or any of their respective affiliates or to advise or opine on any related solvency or viability issues.*⁵³⁷

493. Moreover, Goldman Sachs valuation shows that Lusad did not have all the resources and was not ready to begin its operations or even implement the Concession by October 2018. This valuation revealed the following concerns of investors at the time:

[...] the Company is at a very early stage [...]

*[...] **Whether (and when)** LIBRE would launch a mobile app [...]*

[...] Company was still at a very early stage to launch [revenues add-on] [...]

[...] Consensus was installation timeline seemed optimistic [...].

*[...] An investor "Will pass for now, as this still seems to be too early stage for them, they would like to see the Company roll-out and **have something to show** [...]"*

⁵³⁶ C-0078, Goldman Sachs engagement letter, 30 August 2018, p. 1 ("We are pleased to confirm the arrangements under which Goldman Sachs & Co. LLC ("Goldman Sachs") is exclusively engaged by LIBRE Holding LLC (the "Company") as financial advisor in connection with the possible sale of all or a portion of the Company. During the term of our engagement, we will provide the Company with financial advice and assistance in connection with this potential transaction, which may include performing financial analyses, searching for a purchaser acceptable to the Company, coordinating visits of potential purchasers and assisting the Company in negotiating the financial aspects of the transaction."); p. 3 ("Please note that any written or oral advice provided by Goldman Sachs in connection with our engagement is exclusively for the information of the Board of Directors and senior management of the Company (in each case solely in their capacities as directors and officers of the Company) in connection with their consideration of the transaction.").

⁵³⁷ C-0078, Goldman Sachs engagement letter, 30 August 2018, p. 4.

*[...] An interested investor showed concerns over “— The legal aspects around the concession — The Company's installation ramp-up schedule. [...]*⁵³⁸

494. Notably, these concerns and perceptions of the investors were a reaction to information provided by L1bre to Goldman Sachs and confirm that Lusad was far from ready to implement the app in 2018.
495. It is notable to the majority of the Tribunal that the report is dated October 2018, when the Concession was allegedly suspended since May 2018, and there seems to be no evidence of such a relevant event being discussed or even mentioned in the report.

(iv) Conclusion

496. In sum, Claimants have not proven their allegations that they were ready to implement the Concession and the L1bre System in 2018 and that they were hindered from doing so by Respondent's actions (such as the alleged suspension or the implementation of Mi Taxi as developed in the section below). On the contrary, the evidence shows that the L1bre System was not ready to be implemented and was not functional in 2018.
497. As noted above, the majority of the Tribunal is not persuaded that Respondent permanently suspended the Concession, which is confirmed by the fact that the L1bre System's implementation failed, more likely than not, because it was simply not ready and functional to fulfill with the terms of the Concession.
498. These findings defeat the first and main limb of Claimants' expropriation and Minimum Standard of Treatment claims insofar as there is no evidence that Respondent factually “destroyed” Claimants' investment or “deprived” them of the possibility of receiving revenues or monetizing their rights under the Concession. Rather, such a failure was the result of their own actions. There is also no evidence that Respondent had a sudden change towards the investment, incurred in arbitrary conduct, or violated due process in 2018,⁵³⁹ since Claimants failed to prove the alleged suspensions. This conclusion is not changed by the existence of Mi Taxi (uncontroverted, unlike the 2018 suspensions).

2. Mi Taxi

499. The Parties do not debate the existence and implementation of Mi Taxi, but rather its implications. For the reasons outlined below, the majority of the Tribunal is not persuaded

⁵³⁸ C-0079, Goldman Sachs Report, Pre-Marketing Recap & Potential Next Steps, 4 October 2018, p. 5 (emphasis added).

⁵³⁹ Award, § 424, 428, 430.

that, by deploying Mi Taxi, Respondent breached the expropriation and Minimum Standard of Treatment obligations under NAFTA.

500. First, there is no evidence that Respondent developed Mi Taxi by “taking” or “arbitrarily abusing” any of Claimants’ resources and alleged developments. If anything, it has been demonstrated that Respondent did not “take” or “copy” the L1bre System’s source code, since Mi Taxi’s source code is different.⁵⁴⁰
501. Second, while there may be certain similarities between the apps, there was a fundamental difference between the two of them: the L1bre System had tablets that worked as a taximeter, and therefore, one of its core points was the transition away from the traditional taximeter. Mi Taxi did not have such a purpose, and therefore, lacked a main functionality of the L1bre System, that is, a specific ride-tracking functionality to avoid any alterations to the measuring and cost of each trip.
502. In addition, Mi Taxi was part of a bigger project, *i.e.*, the CDMX App developed by the DAPI, which has several other functionalities beyond the scope of the Mi Taxi.⁵⁴¹ Also, there is no evidence that Mi Taxi’s implementation was mandatory; rather, it appears to be an app that drivers could choose whether to install or not. This is a key difference with the L1bre System, which was mandatory precisely because it was meant to replace the traditional taximeters,⁵⁴² while Mi Taxi co-existed with such devices.
503. Third, even if the apps were interchangeable (*quod non*), or similar, Claimants were never granted exclusive rights that would preclude the State from developing and releasing an app like Mi Taxi.
504. While it may be true that the State typically concedes services that, in principle, it will not assume,⁵⁴³ there are no grounds to conclude that there is a general assumption that the State cannot provide a similar or complementary service. In this case, there was never a guarantee or commitment from the State to refrain from taking measures, like issuing the Mi Taxi app, to further contribute to the fulfillment of its duties in terms of achieving efficiency, and safety for the users of the taxi service.

⁵⁴⁰ Quandary Expert Report, ¶¶ 73, 156, 192-194, 201, 203.

⁵⁴¹ Quandary Expert Report, ¶¶ 72, 166, 167, 169.

⁵⁴² Quandary Expert Report, ¶ 166.

⁵⁴³ R-0101, Appeal for Review Ruling 389/2016, 25 May 2017, pp. 38-39. (Tribunal’s translation from Spanish: An administrative concession is “the act by which the State entrusts to a private party the provision of a public service, use and exploitation of public property, or the performance of both activities, either **because the State cannot or is not interested in directly performing such public tasks**” (emphasis added). “*El acto por medio del cual es Estado encomienda a un particular la prestación de un servicios público, uso y aprovechamiento de bienes del dominio público, o bien la realización de ambas actividades, ya sea porque el Estado no pueda o no esté interesado en cumplir directamente con tales tareas públicas*”)

505. In fact, the Mexican legal framework in place indicates the opposite. The LMDF was clear in that administrative concessions for public transport services do not create exclusive rights,⁵⁴⁴ and there are no grounds to assume that the State was not covered by such non-exclusivity provision but was subject to a limitation, or a non-compete duty nowhere to be identified in the law or the Concession granted to Lusak.
506. Moreover, it is worth noting that the language in the LMDF is similar to that in section 3.2 of the Concession, which provides that it does not “(...) create any real right in favor of the Concessionaire (...) grant exclusivity to the concessionaire over the provision of the public individual transportation service. (...) grant exclusivity to the concessionaire over the routes, facilities and public infrastructure used for the provision of the public individual transportation service (cab).”⁵⁴⁵
507. Also, the Semovi letter issued in April 2017 (relied upon by Claimants and challenged by Respondent for its alleged lack of authenticity) merely states the alleged impossibility of issuing a new concession to third parties, not to the State being unable to develop an app like Mi Taxi or even provide a similar service.⁵⁴⁶
508. Furthermore, there is no evidence that the 2018 Notice was incompatible with the 2020 notice to install Mi Taxi so as to conclude that the latter suppressed Claimants’ investment. The 2020 notice did not force taxi drivers to use Mi Taxi over other apps, nor specifically over the L1bre System. It was the L1bre System which was mandatory for taxi drivers unlike any other digital platform or service. In any case, the taxi drivers never had to choose any option over the L1bre System, because, as noted above, the latter was

⁵⁴⁴ CL-0103, LMDF, Article 96 (Tribunal’s translation from Spanish: “Concessions granted by the Secretary for the provision of public transportation services do not create in rem or exclusive rights to their holders, but only grant them the right to use, exploit and exploit the service in accordance with the rules and conditions established by the applicable legal and administrative provisions, and may be assigned in terms of the provisions of Article 104 of this Law.” (“*Las concesiones otorgadas por la Secretaría para la prestación del servicio de transporte público, no crean derechos reales, ni de exclusividad a sus titulares, sólo les otorga el derecho al uso, aprovechamiento y explotación deservicio de acuerdo con las reglas y condiciones que establezcan las disposiciones jurídicas y administrativas aplicables, y podrán cederse en términos de lo dispuesto por el artículo 104 de esta Ley.*”))

⁵⁴⁵ C-0053, Concession Agreement, 17 June 2016, Section 3.2; C-0020, Concession Agreement, 13 April 2018, Section 3.2. (Tribunal’s translation from Spanish: “(...) *No crea derecho real alguno a favor del concesionario (...) no concede exclusividad al concesionario sobre la prestación del servicio público de transporte individual (...) no concede exclusividad al concesionario sobre los itinerarios, instalaciones e infraestructura pública que se utilice para la prestación del servicio público de transporte individual (taxi).*”)

⁵⁴⁶ C-0056, Oficio No. DNRM-0673-2017 from Semovi confirming the validity of the Concession Agreement, 4 April 2017, p. 2 (Disputed document). (“There is no possibility of granting an additional concession to the one already issued under the Declaration of Necessity dated 30 May 2016, as the [Adjudication Committee] has considered this need to be satisfied and fulfilled.” Tribunal’s translation from Spanish: “*No existe la posibilidad de otorgar una concesión adicional a la ya expedida al amparo de la Declaratoria de Necesidad del 30 de mayo de 2016, pues el Comité Adjudicador de Concesiones para la Prestación del Servicio Público Local de Transporte de Pasajeros o de Carga, ha tenido por satisfecha y cumplida dicha necesidad.*”).

never fully developed. Simply put, Claimants were not ready to implement the Concession in 2018 or in the years to come, when Mi Taxi was released.

509. Lastly, the majority of the Tribunal concludes that, for these same reasons, it cannot uphold a finding of a violation of the National Treatment Standard.⁵⁴⁷
510. In this case, Claimants did not bring references or evidence of a more favorable treatment to any or investment other than the Mi Taxi system. Therefore, Claimants' claim depends on the finding that the L1bre System and Mi Taxi were in "like circumstances" and that there was a "less favorable treatment" as required by NAFTA Article 1102,
511. The standard enshrined in Article 1102 is meant to protect investors from discrimination of the host State on the basis of their foreign nationality in comparison with the treatment afforded to the host State's own nationals.⁵⁴⁸ However, Mi Taxi cannot be considered a suitable "comparator" for the purposes of the National Treatment Standard, and there is no evidence of a more or less favorable treatment based on Claimants' foreign nationality.
512. On the one hand, as noted above, the evidence in this arbitration shows that there are fundamental differences between the features and purposes of Mi Taxi and the L1bre System that do not allow the majority of the Tribunal to conclude that they were in similar or "like" circumstances.
513. On the other hand, even if this were the case, the Tribunal has also concluded that there is no evidence of misconduct or less favorable treatment from Respondent in general, and even less specifically, due to nationality reasons. Not only has the Tribunal found no evidence that Respondent halted the Concession in any manner, including by allegedly suspending it, but also, given the differences between the apps, Mi Taxi's implementation in no way precluded or impaired the implementation of the L1bre System.
514. If anything, the L1bre System had been clearly afforded a more favorable treatment under the Concession because its implementation was given as an order to the taxi drivers, rather

⁵⁴⁷ The Tribunal notes that, due to these findings, it is not necessary to address Respondent's defense brought on the basis of the carve-out provision in NAFTA Article 1108(7).

⁵⁴⁸ RL-0140, *Loewen v. United States of America*, ¶ 139; CL-0001, NAFTA, Article 1102. ("1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. 3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part (...)).

than a mere market option, and such an obligation was not altered or modified by the release of Mi Taxi.

3. Conclusion

515. To conclude, based on the evidence in the record, the Tribunal is unable to find that Respondent breached its obligations towards Claimants' investment under NAFTA Articles 1102, 1105, and 1110, in the terms invoked and argued by the Parties in this arbitration.

VII. COSTS

516. Claimants request that Respondent assumes not only all costs related to this arbitration, but attorney's fees and all other expenses incurred by Claimants⁵⁴⁹. Respondent makes a similar request with respect to Claimants.⁵⁵⁰

A. CLAIMANTS' COSTS STATEMENT

517. The Claimant's costs are as follows:⁵⁵¹

	Fees	Expenses
Hogan Lovells US LLP	\$5,998,944.16	\$274,030.08
Freshfields LLP	\$2,906,245.22	\$7,121.42
Experts	\$1,579,825.10	\$32,523.64
Lodging Fee		\$50,000
Hearing Costs		\$226,818.26
Total	\$10,485,014.48	\$590,494.12
Combined total	\$11,075,508.60	

B. RESPONDENT'S COSTS STATEMENT

518. The Respondent's costs are as follows:⁵⁵²

	Fees	Expenses
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⁵⁴⁹ Claimants' Reply, section VI (iv).

⁵⁵⁰ Respondent's Rejoinder, ¶628.

⁵⁵¹ Claimant's Statement on Costs (excluding USD 600,000 of advance costs made to ICSID).

⁵⁵² Respondent's Statement on Costs (excluding USD 600,000 of advance costs made to ICSID).

Secretaría de Economía	\$275,280.57	\$33,726.92
Pillsbury Winthrop Shaw Pittman, LLP	\$805,827.50	
Tereposky & DeRose, LLP	\$556,736.50	
Experts	\$705,484.94	\$13,244.57
Total	\$2,943,329.51	\$46,971.49
Combined total	\$2,390,301.00	

C. THE TRIBUNAL'S DECISION ON COSTS

519. Article 61(2) of the ICSID Convention provides:

In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

520. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

521. In these proceedings, Claimants were successful in asserting the Tribunal's jurisdiction and all jurisdictional objections raised by Respondent were dismissed. Respondent, in turn, was successful in its defenses related to the merits and all claims from Claimants have been rejected by the Tribunal.

522. Claimants were also unsuccessful in their requests for provisional measures related to criminal actions brought by Respondent and the detention of Mr. Zayas⁵⁵³. Likewise, Claimants failed in the vast majority of their requests in the applications filed on 3 May 2023 and 5 June 2023 requesting the Tribunal to (i) allow the introduction of new evidence into the record to respond to the report on graphoscopy and documentoscopy filed with the Respondent's Rejoinder dated March 7, 2023; (ii) grant access to the original documents relied upon by the Respondent's experts in the Armenta-Bartolo Report; (iii) grant access to an original document in the Semovi File produced by Mexico; (iv) to have the Tribunal strike a jurisdictional challenge raised by the Respondent in its

⁵⁵³ Procedural Orders Nos. 3 and 7.

Rejoinder; (v) to have the Respondent facilitate Mr. Eduardo Zayas' in-person participation at the final hearing (the "**First Application**") and (vi) to supplement the arbitration record with new documents (the "**Second Application**")⁵⁵⁴.

523. The above procedural incidents required time from the Tribunal and the Parties and the Claimants, having been unsuccessful in their requests, must bear the corresponding costs.
524. In accordance with the foregoing, Claimants must assume sixty per cent (60%) of the costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses. Each Party shall assume its own legal fees and other expensed.
525. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses	
Prof. Eduardo Zuleta Jaramillo	USD333,321.47
Mr. Charles Poncet	USD213,894.05
Prof. Raúl Vinuesa	USD231,607.76
ICSID's administrative fees	USD 272,000.00
Direct expenses	USD196,963.60
Total	<u>USD1,247,786.88</u>

526. The above costs have been paid out of the advances made by the Parties in equal parts.⁵⁵⁵ As a result, each Party's share of the costs of arbitration amounts to USD623,893.44.
527. Accordingly, the Tribunal orders the Claimants to pay the Respondent USD124,778.68 for the difference between the share of the arbitration costs paid by the Respondent throughout the proceeding, and the share of costs allocated to it by the Tribunal.
528. Although the content of this Award has been fully deliberated with arbitrator Charles Poncet and the text of the decision of the majority has been ready for months, arbitrator Poncet did not disclose the reasons of his dissent during deliberations, substantially delayed the issuance of his dissenting opinion, and conditioned the delivery of his dissenting opinion to the Award being ready for dispatch. The majority had therefore no

⁵⁵⁴ Procedural Order No. 11.

⁵⁵⁵ The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

opportunity to know the reasons for the dissent until a time when the Award was ready for dispatch to the Parties.

VIII. DECISION

529. Based on the foregoing, the Tribunal:

- (a) Dismisses all of Respondent's jurisdictional objections.
- (b) Declares that it has jurisdiction over Claimants' claims.
- (c) By a majority decision, dismisses Claimants' claims on the merits.
- (d) Order each Party to bear its own legal fees and other expenses.
- (e) Orders the Claimants to pay USD124,778.68 to the Respondent corresponding to the arbitration costs.
- (f) Rejects all other claims and defenses.

[Signed]

Charles Poncet
Arbitrator

Date: March 23, 2026

Raúl Emilio Vinuesa
Arbitrator

Date:

Eduardo Zuleta Jaramillo
President of the Tribunal

Date:

[Signed]

Charles Poncet
Arbitrator

Date:

Raúl Emilio Vinuesa
Arbitrator

Date: March 18, 2026

Eduardo Zuleta Jaramillo
President of the Tribunal

Date:

Charles Poncet
Arbitrator

Date:

Raúl Emilio Vinuesa
Arbitrator

Date:

[Signed]

Eduardo Zuleta Jaramillo
President of the Tribunal

Date: March 17, 2026

Dissenting opinion of arbitrator Charles Poncet

1. The carefully drafted award in this case (« the Award »), is a well-reasoned piece of writing, for which our presiding arbitrator Prof. Zuleta stands to be commanded. In particular, his analysis of the jurisdictional issues and other defenses raised by the Respondent in the arbitration is convincing and neither could one add much, if anything, to the developments in the Award reaching the conclusion that jurisdiction was to be accepted in this case.
2. Without prejudice to the foregoing, I am regrettably unable to join my esteemed colleagues in their disposition of the merits of the claim. The majority of the Arbitral Tribunal has concluded that the claim should be rejected; I, by contrast, would have upheld it without hesitation. The majority's reasoning on the merits is set out at §§ 453 through 515 of the Award, and I am unable to concur with the views expressed there in their entirety. In the interest of brevity, I therefore confine myself below to the principal considerations that, in my view, demonstrate why the rejection of the claim is neither appropriate nor, indeed, sustainable.
3. On the basis of the pleadings, the hearings, and the Tribunal's deliberations, I am of the view that this case is unusual in at least three material respects.
4. Firstly, it is seldom seen in investment arbitration that the main *dramatis personae* in charge of a municipality that gave rise to the claim subsequently becomes the head of the Respondent State by the time the dispute reaches international arbitration. I will briefly refer hereunder to the fact that Mrs. Claudia Sheinbaum was elected to the office of mayor of Mexico City in July 2018 and her new government took office in December 2018. Yet as of this writing, Mrs. Sheinbaum is the President of the United Mexican States, the Respondent in this case, a function to which she was sworn in on October 1st, 2024.
5. President Sheinbaum is rightly regarded as a competent, reliable, and steady-handed head of state - a quality not invariably encountered among contemporary leaders - yet she is *also* the former mayor of Mexico City, and her publicly stated policy at the relevant time flew in the face of the contractual rights relied upon by the Claimants. This combination departs from the ordinary and introduces a pronounced political dimension to this case. I should add, however, that nothing in the reasoning of my two esteemed and learned colleagues suggests that the unusual political context we had to deal with influenced their conclusions in any



respect. Both are experienced arbitrators whose fairness and objectivity are beyond question.

6. Secondly, this case is unusual because whilst it is not uncommon for wild allegations to be exchanged in the tense context of an international investment dispute, this one featured clamorous accusations by both Parties that the other forged some of the documents introduced in evidence. Some of these claims were not disproved, as I will briefly evoke hereunder, but the existence of such mutual allegations of wrongdoing should in my view have called for prudence, objectivity and a large pinch of salt in assessing the respective claims. Yet such prudence and objectivity do not appear to have consistently prevailed in the Award, particularly in light of the existence of three criminal investigations initiated by the Respondent between March 2018 and 19 April 2021, as well as the detention of at least one of the Claimants' witnesses between December 2021 and November 2022. There may have been perfectly legitimate reasons for the Respondent to initiate criminal proceedings and to detain the Claimants' manager of Espiritu Santo Investments LLC; nevertheless, this arbitrator would have expected these facts to be addressed in more than a passing manner in the Award, whether or not they ultimately resulted in a conviction.
7. Thirdly, as is accurately pointed out in § 364 of the Award this case was characterized by a puzzling and paradoxical lack of witnesses for one of the Parties: the Respondent inexplicably failed to adduce as witnesses the officials who signed some of the litigious documents and/or played an important role at the time. Again, there may have been some legitimate reasons to do so and each Party is free to organize its case as it wishes, but perhaps the Award should have drawn the consequences of such unusual reluctance to produce witnesses in a somewhat more detailed and persuasive manner.

My criticism of the majority view in the Award

8. As I have indicated above, I will take the liberty to concentrate on my main objections to the conclusions reached in the Award and this should not be understood as questioning in any way the quality or the thoroughness of my co-arbitrators' analysis. My disagreement is with the emphasis I see in the Award, - or the lack thereof at times - and, at times, to cast the dispute in a light somewhat more favorable to the Respondent than I am able to accept.
9. A good example of that is the very short mention at § 222 of press reports indicating that the new administration would review the Lusad concession and consider cancelling the L1bre System: what my learned co-arbitrators addressed only in passing is, in my view, central to a proper understanding of this case.
 - a. *A candidate determined to stop the project*
10. In assessing the likelihood of an expropriation or a violation of FET standards in this case it is indispensable to remark at the outset that during the 2018 campaign, candidate Sheinbaum forcefully and repeatedly stated her intent to cause the new Mexico City government to cancel the L1bre System as soon as it took office, which it did in December 2018.

11. This is made abundantly clear by contemporaneous press reports and witness testimony. Mr. Santiago León Aveleyra for example states at § 78 that “...*the opposition party, led by then-mayoral candidate Claudia Sheinbaum, campaigned on a platform of opposition to the concession.*” According to the witness it was stated during the campaign that the taxi drivers would have to pay for the installation of the L1bre System, which allegedly “*inflamed tensions with some taxi drivers*”¹.
12. By way of further example, in June 2018 the major Mexican daily Excelsior reported the following: “*Sheinbaum dice que terminará con abusos a taxistas. La candidate dijo que el cambio del uso del taxímetros a tabletas se prestaría a cometer abusos contra taxistas*”². Similarly, as of October 2018, it was pointed out that “*la próxima jefa de gobierno de la ciudad de México se compromete a eliminar “las tablets” de los taxis y regular Uber y Cabify*”³.
13. The foregoing makes no claim to being exhaustive, but it unquestionably shows a deliberate plan put forward by the new administration during the election campaign and after its victory. The new Mexico City government intended to do away with the L1bre project. This puts the entire debate in this case in a perspective that I am unable to find in the Award. It is indeed one thing to debate the qualities and possible shortcomings of a project of this importance when the counterpart in the discussion is a municipality bound by the rule of law assessing the merits and the possible flaws of the project with a view to protecting the interests of its taxpayers. It is an entirely different matter for an investor to be confronted with a city government uncompromisingly focused on doing away with the existing concession.
14. Given the statements made by Mrs. Claudia Sheinbaum as a candidate and later as Mayor, the only reasonable inference was that subsequent actions of her administration were directed toward the realization of the purposes publicly announced during the campaign, and not toward the preservation of the concession holders’ contractual entitlements.
15. Even assuming that “*Eliminar las tablets*” was a legitimate objective of the new administration, the power of a city government to revisit earlier decisions is not unconstrained. Where such action affects third parties holding established rights protected by international law — most notably a public-service concession — the revocation of those rights carries with it a clear and unavoidable obligation to compensate.
16. This is the perspective — and the *principium cardinale* — by which, in my view, an arbitral tribunal should be guided when assessing a claim of expropriation or breach of FET in such a specific context. The Award, however, appears to approach the dispute as a routine and essentially unremarkable disagreement between a concession holder and a conceding authority. In my assessment, that approach overlooks the stated intent to dismantle the L1bra System, which constituted the central principle that ought to have informed the Tribunal’s

¹ WS Aveleyra, §78.

² C-017.

³ C-256.

analysis of the case. I am therefore unable to share the perspective within which my learned co-arbitrators have situated this dispute.

b. The 2016 concession

17. The Award describes the 2016 concession at §§ 362 – 406 and adequately addresses the Respondent's allegations as to the allegedly fraudulent character of the 2016 concession. I agree in particular with the finding that Respondent should have substantiated its challenge as to the authenticity of the documents submitted by the Claimants. It could and should have done so by way of the introduction of witnesses, something it has shown little inclination to do when it came to people such as Mrs. Balandran for instance. My learned colleagues were also right to point out that subsequent behavior clearly shows that the Respondent's contemporaneous conduct cannot be explained other than concluding that there was indeed a concession. This is clear from documents signed by Mrs. Balandran in 2016⁴ or 2017⁵, as well as from other records dating from the relevant period⁶. The majority rightly emphasized in particular that it would be somewhat audacious for the Respondent to claim that there was no concession but a mere project when its own minutes of a meeting of 12 May 2017, signed by Mrs. Balandran and Mr. Robledo Lopes refer to Lusad as "*Empresa concesionaria*" and "*Concesionaria servicios digitales Lusad*" in the dispositive section⁷. Accordingly, I concur with my learned colleagues' conclusion at § 397 that a concession was indeed granted in 2016. Similarly, I agree with the majority's assessment that the evidence clearly shows that the Mexico City administration was part and parcel to the issuance, the granting and the implementation of the concession, which prevents the Respondent from claiming "illegality" whether through an *amparo* procedure or not.
18. This being said, I am unable to agree with the inclusion of the material set out at §§ 398–403, which does not bear on the issue addressed in the corresponding section of the Award. It is not clear to me why we should mention an alleged meeting between Claimants and Mexican officials before the public bidding process, or the advantageous position in which Lusad allegedly found itself when other bidders did not have the same information. Even if intended as an introduction to the subsequent discussion of the suspension of the concession, this material serves no discernible purpose. Similarly, I am unable to agree with the conclusion that no amendment occurred in 2017 but, in the interest of brevity, confine myself hereunder to the principal points on which I disagree.

c. The Respondent's creative presentation of a concession "project"

19. As indicated above, I do join the majority of the Arbitral Tribunal in the conclusion it reaches at § 406 of the Award but I wish we had treated the Respondent's argument as to an alleged concession "project" in more details than the mere recital of the facts contained at §§ 175 ff. In my view, the evidence adduced in

⁴ See for instance C-230, C-233.

⁵ See for instance C-174, C-235.

⁶ See in particular C-013, C-014, C-016, C-051, C-058, C-071, C-072, C-073, C-074, C-129, C-191, C-229, C-232, C-236, C-237.

⁷ See R-073.

the proceedings is significant as to the lengths to which the Respondent appeared prepared to go to deny the very existence of a concession. While this may not be surprising, given that the new administration entered office with a firm commitment to do away with the L1bre project, the apparent alteration of records in this regard is, in my view, troubling. Instead, the Award chose to address the doubts raised as to the Claimants' evidence concerning the 2018 suspensions and it does so at §§ 458 ff, setting forth what the majority calls "*the inconsistencies in Claimants' exhibits*". As explained below, I am unable to concur fully with my distinguished colleagues in this respect. In my view, the Award unduly minimizes the Respondent's defense founded on the contention that there existed no more than a 'project' of a concession.

20. § 102 of the Respondent's Counter-Memorial of May 13, 2022 reads as follows in the English translation:

"102. As can be read, the draft of Concession Project 2016 confirms the Adjudicator Committee's decision: the definitive concession title would be issued after Lusad complies with Semovi's tests and requirements, strangely this condition is not in any of the documents submitted by the Claimants".

21. This was a defense of fundamental importance, since the Claimants could not rely on any operative concession and had been furnished with nothing beyond a draft. In support of this allegation, Respondent introduced exhibit R-068 namely the minutes of the Adjudication Committee of June 17, 2016. On p.13 of this document, I read an invitation to elaborate a draft concession for a subsequent decision by the adjudication committee, worded as follows: "*Mientras tanto, elabórese el proyecto de concesión y dígase al interesado que la expedición y suscripción del Título Definitivo se hará siempre y cuando cumpla satisfactoriamente las pruebas*". However, the very same minutes repeatedly refer to "*otorgar la concesión*" or to "*otorgamiento*"⁸.
22. The two wordings are obviously inconsistent with each other and I cannot help but note that the footer of p. 13 of R-068 does not match the footer in the rest of the document. Furthermore, considering that Mr. Muñana – the only witness we heard who was actually present on June 17, 2016 – disclaimed the version contained in R-068, it would have been appropriate for the Respondent to introduce some witness(-ses) in this respect but it did not. The Respondent also claimed that they could not find p.22 of Exhibit C-051 in their file – clearly an important document which contains the word "*este comité aprueba otorgar*" - but then produced it with the same contents⁹. At the hearing¹⁰ the tribunal's attention was also drawn to a set of documents "*sin folio consecutivo*", a statement somewhat hard to reconcile with the contents of Exhibit C-168, which seems to include page numbering.
23. In the light of the foregoing, an email dated May 21, 2018 from Mr. Fagoaga to Mr. Muñana and Mrs. Balandran invites serious reflection as it states with regard to the "*...acta completa del Comité adjudicator*" the following statement that I do

⁸ Exhibit C-162 at pp. 6, 8, 9,11, 13, 14.

⁹ Exhibit C-168 at p.486 of the PDF.

¹⁰ StR. April 8, 2024, pp. 29-32.

not find easy to understand: “...*Hoja que debe cambiarse es solo la numero 13*”¹¹. Perhaps further examination would have been appropriate as to why Mr. Fagoaga was stating in May 2018 that the only page that needed *changing* was p. 13. Was this with a view to the language: “*proyecto de concesión*” at p. 13, precisely, of R-068 and was it perhaps introduced to persuade the arbitrators that there was no concession at all but merely a *proyecto*?

24. Whilst a detailed review of the evidence introduced by the Claimants in support of the challenge to the existence of a “*Proyecto del concesión*” would probably go beyond the scope of this limited opinion, even a perfunctory review of Exhibits C-330 to C-342 for instance adds further question marks and the Claimants’ allegations of manipulation of documents by the Respondent do not appear to have been disproved. I would have been grateful for a more detailed discussion of this issue in the Award. Perhaps it might have queried whether *both* parties to this arbitration stood *in pari turpitudine* as to the documents they introduced – a view I do not share at all - but the majority opinion falls quite short of even that and overlooks the entire Respondent’s argument as to the non-existence of the concession only to focus on the discrepancy it sees in the documents introduced by the Claimants with regard to the alleged suspensions of the 2018 concession, on which I will now offer some comments.

d. The 2018 concession

25. The Award sets forth the majority view at §§ 381 through 395, asserting that a formal installation notice was issued in 2018 and that a document was signed on November 6, 2018. However, the Claimants allege that the document of 6 November 2018 was procured by way of misleading representations made to Mr. Zayas that it was required as a modification to avoid political criticism following the new administration’s assumption of office. In other words, according to the Claimants, what was presented as a meaningless modification of the existing concession was in fact a new document removing in particular Lusad’s preferential right to install and maintain digital taximeters in Mexico City. It also reduced the length of the trial period and did away with the Recuperation Fee, the right to charge for advertising displayed in the cabs and to charge for the use of a WiFi, let alone a change in Lusad’s obligations concerning a performance bond and insurance¹².
26. My learned coarbitrators rejected the account put forward by the Claimant as to the November 6, 2018 on two counts: first, there is no convincing evidence that Mr. Zayas was “*forced or induced*” to sign the document under false pretenses; second, Mr. Muñana’s testimony in support of the Claimants’ version of the November 6, 2018 episode is described as coming from a person “...*with a sharp memory for past events*”¹³.
27. I am not sure that approach is appropriate because it overlooks one decisive element: the Respondent introduced *no witnesses at all* in support of a different version of the episode. Whether or not Mr. Muñana delivered the entire

¹¹ C-332.

¹² C-007 and C-020 are the exhibits Claimants mainly rely in this respect.

¹³ Award, §389.

correspondence related to his duties at the appropriate time and even if he was not involved “*directly*” in the concessions or lacked the authority to direct amendments, his testimony stands and so does Mr. Zayas’. Both witnesses were submitted to robust cross-examination at the hearing on April 9, 2024 and both stood their ground quite convincingly in my view¹⁴. The *Comparecencia* bears signatures, that of Mr. Cuellar Lara for instance and one wishes we could have heard from the other Semovi officials present at the meeting as to their version of the episode.

28. I take the view that when confronted with two witness statements giving a clear version of what allegedly happened and no testimony at all to the contrary, it is hardly fair to the Claimants to criticize Mr. Muñana’s testimony in particular, only to reach the otherwise unsubstantiated conclusion that the Claimants would not have been the victims of a questionable manipulation on 6 November.
29. I for one would have wished we had drawn a negative inference from the conspicuous absence of witness testimony by the Respondent in this respect.
30. Nor do I find persuasive the majority’s view that there is “*no convincing evidence in the record*”¹⁵ that Mr. Zayas was forced or induced to sign the document of 6 November 2018. By definition, if a confidence trick was employed, the absence of “*convincing evidence*” would be inherent in its very purpose. In any event, given the seriousness of the allegations, appropriate inferences should have been drawn from the absence of witness testimony on the part of the Respondent.
31. Without prejudice to the foregoing, I am also unable to concur with my coarbitrators as to the conclusions reached with regard to the suspension of the 2018 concession.
32. Firstly, it seems appropriate to point out that the real test as to the existence or not of the alleged suspension should be based on the appropriate allocation of the burden of proof. Clearly, since the Claimants put forward the set of facts concerned, *they* have the burden of proof. As I will try to point out below in a somewhat more detailed format, they have sought to meet that burden by the introduction of witnesses and the production of documents.
33. There are a number of items which should have informed our assessment in this respect that I would have wished the majority to give more weight to, namely:
 - Whilst claiming some documents to be of questionable authenticity¹⁶, the Respondent again fell short of adducing *any* testimony from Mrs Balandran, the principal signatory – indeed the only one – who executed the disputed document. Such an omission should not have been overlooked in my view.

¹⁴ See for instance Day 2, pp. 337-367 (Mr Muñana); pp 443-445 (Mr Zayas).

¹⁵ Award, §386.

¹⁶ See C-18, C-19, C-226 and C-227.

- Similarly, as recalled above¹⁷ the Respondent's past procedural conduct calls for careful scrutiny of the manner in which documents were prepared and handled by the United Mexican States in this case.
 - The Respondent's stance with regard to C-018 sits uneasily with its original defense in this arbitration, which denied the existence of *any* concession. Perhaps a few thoughts should have been given to the well-known concept of *venire contra proprium factum*.
34. In summary, even if one were to decline to draw the strong inferences that, in my view, would have been justified, the Respondent's allegations of lack of authenticity should have been approached with considerable caution and assessed in the light of the other facts on the record.
35. Secondly, while the majority opinion reflects a thorough analysis, for which the President of the Arbitral Tribunal deserves commendation, it does not, in my view, sufficiently engage with the broader context, nor does it take account of a number of additional evidentiary elements, some of which I address below:
- 1) As already recalled the 2018 mayoral campaign for the City of Mexico was characterized by vigorous campaigning from a candidate who made no secret that she was completely opposed to the L1bra Project. We have repeated statements from her during and after the campaign in this respect, including a video interview¹⁸ and several articles expressing her commitment to "*eliminar las tablets*"¹⁹. As I indicated above²⁰, opposing the decisions made by the previous administration and vowing to overturn them is perfectly legitimate in a political campaign, but overlooking or minimizing the existence of that commitment does not seem a convincing way to assess the evidence.
 - 2) Furthermore, a suspension was the only *logical and prudent course* available in the spring or summer of 2018. The Mexico bureaucracy necessarily had to take account of an intense political campaign, in which context the making of hasty decisions would have been particularly ill-advised. Public administrations everywhere are, quite properly, expected to proceed with caution when political circumstances are unsettled. Against that background, and in assessing the evidence, it bears keeping in mind that the issuance of C-18 was entirely rational at the time.
 - 3) Correspondingly, it seems beyond discussion that a prudent operator, faced with such a suspension, would nevertheless continue to prepare for the installation of the system. Being heavily invested already, one would wish to be ready to start operations swiftly once the environment was more favorable. In other words,

¹⁷ §§21-24.

¹⁸ See C-029.

¹⁹ See C-0254 ; C-0255 ; C-0256 ; C-0257 and C-0259.

²⁰ §§10-16.

it was *normal* for Lusad not only to keep acquiring hardware and training personnel²¹ but also to continue to seek and obtain critical certifications of its system²².

- 4) As stated by Mr. Herrera²³ among others, Lusad prepared a server made available to Semovi in the Spring of 2018 for the exclusive use of monitoring the mandatory installation period and a letter of May 30, 2018²⁴ to Mrs Balandran suggests that the only thing left to do was to activate the system. I have found no evidence – particularly no witness evidence that could be tested by cross-examination – to support the claim made by the Respondent that the necessary link was placed on the website, but Lusad failed to activate the portal. I am troubled by the Kroll report which calls into question the Respondent's asserted posting date of the appointments link. If the link was indeed unavailable – on a page that did not even exist on Semovi's site until January 22 – as claimed in the Kroll report²⁵, that should have been taken into account to assess the plausibility of the Respondent's defenses. The same applies to Mr. Herrera's assertion that taxi drivers in Mexico City were reacting very positively to the L1bre System and indeed sought to install it voluntarily²⁶. Again, these assertions have been left uncontradicted by any testimony.
- 5) The allegations of lack of authenticity are subject to the same difficulty. If documents were prepared to create the appearance of a suspension of the Concession, such conduct would necessarily have been reflected in witness testimony on the Respondent's side. No such evidence exists. Instead, Mr. Lajous confirms that he met with Mr. León and Mr. Zayas in February 2019. The meeting was at the Mayor's office and Mr. Lajous disclaimed the existence of the Concession²⁷.
- 6) He confirmed it on direct examination²⁸. Under cross-examination²⁹ he seemed to go back to the argument that there was no concession at all, mentioned "*verbal reports*" as to the contents of the Semovi file³⁰, a somewhat unconvincing proposition, admitted to the existence of the meeting³¹ and was not more convincing as to the conclusion in the June 5, 2019

²¹ See C-080.

²² See First WS Aveleyra, § 80 and C-060, C-063 and C-064 for example.

²³ WS Edouardo Herrera de Juana, § 41.

²⁴ See C-0188.

²⁵ Expert report of Joshua Mitchell, Appendix A.

²⁶ WS Herrera, § 19 and also see C-0178 and C-0179.

²⁷ WS Lajous, § 40.

²⁸ StR. April 9, 2024 pp.593-596.

²⁹ *Ibidem*, pp 604 ff.

³⁰ See for instance *ibidem*, p.610.

³¹ *Ibidem*, p.612.

letter³² that “*there was destruction, loss and theft of information by public officials in the Semovi file*”³³.

- 7) Finally, I have difficulty accepting that faced with inaction from Lusad but in the absence of any suspension of the concession, Semovi or the City of Mexico would not have issued at least a notice of breach. Indeed by failing to fulfil its obligations under the concession, Lusad would have been in breach and might even have faced termination of the concession for cause. I find no correspondence to that effect in the record of this arbitration.
36. In light of the foregoing, I am unable to associate myself with the exercise in graphological interpretation undertaken by my co-arbitrators. Notwithstanding the care and subtlety with which the majority opinion approaches the issue, I do not consider that arbitrators are well placed to reach reliable conclusions on a graphological controversy where the two experts specifically appointed for that purpose have themselves been unable to reach any agreement.
37. It is nonetheless on the basis of these asserted “*clear visual discrepancies*” - while at the same time discounting uncontradicted witness testimony and notwithstanding the Respondent’s failure to present any witnesses - that my learned co-arbitrators conclude that it is “*more likely than not*” that no indefinite suspension was imposed upon the Claimants by the Respondent in the summer of 2018. The reliance on a standard of ‘likelihood’ is, in my view, problematic and not readily defensible. A fact must be found to have been either proved or disproved on the basis of the evidence as a whole, including such inferences as may properly be drawn from the conduct of the Parties. The majority opinion draws such inferences from a small number of documents at §§ 466–469, yet appears to disregard the evidentiary elements identified above at §35. This selective approach leads to a conclusion—namely, that no suspension of the Concession occurred—that plainly warrants scrutiny and, in any event, reconsideration.

e. As to the status of the L1bre System

38. The Award assesses the status of the L1bre System at the pertinent 2018 time at §§ 470 ff. In substance, the majority has reached the conclusion that the Kroll report by Mr. Joshua M. Mitchell has failed to establish that at the pertinent time, the Claimants had a functional system and were ready to start operations.
39. With the greatest respect to my co-arbitrators, I am unable to associate myself with this conclusion, for the reasons set out below, notably the contents of the Kroll report and the robust cross-examination of Mr. Mitchell, in the course of which his evidence remained unshaken.
40. As a preliminary set of comments, some initial observations need to be made about the L1bre System:

³² See C-328.

³³ *Ibidem*, p. 621.

- The Arbitral Tribunal is dealing with a software system deployed across a metropolitan area of more than *twenty million* inhabitants³⁴, involving well over *one hundred thousand* taxi drivers³⁵. While the L1bre System was not an entirely novel product but rather a replacement technology³⁶, the expectation that it would operate flawlessly from day one, without adjustment or incident, is difficult to sustain. The proposition rests on assumptions that, in my view, are not borne out by the realities of large-scale system deployment.
 - Similarly, the record shows that the technology was successfully tested in 1100 cabs³⁷ with satisfaction expressed by the drivers³⁸.
 - The technological advantages of the L1bre System over traditional taxi meters are obvious³⁹ and explain why three years of investment in software development was financed by the Claimants, who also underwent very significant hardware and operating expenses⁴⁰.
 - The Claimants had a management team in place. Their costs were under control and I see nothing adventurous in the project⁴¹, particularly in view of the existence of fees regulated by Semovi⁴² with the volumes of taxi clients well-known on a statistical basis⁴³.
 - It is difficult to accept that a firm such as Goldman Sachs, whilst noticing the early stage of the roll-out, would have assessed the value of a project in the billions while disregarding the fact that “...*Claimants were not ready to implement the Concession by 2018*”⁴⁴ as such a premise sits uneasily with any orthodox valuation practice and even with commercial reality⁴⁵.
41. The proposition that a senior management team would have joined Lusad after the completion of software development without verifying that the system was ready for operation is equally unconvincing. By the Summer of 2018, the Claimants had retained 34 employees⁴⁶ and it is implausible that top level people would have joined the project without making sure that by the Spring or Summer of 2018 it would be “*ready to go*”. This is particularly so in the case of Mr. Manuel Tabuenca: a former Uber and Visa executive, he joined Lusad in 2017, and it is difficult to accept that he would have undertaken operational responsibilities on

³⁴ See Rosen First Report, p.80.

³⁵ See C-7 at 5.2.1 p. 21.

³⁶ See C-7, p.1 and the wording “*sustitución*”.

³⁷ C-13, C-14.

³⁸ WS Herrera, §19.

³⁹ Rosen Second Report, §145-149.

⁴⁰ Rosen First Report, Figure 5, p.27.

⁴¹ Rosen First Report, Appendix 4, pp.89ff.

⁴² C-7, pp.23ff.

⁴³ Rosen Second Report, pp.57-60.

⁴⁴ Award, § 470.

⁴⁵ C-77, C-78 and C-79, particularly pp.5-6.

⁴⁶ See HR-002 SPA (chart as of August 2018).

the basis of software that was not functional⁴⁷. The implausibility is no less evident in the case of Mr. Silva: in light of his experience as a former executive of a U.S. software company, it is difficult to reconcile his continued involvement after 2017 with the suggestion that Lusad was incapable of operating a mere taxi software system involving no unusual technical complexity⁴⁸. Finally, it strains credibility that an executive ranked among the *top fifty marketing leaders in Mexico* would have joined—and remained with—a team incapable of putting in place the requisite software⁴⁹.

42. The list of achievements as of the Spring of 2018 is considerable and setting it forth in detail would exceed the size of my opinion. Suffice it therefore to point out that Chapter 4 of Claimants' Reply of November 4, 2022 recites achievements and accomplishments carried out with a view to be "ready-to-go" as soon as the green light was given by Semovi⁵⁰. The robust and convincing demonstration presented by the Claimants and reiterated in opening and closing⁵¹ has not been disproved and I wish these had been given greater weight in the majority opinion.
43. Similarly, one cannot deny that Lusad received the requisite certifications and approvals from Semovi and successfully completed the trial period, which is difficult to reconcile with a finding that somehow, the system would not have been ready to operate⁵². It is not denied that training manuals had been ready for the launch of the application and step-by-step instructions for proper use, again hardly consistent with a system that would not be operational⁵³.
44. Of further significance is the fact that key suppliers and service providers—including installation centres and cellular data providers such as AT&T—had already concluded the requisite agreements with Lusad. These counterparties plainly acted on the basis that Lusad was operationally ready, and it is beyond serious dispute that Lusad stood ready to install the tablet⁵⁴. The same applies to hardware providers⁵⁵ and it is difficult to see why, in the absence of an operational system, Lusad would have entered into such agreements and held a tablet inventory as of the Summer of 2018 that was sufficient to cover more than half the Mexico City cabs⁵⁶.
45. The video demonstration of the L1bre platform is far from unconvincing⁵⁷ and one hardly sees the point in creating an inventory which would have to be used by software that would not work or did not work when stockpiles of tablets were constituted.

⁴⁷ C-0310.

⁴⁸ C-0311.

⁴⁹ C-0312.

⁵⁰ Claimants' Reply of November 4, 2022, pp.154-163 and the exhibits quoted at footnotes 751 to 793 of the Reply.

⁵¹ Opening of April 8, 2024, slides 86-92 in particular and also, without claim to exhaustivity, Closing slides 46-54 of October 3, 2024.

⁵² Among others, C-011, C-010, C-064.

⁵³ HR-053.

⁵⁴ HR-018 for the installation centers and HR-003 for the services agreement with AT&T.

⁵⁵ C-071 and HR-014, among others.

⁵⁶ Rosen First Report, p.148; and HR-057.

⁵⁷ C-062.

46. In his presentation to the Arbitral Tribunal on April 12, 2024, Mr. Rosen repeatedly maintained that Lusad was fully prepared to operate⁵⁸, a position he reiterated on several occasions during cross-examination⁵⁹. While Mr. Rosen was not, of course, appearing as a fact witness, he is a highly regarded quantum expert and the majority decision to accord no weight to his analysis whilst in parallel discounting other corroborative evidence - portions of which are cited above - raises concerns as to the even-handed assessment of the record.
47. In reaching the conclusion that the claim should be rejected, my learned co-arbitrators engage with the Mitchell report and Mr. Mitchell's testimony at §§ 471 ff. of the Award. I have serious reservations as to the reasoning advanced in that respect. It is not apparent on what basis an arbitral tribunal could reliably assess the quality and operational readiness of a complex software system in preference to the conclusions of a highly qualified expert. Yet this is precisely the course adopted by the majority, notably at § 479 (referring to "*compelling flaws in the analysis*"), through an interpretative reading of the phrase "... *or is supposed to work*" at § 483 that borders on the hermeneutic, and by an uncritical reliance on the opposing expert's report at § 485, without adequate justification. With the greatest respect to my co-arbitrators, I am unable to accept that the reasoning advanced to discount the Mitchell report is capable of withstanding careful scrutiny.
48. Mr. Mitchell holds a Bachelor of Science in information and computer science from Park University — a qualification I for one do not possess — and he has been certified in GIAC Reverse Engineering Malware since 2021. This makes him certified to be in possession of the knowledge and skills to reverse-engineer software among others⁶⁰. Similarly, he is CISSP certified as an information systems security professional since 2022, a cyber security certification of high level requiring at least five years of professional experience and successfully passing some rigorous tests⁶¹. He has been a senior vice-president at Kroll Cyber Risk since June 2020 and before that a consultant, a senior research scientist, a security researcher, etc. He is the author of several publications, and the relevance of questioning his qualifications — or indeed the basis for any challenge to his competence — remains unclear and unsupported.
49. The Kroll Report on November 3, 2022 was based on an obviously thorough analysis and concluded that the source code in the L1bre application could be compiled and operate as a functioning⁶² Android application. The Report also concluded that the source code has the functionality consistent with the nine primary features outlined in the Concession. Mr. Mitchell was subjected to probing and rigorous cross-examination on April 11, 2024⁶³, confirming at the

⁵⁸ StR, Day 5, pp 1317-1321. Also 1326.

⁵⁹ See p. 1390, for instance.

⁶⁰ <https://www.giac.org/certifications/reverse-engineering-malware-grem/>.

⁶¹ https://www.isc2.org/certifications/cert&utm_term=search&utm_content=GBL-Ecomm-CISSP-cert&gad_source=1&gad_campaignid=23374861159&gbraid=0AAAAAD-S_-MA9OQaqvlevnL5DmNM5mKF1&gclid=CjwKCAiAssfLBhBDEiwAcLpwfoKtK4mbSiQCpfhXv6g1GBLivys4BPT3CiJgCgi1Xagx5XvUU1-eUBoCVWYQAvD_BwE.

⁶² Emphasis supplied.

⁶³ StR, April 11, 2024 pp. 1208-1266

outset that he also heads the Malware Analysis and Reverse Engineering team of Kroll, has a master degree in data science from Southern Methodist University and at least *fifteen years'* experience in software analysis⁶⁴. During cross-examination⁶⁵, it became apparent that Mr. Mitchell's command of the subject matter exceeded that of the examiner⁶⁶.

50. At §§ 471–485 of the Award, the majority engages in a selective reading of the Mitchell report, extracting isolated language in order to cast doubt on the expert's competence or qualification to express the views he did. In the absence of comparable technical expertise on the part of the Tribunal, such attempts to second-guess Mr. Mitchell's analysis are, in my view, methodologically unsound. They lie beyond the Tribunal's proper sphere of competence, and I see no principled basis for revisiting the technical analysis of an obviously qualified expert, save to engage in an exercise in futility.
51. At the conclusion of his cross-examination, the expert responded to questions from the Tribunal⁶⁷ in a clear and coherent manner. His analogy between static testing being tantamount to reading a partition and the dynamic testing consisting in playing the music, I found quite logical and persuasive⁶⁸. He concluded his testimony by expressing the unchallenged view that developing the software at hand would take “... *months and years (...) you also need to have architects for the server (...) so we need many people of many disciplines (...) it is not something that you could do as a hobby, and it's not something that you could sit down and do in a couple of weeks with a couple of people. This is a substantial investment*”.
52. In light of the foregoing, it is not apparent how the Tribunal could properly substitute its own assessment for the analysis of a software system developed over several months by a substantial team, and then conclude that it was unfit for operation in the face of a qualified expert opinion reaching the opposite conclusion. The Respondent's expert did not meet the challenge posed by the Kroll Report and advanced no compelling technical grounds in support of the general assertions that Mr. Mitchell's analysis was unpersuasive. In the absence of corresponding expertise on our part, such an approach risks giving the appearance that the conclusion preceded the analysis.
53. Finally, the Award devotes a portion of its analysis to the Mi-Taxi application and concludes that its deployment, notwithstanding the existence of a concession granted to Lusad, would be immune from criticism. I am unable to find the reasoning set out at §§ 500–514 persuasive. In particular, despite the majority's efforts to reconcile the issue, it is not apparent how the implementation of the Mi-Taxi application - even on a non-mandatory basis - could be regarded as consistent with the L1bre System, a defining feature of which was precisely its potential exclusivity. I am therefore unable to join my co-arbitrators in concluding

⁶⁴ StR, April 11, 2024 p.1210.

⁶⁵ *Ibidem*, pp. 1227-1262.

⁶⁶ See, for instance, p.1229:12-14; p.1230:17-19; p.1232:2-10; p.1236:10-13; p.1237:10-14; p.1238:11-15; p.1243: 8; p.1246:14-19; p.1252: 5-15, etc.

⁶⁷ *Ibidem*, pp. 1259-1266.

⁶⁸ *Ibidem*, p. 1261 :8-22; also see p.1262:22 and p.1263:1-18 in answer to the President's question.

that the development and release of the Mi-Taxi application would have been acceptable in the absence of Claimants' exclusive rights. As the Award itself correctly recalls, concession services are, by definition, services that the state does not operate directly but entrusts to a third party. In light of the repeated statements that the objective of the new Administration was to dismantle the L1bre system, the substitution of Mi-Taxi was inconsistent with any accepted standard of Fair and Equitable Treatment and, in my view, came close to constituting an expropriation in and of itself.

These are some of the points I wanted to make in respect of the majority opinion issued by my learned colleagues. I regret to be unable to joint them and the foregoing is an attempt to set forth some of the reasons for which I take the view that the claim should have been upheld and compensation awarded in a measure that I shall not discuss in this separate opinion, the purpose of which is simply to outline some of my areas of disagreement with the majority view.

Dr Charles Poncet

Geneva, January 31, 2026

[Signed]

Charles Poncet
Arbitrator

Date: January 31, 2026