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)

PROCEDURAL ORDER NO. 11

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. Elisa Méndez Bräutigam

July 3, 2023

I. INTRODUCTION

1. The Tribunal is seized with two applications by the Claimants:

   a. The first application dated May 3, 2023 seeks (i) to introduce new evidence into the record to respond to the report on graphoscopy and documentoscopy filed with the Respondent's Rejoinder dated March 7, 2023 (the "**Armenta Report**"); (ii) access to the original documents relied upon by the Respondent's experts in the Armenta Report; (iii) 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 Rejoinder; and (v) to have the Respondent facilitate Mr. Eduardo Zayas' in-person participation at the final hearing (the "**First Application**").

   b. The second application dated June 5, 2023 seeks to supplement the arbitration record with new documents (the "**Second Application**").

II. PROCEDURAL BACKGROUND

2. On May 3, 2023, the Claimants filed their First Application together with Annexes A and B.

3. On the same day, the Tribunal invited the Respondent to comment on the First Application by May 12.

4. On May 8, 2023, the Respondent sought an extension until May 19 to file its comments. On May 9, the Tribunal granted the Respondent's request.

5. On May 19, 2023, the Respondent filed its Response to the First Application together with Annexes A to C, opposing the First Application.

6. On May 22, 2023, the Claimants sought leave to reply to the Response by May 24. On the same day, the Tribunal granted the Claimants' request and invited the Respondent to file a rejoinder by May 26.

7. On May 24, 2023, the Claimants filed their Reply on the First Application.

8. On May 26, 2023, the Respondent filed its Rejoinder on the First Application.

9. On June 5, 2023, the Claimants filed their Second Application together with Annexes A and B. On the same day, the Tribunal invited the Respondent to comment on the First Application by June 9.

10. On June 9, 2023, the Respondent filed its Response to the Second Application together with Annex 1.

11. On June 11, 2023, the Claimants sought leave to reply to the Response by June 13, 2023. The Respondent opposed the Claimants' request. On the same day, the Tribunal granted the Claimants' request and invited the Respondent to file a rejoinder on the Second Application by June 16, 2023.

12. On June 13, 2023, the Claimants filed their Reply on the Second Application.

13. On June 16, 2023, the Respondent filed its Rejoinder on the Second Application.

III. PARTIES' POSITIONS

A. THE CLAIMANTS' POSITION

(1) The First Application

a. The Request to Introduce New Evidence to Respond to the Armenta Report

14. The Claimants seek leave to address arguments and expert evidence raised by Mexico in its Rejoinder by July 17, 2023.[1]

15. The Claimants submit that the Respondent has waited until the filing of its Rejoinder to submit an expert report, the Armenta Report, which evaluates the authenticity of documents that the Claimants say have been on the record since either the Request for Arbitration or the Memorial on the Merits. Waiting until the last pre-hearing written

[1] First Application, pp. 2-3.

submission to introduce new expert evidence, the Claimants submit, has left them without a fair opportunity to address the allegations on the purported inauthenticity of the disputed exhibits.[2]

16. The Claimants contend that Mexico could have advanced its case on the alleged inauthenticity of the exhibits and submit supporting expert evidence earlier. Instead, Mexico decided to make only imprecise and vague protestations in its Counter-Memorial, as opposed to the "full-blown allegations" of forgery that are now being pleaded in the Rejoinder. The Claimants say that in their Reply submission they could not have anticipated the nature and extent of the Respondent's allegations.[3]

17. The Claimants observe that the Armenta Report challenges the signatures of four different individuals. The Claimants say that they have access to evidence confirming that these individuals signed the relevant documents and/or acknowledge the existence of the 2016 Concession. The Claimants are also considering what other evidence is relevant and necessary for them to have a fair opportunity to confront the Armenta Report at the final hearing.[4]

18. As to the Respondent's argument that the Claimants have brought their request to file new evidence late, the Claimants submit that they had no duty to guess which documents, if any, Mexico would decide to challenge, and could not have anticipated undisclosed expert testimony on specific documents. The Claimants rely on section 16.6 of Procedural Order No. 1 to argue that documents are presumed authentic unless specifically objected to by a party. The Respondent only "specifically objected" to some of the documents in the Rejoinder, and the Claimants had no burden to defend the authenticity of their documents in the abstract.[5]

[2] First Application, pp. 1-2.
[3] First Application, p. 2; Reply on the First Application, p. 2.
[4] First Application, p. 2.
[5] Reply on the First Application, pp. 1-2.

b. The Request to Have Access to the Original Documents Reviewed by Mexico's Experts in the Armenta Report

19. The Claimants seek access to the original versions of the documents reviewed by the Respondent's experts when preparing the Armenta Report. The Claimants further request that these documents be made available on the same terms and conditions established for Mexico's inspection of the Claimants' original documents (i.e., at ICSID's facilities in Washington, D.C. in accordance with Procedural Order No. 6).[6]

20. The Claimants submit that, in its Rejoinder, the Respondent, through the Armenta Report, challenges the authenticity of five Semovi documents relied upon by the Claimants (C-0007, C-0009, C-0018, C-0019 and C-0055).[7] The challenge is based on the Respondent's experts' comparison of the original documents of these exhibits produced by the Claimants and 30 Semovi documents from unrelated matters. Image of these 30 documents have been attached as exhibits FEBS-0017-SPA through FEBS-0046-SPA to the Armenta Report.[8] According to the Claimants, the Armenta Report implies that Mexico provided the experts with the original versions of these documents to perform their analysis.[9]

21. The Claimants observe that Article 5(2)(e) of the International Bar Association ("IBA") Rules on Taking of Evidence in International Arbitration provides that an expert report must contain the documents on which the Party-appointed expert relies.[10]

22. The Claimants submit that they require the same access to the original documents as the Respondent's experts in order to enable them to properly review and test the Armenta Report, as well as to not be unfairly limited in their preparations to cross-examine the Respondent's experts.[11]

23. The Claimants say that in *inter partes* correspondence, they asked Mexico for confirmation on whether its experts have had access to the original versions of exhibits FEBS-0017-SPA

[6] First Application, pp. 3-4.
[7] First Application, p. 3.
[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] *Id*.

through FEBS-0046-SPA and, if so, to have access to the originals. Mexico confirmed that its experts had reviewed the original versions, but refused to make them available to the Claimants.[12]

c. The Request to Have Access to an Original Document in the Semovi File Produced by Mexico

24. The Claimants seek access to an original document in the Semovi file produced by Mexico (the "Respondent's Oficio DGJR-1291"). The Claimants request access to that document on the same terms and conditions established for Mexico's inspection of the Claimants' original documents (i.e., at ICSID's facilities in Washington, D.C. in accordance with Procedural Order No. 6).[13]The Claimants say that access to the original of the Respondent's Oficio DGJR-1291 is needed to prove the authenticity of exhibit C-0009.[14]

25. The Claimants submit that the original version of exhibit C-0009 was made available by the Claimants for the Respondent's review on October 31, 2022 and its experts concluded that the exhibit is false. However, they say, the Semovi file produced by Mexico in response to the Claimants' document request no. 1 includes the Respondent's Oficio DGJR-1291, which differs visibly from the one produced as exhibit C-0009. Among others, the reference quoting the June 17, 2016 Adjudication Committee Minutes in both documents is different – while exhibit C-0009 states that the 40% of the advertisement space must be reserved for the government, the Respondent's Oficio DGJR-1291 states only 20%. The Claimants contend that the reference in the Respondent's Oficio DGJR-1291 to 20% is nowhere to be found in the version of the Adjudication Committee Minutes the Respondent relies on (R-0068), while the reference to 40% included in exhibit C-0009 is found in the version of the Minutes the Claimants cite (C-0051).[15]

26. According to the Claimants, this inconsistency suggests that one or both of the Respondent's documents were altered to benefit Mexico. Accordingly, the Claimants say,

[12] *Id*.
[13] First Application, pp. 4, 10.
[14] First Application, 4.
[15] First Application, pp. 5-9.

access to the original version of the Respondent's Oficio DGJR-1291 is needed to challenge the Armenta Report.[16]

d. The Request to Strike a Jurisdictional Objection From the Rejoinder

27. The Claimants request that the Tribunal strike paragraphs 327 to 337 of the Rejoinder, which they say sets out a new jurisdictional objection that the Claimants were precluded from invoking the dispute resolution mechanism of NAFTA by reason of the waiver of their rights in Lusad's constitution. In the alternative, the Claimants seek leave to address the new objection in a written submission, including with additional supporting documents and legal authorities, by July 17, 2023.[17]

28. The Claimants say that the Respondent has raised this new jurisdictional objection too late. They observe that ICSID Arbitration Rule 41(1) requires the Respondent to raise any objections as early as possible and, in any event, no later than the filing of its Counter-Memorial, unless the facts on which the jurisdictional objection is based are unknown to the party at that time.[18]

29. Relying on investor-State decisions, the Claimants submit that where a party fails to raise a jurisdictional objection within the time limits of Rule 41(1), it waives its right to do so and the tribunal is empowered to reject the objection. The Claimants say that the Respondent waited until its Rejoinder to raise its new jurisdictional objection, and that it has failed to show that the facts on which the objection is based were unknown to the Respondent at the time of its Counter-Memorial.[19]

e. The Request to Have Mr. Eduardo Zayas Attend the Hearing in Person

30. The Claimants request that the Tribunal order Mexico to facilitate Mr. Zayas' in-person participation at the hearing.[20]

[16] First Application, pp. 5, 10.
[17] First Application, pp. 10-11.
[18] First Application, p. 11.
[19] First Application, pp. 11-12.
[20] First Application, p. 13.

31. The Claimants say that Mr. Zayas' release from the Reclusorio Preventivo Varonil Sur in November 2022 was conditioned upon him surrendering his Mexican passport and not travelling outside of Mexico. The Claimants submit that Mr. Zayas' in person attendance is required because he is a key witness in this arbitration. While Mr. Zayas is available to provide virtual testimony if necessary, the Claimants submit that they believe that the Tribunal and the Parties would benefit from his in-person testimony.[21]

32. The Claimants note that Mr. Zayas plans to request leave from the competent Mexican court to travel to the United States for the limited purpose of preparing and rendering his testimony in person at the hearing.[22]

(2) The Second Application

33. The Claimants seek the Tribunal's permission to introduce into the record:

a. A recent Mexican judicial decision concerning the Claimants' witness, Mr. Santiago León Aveleyra (the "**Mexican Judicial Decision**"); and

b. 13 internal e-mail exchanges among Mexican government officials (the "**Emails**").[23]

34. According to the Claimants, these documents are not only relevant and material to the outcome of the case, but are critical and essential to key issues in this proceeding.[24]

a. The Mexican Judicial Decision

35. The Claimants submit that the Mexican Judicial Decision they wish to introduce into the record is a decision dated May 18, 2023 issued by Mexico's Eighth Criminal Court of the First Circuit in an *amparo* action filed by their witness, [redacted]. The *amparo* and the decision concern the case and related arrest warrant issued against Mr. León, which has been discussed by the Parties in this proceeding.[25]

[21] First Application, pp. 12-13.
[22] *Id*.
[23] Second Application, p. 1.
[24] Second Application, pp. 2, 6.
[25] Second Application, p. 2.

36. The Claimants contend that it is necessary to add this decision and corresponding *Informes de Cumplimiento* to complete the record and avoid any misrepresentation as to the status of the criminal proceedings in Mexico.[26]

b. The Emails

37. The Claimants submit that they were recently provided with the Emails by one of their fact witnesses, Mr. Agustín Muñana Zúñiga. The Emails involve, among other individuals, Semovi's comptroller, Semovi's general counsel, and various individuals that held directorship positions within Semovi. According to the Claimants, the Emails are the only internal Mexican government emails available for the Tribunal during the relevant June 2016-October 2018 period.[27]

38. According to the Claimants, the Emails are relevant for this case because they provide a contemporaneous record from the government officials in charge of overseeing the Concession. The Claimants say that the Emails will particularly assist the Tribunal in resolving the dispute between the Parties as to which of the competing and inconsistent versions of the various documents that concern Mexico's granting of the Concession to Lusad, which the Parties have introduced into the record, are authentic and whether Lusad received a *projecto de concesión* or a binding Concession in June 2016. In particular, the Emails show that Mexican government officials modified and/or backdated versions of several contested documents which, in turn, shows that Mexican government officials have altered key documents relating to the Concession.[28]

c. Special Circumstances Justifying the Submission of the New Documents

39. The Claimants contend that Procedural Order No. 1 does not elaborate on the special circumstances required to submit new evidence. They submit that tribunals have considered circumstances to be "special" or "exceptional" when, among others, the relevant and material evidence has become available or accessible to the requesting party

[26] *Id*.
[27] Second Application, pp. 3, 5. With their Second Application, the Claimants provided a list of the relevant email chains, with each email's date and a description of the Mexican governmental officials who sent, received, or were copied on these emails (Annex B to the Second Application).
[28] Second Application, p. 3; Reply on the Second Application, p. 1.

after the parties had their last opportunity to submit evidence in accordance with the procedural calendar.[29]

40. The Claimants say that these considerations apply here. They only recently learned of the existence of these new documents and therefore could not have submitted them earlier. The Mexican Judicial Decision was only issued on May 18, 2023, while the Emails were solely between Mexican government officials and were not otherwise available or accessible until Mr. Muñana provided them to the Claimants.[30]

41. The Claimants further submit that the Respondent would not be procedurally prejudiced by allowing these documents into the record. The judicial decision is public, and the Emails are between Semovi officials and are therefore Mexico's documents. The Emails were further responsive to the Claimants' document requests, and Mexico should have made an inquiry into responsive documents eight months ago. Finally, given that the hearing will take place in October 2023, the Respondent will have time to review and address the documents at the hearing. The Claimants would also have no objection if the Tribunal were to grant the Respondent an opportunity to make observations on these documents in accordance with paragraph 16.3.2 of Procedural Order No. 1. The Claimants say, however, that Mexico's request to submit additional rebuttal evidence and witness testimony concerning these documents is premature. Insofar as the documents are admitted into the record, the Respondent should then make a reasoned application requesting any procedural relief it consider appropriate.[31]

42. In their Reply, the Claimants submit that Mexico does not dispute that the documents are relevant to the arbitration, and that the Respondent notes that the subject of the Emails overlaps with issues which the Parties have pleaded.[32]

[29] Second Application, p. 5 *citing Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Procedural Order No. 5, ¶ 11 and *Rand Investments Ltd., et al. v. Republic of Serbia*, ICSID Case No. ARB/18/8, Procedural Order No. 9, ¶ 21.
[30] Second Application, pp. 5-6; Reply on the Second Application, p. 2.
[31] Second Application, p. 6; Reply on the Second Application, p. 2.
[32] Reply on the Second Application, p. 1.

B. THE RESPONDENT'S POSITION

(1) The First Application

43. The Respondent submits that the Claimants' First Application is unreasonable and requests its dismissal. If the Tribunal were to grant any of the Claimants' requests, the Respondent says, then it would expect to be granted an opportunity to file a rejoinder and seek documents from the Claimants in order to preserve the principle of equality of arms.[33]

a. The Request to Introduce New Evidence to Respond to the Armenta Report

44. The Respondent opposes the Claimants' request to submit new evidence in response to the Armenta Report.[34]

45. The Respondent contends that the Claimants' request is, in reality, an attempt to correct their litigation strategy. The Claimants chose to rely on witness testimony, instead of expert evidence, to support their allegations on the authenticity of their exhibits. The Respondent says that neither the Tribunal nor Mexico can now be held responsible for the Claimants' choice of strategy.[35]

46. Furthermore, the Respondent submits, a review of the procedural history of this arbitration shows that the Claimants knew that the Respondent would file a report on graphoscopy and documentoscopy. In particular, its objections concerning the authenticity of the disputed documents were ongoing and unambiguous. Accordingly, the Claimants cannot claim that the Armenta Report took them by surprise. While the Claimants could themselves have filed expert evidence on the authenticity of their documents, they chose not to do so.[36]

[33] Response to the First Application, p. 2; Rejoinder on the First Application, p. 4.
[34] *Id*.
[35] Response to the First Application, pp. 2, 4-5.
[36] Response to the First Application, p. 2; Rejoinder on the First Application, p. 2.

47. The Respondent says that the Claimants themselves, in their objections to the Respondent's document requests of July 1, 2022, had highlighted the need for expert evidence to determine the authenticity of their exhibits.[37]

48. The Respondent submits that allowing the Claimants to file new evidence would violate the procedural phases of this proceeding, which the Claimants had voluntarily agreed to. Furthermore, according to the Respondent, allowing the Claimants' request, would imply opening the arbitration to enless rounds of submissions.[38]

49. In its Rejoinder, the Respondent says that in their Reply submission the Claimants acknowledge that the Respondent had objected to the disputed documents, but now claim that these objections were not specific. The Respondent disputes the Claimants' contention that section 16.6 of Procedural Order No. 1 requires that its objections meet a certain degree of specificity. In any event, the Respondent says, it did raise specific objections as it specified the documents it was challenging as well as the specific issues, including the inconsistencies, it had identified in these documents.[39]

b. The Request to Have Access to the Original Documents Reviewed by Mexico's Experts in the Armenta Report

50. The Respondent submits that the Claimants have no legal basis to request access to the original documents reviewed by its experts for the Armenta Report.[40]

51. The Respondent contends that exhibits FEBS-0017-SPA through FEBS-0046-SPA are part of the Armenta Report and were uploaded to the Box folder for this case in accordance with Procedural Order No. 1 and Article 5.2(e) of the IBA Rules. Nothing in the IBA Rules requires the Respondent to provide the original documents of the exhibits to the Report.[41]

52. The Respondent says that, as with respect to their request to respond to the Armenta Report, the Claimants are seeking to open up the proceeding to "*fases infinitas de controversias*"

[37] Response to the First Application, pp. 3-4.
[38] Response to the First Application, pp. 4-5.
[39] Rejoinder on the First Application, pp. 2-3. The submission states, in Spanish: "*significaría abrir el arbitraje a fases infinitas*."
[40] Response to the First Application, p. 6.
[41] Response to the First Application, pp. 5-6.

with their attempt to access the original documents reviewed by the Respondent's experts, which the Respondent strongly opposes.[42]

53. The Respondent concludes that the Claimants are late in their request. They had knowledge of the scope of work of Mexico's experts and had access to the originals of the disputed documents for months.[43]

c. The Request to Have Access to an Original Document in the Semovi File Produced by Mexico

54. The Respondent submits that the Claimants' request to have access to an original version of the Respondent's Oficio DGJR-1291 has been raised too late. The Claimants knew that exhibit C-0009 would be one of the documents reviewed in the Armenta Report, and they had access to the documents produced by the Respondent for over a year. Furthermore, Mexico introduced the Respondent's Oficio DGJR-1291 when filing its Counter-Memorial.[44]

55. The Respondent says that it does not know the source for exhibit C-0009 nor the reasons for the discrepancies in the documents raised by the Claimants. Nevertheless, the Respondent says, this would not be the first time that the Claimants submit documents that differ from those of Semovi and, therefore, there is no reason to assume that exhibit C-0009 is authentic.[45]

d. The Request to Strike a Jurisdictional Objection From the Rejoinder

56. The Respondent disputes the Claimants' allegation that it has brought a new jurisdictional objection in its Rejoinder. The Respondent says that it has merely strengthened its argument concerning the Claimants' and its partners' nationality, which the Respondent says it had brought in its Counter-Memorial.[46]

[42] Response to the First Application, p. 6.
[43] Response to the First Application, p. 6; Rejoinder on the First Application, p. 2.
[44] Response to the First Application, p. 7.
[45] *Id*.
[46] *Id*.

57. In particular, in its Counter-Memorial the Respondent submitted that Messrs. Covarrubias, Zayas and León acted like Mexican nationals, in their own name and in representation of Lusad. Furthermore, in the *Taxinet* case, the partners recognized that any concession, in particular, the 2018 Concession, would be granted only to Mexican businessmen. This implied that any foreign person related to Lusad accepted to be treated as Mexican and, accordingly, renounced the protection of a different government for Lusad's actions.[47]

58. The Respondent concludes that paragraphs 327-337 of its Rejoinder are part of the objection *ratione personae* it had raised in its Counter-Memorial and should be maintained.[48]

e. The Request to Have Mr. Eduardo Zayas Attend the Hearing in Person

59. As to the Claimants' request that Mexico facilitate Mr. Zayas' in-person participation at the hearing, the Respondent submits that its counsel is not authorized to request the competent Mexican court to modify or suspend the provisional measures against Mr. Zayas so as to allow him to travel abroad. It is for the Claimants to make the pertinent requests.[49]

60. The Respondent further submits that the Claimants have failed to show why it would be unreasonable or unviable for Mr. Zayas to attend the hearing remotely. Relying on its previous experience with remote testimony in arbitral proceedings, the Respondent submits that Mr. Zayas' remote attendance is appropriate.[50]

(2) The Second Application

a. The Mexican Judicial Decision

61. The Respondent agrees to add the Mexican Judicial Decision into the record on the understanding that the Respondent may also submit information on any new development that may occur in the criminal proceedings against Messrs. León and Zayas.[51]

[47] Response to the First Application, p. 8.
[48] *Id*.
[49] Response to the First Application, pp. 8-9.
[50] Response to the First Application, p. 9.
[51] Response to the Second Application, p. 2.

b. The Emails

62. The Respondent opposes the Claimants' request to add the Emails into the record and submits that the Claimants have failed to show that "special circumstances" exist that would justify their request. The Respondent further contends that granting the Claimants' request would put Mexico at a significant disadvantage.[52]

63. The Respondent says that the Claimants have not proven that Mexico raised new allegations after its Rejoinder that they would want to respond to with the Emails and that would justify adding them into the record. Nor have the Claimants explained why they only gained access to these documents until after the filing of the Rejoinder. In particular, the Claimants have failed to explain how or in which moment Mr. Muñana discovered the Emails and why he did not find them while the Claimants were preparing their Reply. The Respondent made available to the Claimants Semovi's file on the Concession in July 2022, and the Claimants, together with Mr. Muñana, had sufficient time since then to rebut the Respondent's arguments on the authenticity of the disputed documents. There is therefore no reason why the Claimants could not have submitted the Emails with their Reply.[53]

64. The Respondent submits that, if the documents had been submitted with the Reply, it would have had enough time to address them. It would be, however, unfair to allow the Claimants to submit new documents without allowing the Respondent to respond to them, or only allowing it to do so within a limited time period or with limitations as to which evidence the Respondent may adduce in response.[54]

65. While the Claimants allege that the Emails will assist the Tribunal in determining the authenticity of the disputed documents, the Respondent submits that these documents and the facts concerning their authenticity have already been widely discussed by the Parties. Furthermore, the Respondent contends that the Emails appear to include information on events that occurred at a time period that has not been previously pleaded by the Parties. It

[52] Response to the Second Application, p. 6.
[53] Response to the Second Application, p. 3; Rejoinder on the Second Application, p. 1.
[54] Rejoinder on the Second Application, p. 2.

would thus appear that the Claimants intend to improperly allege new facts on the basis of these Emails.[55]

66. Moreover, the Respondent submits that the Emails would only serve to confuse the relevant facts. The Respondent says that Mr. Muñana has contradicted himself in at least two occasions, and the Emails only reveal additional, grave contradictions of his testimony. Accordingly, the Emails would not assist the Tribunal in resolving any issue concerning the disputed documents.[56]

67. The Respondent further submits that Semovi has not been able to find the Emails in its server nor is Mexico aware of the Emails' content. Accordingly, if the Emails are added to the record, the Respondent will seek leave to submit evidence in response, including new witness testimony.[57]

68. Finally, the Respondent submits that it has agreed to procedural calendars in other cases on the basis of the calendar that was originally established in this case, and that it has important commitments in other cases during the summer of 2023. The fact that the hearing will take place in October 2023 does not mean that the Claimants are at liberty to initiate new rounds of arguments whenever they please.[58]

IV. TRIBUNAL'S ANALYSIS

(1) The Request to Introduce New Evidence to Respond to the Armenta Report

69. The Claimants are requesting the Tribunal leave "*to introduce evidence in these proceedings to respond to the belated Armenta Report and Mexico's corresponding arguments*."[59]

70. The Claimants argue that the Respondent belatedly introduced with the Rejoinder specific objections against the authenticity of certain exhibits presented by the Claimants since the

[55] Response to the Second Application, pp. 3-4.
[56] Response to the Second Application, pp. 4-5.
[57] Response to the Second Application, pp. 2, 6.
[58] *Id*.
[59] First Application, § A, p. 1.

Memorial. Given that the Rejoinder was the last substantive filing before the hearing, the Claimants argue that they require an additional opportunity to address the Armenta Report and the Rejoinder's arguments on the alleged inauthenticity of the Claimants' exhibits.[60] By contrast, the Respondent argues that it objected the authenticity of the Claimants' exhibits and anticipated the filing of expert evidence on time, with its Counter-Memorial.

71. Regarding the authenticity of the documents submitted in this arbitration, Procedural Order No. 1 provides that "*[C]opies of documentary evidence shall be assumed to be authentic* ***unless specifically objected to by a party,*** *in which case the Tribunal will determine whether authentication is necessary*."[61] (Emphasis added).

72. Section 16.3 of Procedural Order No. 1 provides that "*Neither party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission, unless the Tribunal determines* ***that special circumstances*** *exist based on a reasoned written request followed by observations from the other party*." (Emphasis added). Likewise, section 17.2 of Procedural Order No.1 provides that "*Neither party shall be permitted to submit any testimony that has not been filed with the written submissions, unless the Tribunal determines* ***that special circumstances*** *exist based on a reasoned written request followed by observations from the other party (following the procedure outlined in §16.3).*" (Emphasis added).

73. The Parties disagree on whether the timing of the Respondent's submission of the Armenta Report to support its objection to the authenticity of the Claimants' exhibits[62] amounts to a "special circumstance" justifying the submission of new evidence by the Claimants at this stage of the proceeding.

74. Since timing is at the core of the Parties' disagreement, the Tribunal will first recall the timeline of events pertaining to the Respondent's inauthenticity allegations:

[60] First Application, § A, pp. 2-3.
[61] Section 16.6 of Procedural Order No. 1.
[62] Rejoinder, ¶ 208.

i. On May 13, 2022, the Respondent filed the Counter-Memorial, and in paragraph 197 questioned the "veracity" of certain documents, including exhibits C-0007, C-0009, C-0018, C-0019, and C-0055. In particular, the Respondent questioned the veracity of exhibits C-0007, C-0009, and C-0055 for allegedly being unable to locate those same documents in the files of the Semovi. Regarding exhibits C-0018 and C-0019, the Respondent affirmed that it was also unable to find identical documents, but it did find other documents with the same ID number, which had different content.[63]

[63] Counter-Memorial, p. 59, ¶ 197. "*197. Segundo, el anexo C-0038 no es la excepción. La Demandada detalla algunos aspectos relacionados con otros anexos documentales ofrecidos por las Demandantes que ponen en duda su veracidad:*

- *Anexos C-0053, C-0007 y C-0118. La Demandada entiende que estos anexos consisten en la supuesta concesión otorgada a Lusad en 2016, la cual fue modificada en enero de 2017 y "re-expedida" en marzo de 2017. La situación a considerar es que la Semovi no localizó estos documentos en sus registros, archivos y expedientes.*
  (…)
- *Anexo C-0009. La Semovi no localizó en sus registros, archivos y expedientes el oficio del 29 de junio de 2016 firmado por el Sr. Rubén García, Director General Jurídico y de Regulación de la Semovi en el que autorizó a Lusad la posibilidad de instalar pantallas publicitarias al interior de taxis. Además, el Sr. Rubén García no contaba con facultades para expedir el oficio, ya que esa función le competía al funcionario encargado de la Dirección General de Servicio Público de Transporte Individual de la Semovi, de conformidad con la legislación aplicable.*
  (…)
- *Anexo C-0055. La Semovi no localizó en sus registros, archivos y expedientes la comparecencia del 15 de marzo de 2017, firmada por el Sr. Zayas, en representación de Lusad, y el Director de Normatividad y Regulación a la Movilidad de la Semovi, sobre la reexpedición de la concesión aparentemente otorgada en 2016 a Lusad.*
  (…)
- *Anexo C-0018. La Semovi no localizó en sus registros, archivos y expedientes el oficio DGSTPI-965-2018 del 30 de mayo de 2018, dirigido a Lusad y firmado por la Sra. Alejandra Balandrán, Directora General del Servicio de Transporte Público Individual de la Semovi, en el que "solicitó la suspensión" del periodo de instalación de taxímetros digitales. Sin embargo, la Semovi localizó otro oficio con el mismo número de registro ("DGSTPI-965-2018") pero del 2 de mayo de 2018, y que se refiere a un tema distinto al Proyecto L1bre y a Lusad. Además, la veracidad de la firma del anexo C-0018 es cuestionable*
- *Anexo C-0019. La Semovi no localizó en sus registros, archivos y expedientes el oficio DGSTPI-1943-2018 del 28 de octubre de 2018, dirigido a Lusad y firmado por la Sra. Alejandra Balandrán, Directora General del Servicio de Transporte Público Individual de la Semovi, en el que "solicitó que continuara la suspensión" del periodo de instalación de taxímetros digitales. Sin embargo, la Semovi localizó otro oficio con el mismo número de registro ("DGSTPI-1943-2018") pero del 8 de octubre de 2018, y que se refiere a un tema distinto al Proyecto L1bre y a Lusad. Además, la veracidad de la firma del anexo C-0019 también es cuestionable.(…)*

198. Con base en lo anterior, el Tribunal podrá entender las preocupaciones de la Demandada. Falsificar o alterar documentos oficiales es un delito conforme al ssitema jurídico mexicano, y una práctica deplorable en arbitraje de inversión.
(…)

200. Esta situación no puede ser minimizada por las Demandantes. La Demandada anticipa que solicitará la producción de los documentos originales de diversos anexos documentales exhibidos por las Demandantes en el momento procesal oportuno para corroborar su originalidad, de conformidad con la disposición 15 de la Resolución

ii. On June 3, 2022, the Parties exchanged their document production schedules. Requests nos. 45 and 46 of the Respondent's schedule involved the production of the originals of some of the Claimants' exhibits, including exhibits C-0007, C-0009, C-0018, C-0019, and C-0055. The Respondent substantiated its requests on the basis that the Semovi could not find some of those documents within its registires, files and dockets and that other documents were signed by officials of the Semovi who lacked the authority to do so. The Respondent also argued that the original documents were relevant to verify their authenticity given the "*possible forgery*" of some of the Claimants' exhibits.[64]

iii. On July 1, 2022, the Parties exchanged their responses and objections to the document production requests. The Claimants agreed to produce documents responsive to the Respondent's requests nos. 45 and 46 but disagreed that the original hard copy versions were relevant since "*Mexico had not established any legitimate doubts about the authenticity of these documents* […] *Mexico has not engaged a forensic expert to analyze the documents already on record in the arbitration*."[65]

iv. On July 22, 2022, each Party submitted to the Tribunal their document production schedules with their requests, objections and replies for the Tribunal to decide on the objected requests. In its general reply no. 1 to the Claimants' objections, the Respondent indicated that it required access to the originals of the Claimants' exhibits because a forensic analysis on their authenticity on the basis of copies would be futile.[66] Moreover, in the Respondent's specific reply to requests nos. 45 and 46, Mexico

Procesal 1 y las Reglas IBA 2010. El hecho de basar reclamaciones en documentos posiblemente falsos afecta la credibilidad de las Demandantes, sus testigos y es un daño sistémico al arbitraje inversionista-Estado que no puede ser aceptado por el Tribunal."

[64] Procedural Order No. 4, Annex B (Respondent's document production schedule), requests nos. 45 and 46, fourth column, pp. 198-199.

[65] Procedural Order No. 4, Annex B (Respondent's document production schedule), requests nos. 45 and 46, fifth column, pp. 193-198. The submission states, in Spanish: "*La Demandada no considera necesario repetir en esta SED la problemática en torno a ciertos anexos documentales presentados por las Demandantes y su posible falsificación* […] *algunos anexos documentales de las Demandantes no fueron localizados al interior de la Semovi; su autenticidad es cuestionable y en otros casos fueron firmados por funcionarios de la Semovi sin facultades para ello.*"

[66] The Respondent's reply to the Claimants' response to the document production requests, p. 21, ¶ 11.

manifested that it had serious concerns regarding the veracity of various documents and that the Claimants could be basing their claims on altered or false documents.[67]

v. On August 4, 2022, the Tribunal granted the Respondent's requests nos. 45 and 46 in Procedural Order No. 4, and invited the Parties to agree on a protocol for the review of the original hard-copy documents.

vi. On September 15, 2022, the Tribunal recorded in Procedural Order No. 6 the protocol for the inspection of the original documents, considering the agreements reached by the Parties as informed in their September 12, 2022 letters.[68] One of the points of agreement was the possibility for each Party to appoint one expert to participate in the inspection. The Claimants decided not to designate any expert and did not oppose the Respondent bringing its own expert: "*Mexico proposed that one of its experts be allowed to participate. See Exhibit B. Claimants have no objection, provided that Mexico identifies the expert and his/her qualifications at least one week prior to the review. Mexico did not object to this request. See Exhibit D*."[69]

vii. On October 24, 2022, the Respondent sent an e-mail to the ICSID Secretariat –copying the Claimants– to convey the list of participants for the inspection of the originals. In that email, the Respondent provided a detailed description of the procedure to be applied by the experts during the inspection, explaining that the expert's work in graphoscophy and documentoscopy would be "*extensive*" involving, among others, the analysis of 327 pages, taking at least 1635 photos, using different types of cameras, and involving the "*systematizing and analyzing of the type of samples*."[70]

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[67] Procedural Order No. 4, Annex B (Respondent's document production schedule), requests nos. 45 and 46, sixth column, pp. 194-195. The submission states, in Spanish "*México tiene serias preocupaciones sobre la veracidad de diversos documentos* […] *las Demandante sposiblemente están basando sus reclamaciones en documentos alterados o falsos*."

[68] The Claimants' letter of September 12, 2022; the Respondent's letter of September 12, 2022.

[69] The Claimants' letter of September 12, 2022, p. 2.

[70] The Respondent's e-mail of October 24, 2022, sent by Ms. Rosalinda Toxqui Tlaxcalteca, provided as Annex C to the Respondent's Response to the First Application. The submission states, in Spanish: "*el trabajo de los peritos en grafoscopía y documentoscopía será arduo y han sido enfáticos en requerir cinco días para realizar sus labores. Cada hoja requiere de al menos cinco fotografías con diferente tipo de cámaras. Los peritos analizarán seis documentos, no cinco, con un total de 327 páginas, es decir, que los peritos tomarán al menos 1635 fotografías con*

viii. Between October 31 and November 3, 2022, the Parties conducted the on-site inspection of the originals of the Claimants' exhibits, with the presence of the Respondent's experts. The Respondent affirms –and the Claimants do not contend– that during the inspection it identified that the hard copy documents produced by the Claimants did not correspond with exhibits C-0018 and C-0019, since multiple differences were identified between both sets of documents. The Respondent further affirms that it raised this concern with the Claimants but that they replied that they would wait for the Respondent's comments in writing.[71]

ix. On November 4, 2022, Mexico sent to the Tribunal a letter raising its concerns regarding the production of the originals of exhibits C-0118 and C-0119. On the same date, the Claimants filed their Reply Memorial.[72] In their Reply, the Claimants "*vehemently deny that they forged or doctored any document at any time, including those documents that they submitted into evidence in this confirmatory evidentiary support for the document that Mexico challenges*"[73]

75. From the foregoing, the Tribunal concludes that the Respondent did raise specific objections to the authenticity of the Claimants' exhibits as early as in its Counter-Memorial. These allegations were consistently reiterated during the document production phase. The Claimants, in turn, criticized Mexico for not engaging a forensic report with the documents already on record at that moment, which were copies and not originals. In the Tribunal's view, if the Claimants' position at the time was that Mexico could make a forensic report with the copies, it is unclear why they chose not to present any expert evidence with the Reply, especially when they had the originals and Mexico had clearly and specifically objected the authenticity of the evidence the Claimants intended to rely on. Moreover, the Claimants could have had a forensic expert present during the inspection of the documents at ICSID, but decided not to have one.

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una cámara. Asimismo, su labor no se limita a la simple toma de fotografías, debido a que esta toma de muestras también conlleva sistematización y análisis del tipo de las tomas o muestras, no es un trabajo ineficiente ni innecesario."

[71] As informed to the Tribunal in the Respondent's letter of November 4, 2022, p. 2.

[72] The Respondent's letter of November 4, 2022.

[73] The Claimants' Reply Memorial, ¶ 19.

76. Therefore, in their Reply the Claimants had a clear procedural opportunity to present evidence, including an expert report and the evidence that they now claim to have available, to support the veracity of the documents they intend to rely on, and to counter the inauthenticity allegations raised by the Respondent. However, it was the Claimants' decision not to file expert or other evidence. The Tribunal recalls that the Claimants themselves affirmed in their Reply that they had "*confirmatory evidentiary support for the document that Mexico challenges*."[74] If the Claimants knew there was a challenge and had the evidence to counter the challenge, it is unclear why they decided not to file the evidence at the proper time, that is to say, with their Reply.

77. Moreover, in this case, the Tribunal does not find that the timing of the Armenta Report justifies the Claimants' request to file a new expert report of their own. Mexico challenged the Claimants' documents since its Counter-Memorial, and during the document production phase requested the originals to conduct a forensic analysis. The Tribunal granted the Respondent's document requests, and the Claimants agreed to the presence of the Respondent's expert to inspect the original documents and declined the opportunity to have an expert of their own. At that moment, it was clear that the Rejoinder was the procedural opportunity available for the Respondent to file the report of the experts present at the inspection of the documents with the conclusions from the inspection. Even after filing the Reply and before the Rejoinder, the Claimants could have raised their concerns as to the procedural opportunity to address any evidence resulting from the document inspection, but they decided not to do so until after the submission of the Rejoinder.

78. In light of the above, the Tribunal does not find that the Respondent has brought a "*belated challenge*"[75], nor that the timing of the Armenta Report can amount by itself to a "*special circumstance*" (section 16.3 of Procedural Order No. 1) to allow the Claimants to submit additional or responsive evidence after their last written submission. Despite that the Respondent's expert report had been anticipated, the Claimants decided not to bring an expert of their own to the document inspection, and not to file expert evidence with their

[74] The Claimants' Reply Memorial, ¶ 19.
[75] First Application, § B, p. 3.

Reply to support the authenticity of the exhibits questioned by the Respondent; instead, they chose to submit other type of "*confirmatory evidentiary support*."[76]

79. Finally, it was also the Claimants' decision to wait almost two months after the Respondent filed its Rejoinder on March 7, 2023 to raise their concerns with the First Application on 3 May 2023.

80. Based on the above, the Tribunal considers that there are no circumstances that justify allowing the Claimants to present additional evidence at this stage of the proceeding to rebut the Armenta Report, much less undetermined evidence that they claim to have and that they had available and decided not to present with the Reply.

81. However, the Tribunal considers that, as explained in section (2) below, on the one hand, there are circumstances that merit the submission of limited and precisely defined additional evidence, and, on the other, that such limited evidence will assist the Tribunal in determining the issue of the authenticity of certain documents that are relevant to this case.

(2) The Request to Have Access to the Original Documents Reviewed by Mexico's Experts in the Armenta Report

82. In addition to a new procedural opportunity to respond to the Armenta Report, the Claimants request the Tribunal to "*order Mexico to make available to Claimants all documents that were made available to Mexico's* experts" in the same terms as set out in Procedural Order No. 6.[77]

83. The Claimants argue that "*Mexico's belated challenge is based on its experts' comparison of the original documents produced by Claimants and Semovi documents from unrelated matters.*"[78] The Claimants further argue that, while the copies of the documents on which the Armenta Report relies were provided as exhibits FEBS-0017-SPA through FEBS-0046-SPA, the originals must be provided under Article 5(2)(e) of the IBA Rules on Taking

[76] The Claimants' Reply, ¶ 19.
[77] First Application, § B, p. 3.
[78] First Application, § B, p. 3.

of Evidence in International Arbitration, which requires expert reports to be accompanied by the documents on which the expert relies.

84. Moreover, the Claimants have indicated in a footnote in the First Application that "*[I]f the Tribunal grants Claimants access to the original versions of the documents requested in Sections B and C, Claimants reserve the right to request permission to introduce new evidence resulting from the review of those documents, including a possible rebuttal report*."[79]

85. To begin with, the Tribunal clarifies that, while it is not bound by the IBA Rules on the Taking of Evidence in International Arbitration, these rules "*shall provide guidance*" to the Tribunal pursuant to section 15.2 of Procedural Order No. 1.

86. Article 3.12 (a) of the IBA Rules provides that the copies of documents should suffice insofar as they conform to the originals. Accordingly, Article 5(2)(e) does not specifically require expert reports to be accompanied by the original documents.

87. However, the Respondent itself has claimed in this arbitration that access to original documents is required in document authenticity assessments, otherwise the analysis would be futile ("*totalmente futil*")[80] and, thus, was given access by the Claimants to original documents during the inspection at ICSID. The same rule must be applied in favor of the Claimants, who are requesting access to the original documents used in the Armenta Report to challenge the authenticity of certain exhibits.

88. The Armenta Report compares the signatures in the challenged documents with documents that were not in the record in this arbitration and that were first submitted, in copies, as annexes to the Armenta Report, with the Rejoinder. As mentioned above, access to such originals is necessary for the Claimants to be in a fair and equal position to present their case, and, particularly, to be able to cross examine the authors of the Armenta Report during the upcoming hearing.

[79] First Application, § B, p. 3, footnote 1.
[80] The Respondent's reply to the Claimants' response to the document production requests, p. 21, ¶ 11.

89. The Tribunal, on the other hand, requires sufficient information to decide on the challenge of relevant documents, but agrees with the Respondent in that opening the door at this stage of the proceeding to unlimited rounds of submissions and production of evidence would be inefficient and costly, and would not assist the Tribunal in conducting the case in a proper manner.

90. Considering the foregoing, the Tribunal:

a. Grants leave for the Claimants to inspect the original documents held by the Respondent and used in the Armenta Report, corresponding to exhibits FEBS-0017-SPA through FEBS-0046-SPA, in the presence of a forensic expert of their own and the authors of the Armenta Report.

b. The inspection of the original documents held by the Respondent will be conducted in the same conditions as set forth in Procedural Order No. 6, except for the location. In order to reduce time and costs, insofar as the documents are held by the Respondent in Mexico, and given that the Claimants' counsel has offices in Mexico, the inspection will take place in Mexico City in a location to be agreed upon by both Parties.

c. The experts of both Parties –that is to say the expert(s) appointed by the Claimants and the Respondent's experts who produced the Armenta Report (Angélica Armenta and Francisco Elías Bartolo Sánchez)– shall submit a joint expert report after the inspection indicating their points of agreement and disagreement. The joint report must be limited to the documents (original and copies, as well as digital and hard copies) that were used in the Armenta Report. This includes the originals of exhibits FEBS-0017-SPA through FEBS-0046-SPA, and the originals of the Claimants' exhibits inspected from October 31 to November 3, 2022. These originals may be introduced in the inspection referred to above in paragraph 90(b), if the experts jointly require it. The joint report cannot be accompanied by new factual evidence, nor introduce new submissions or documents, and may only be accompanied by legal authorities related to the joint report.

91. The Parties are instructed to inform the Tribunal, **no later than Friday, July 7, 2023** of the following:

(a) The date and duration of the document inspection referred to in paragraph 90 above.

(b) The deadline to submit the joint expert report, which in any event shall be filed by **Monday, September 4, 2023**.

(3) The Request to Have Access to an Original Document in the Semovi File Produced by Mexico

92. The Claimants are also requesting the Tribunal to grant them access to an original version of the document identified as Oficio DGJR-1291 of June 29, 2016, which they claim is in Mexico's possession, and corresponds with exhibit C-0009, which is one of the documents analyzed in the Armenta Report. According to the Claimants, access to this document is necessary "*to rebut the Armenta Report and have a fair opportunity to confront Mexico's experts at the final hearing*."[81]

93. The document identified as "Oficio DGJR-1291"of June 29, 2016 is a communication adressed to Servicios Digitales Lusad, S. de R.L., de C.V. and is signed by Ruben Alberto García Cuevas, as *Director General Jurídico de Regulación*, referring to the display of advertising and publicity content on the taxis' tablets.

94. The Tribunal observes that a version of Oficio DGJR-1291 was first submitted by the Claimants as exhibit C-0009 with the Memorial. With the Counter-Memorial, the Respondent submitted another version of the Oficio DGJR-1291 as exhibit R-0068. As noted earlier, since the Counter-Memorial, the Respondent objected the veracity of exhibit C-0009. During the document production phase, on July 26, 2022, the Respondent voluntarily produced part of the documents requested under the Claimants' request no. 1, particularly, the Semovi file.[82] However, the Claimants insisted on this request, which was partially granted by the Tribunal in Procedural Order No. 4 of August 4, 2022. The Respondent was ordered to produce, among others, the complete Semovi file or docket

[81] First Application, § C, p. 4.
[82] The Claimants' Motion to Compel, Exhibit 1 (A), PDF p. 12.

naming Lusad as a party from 2016 to 2018, no later than September 9, 2022. With the Reply, the Claimants submitted a version of Oficio DGJR-1291 found in the Semovi file produced by the Respondent during the document production phase, on pages 470 to 483 of exhibit C-0168.

95. In sum, there appear to exist three documents on the record identified as Oficio DGJR-1291, *i.e.* exhibit C-0009, exhibit R-0068, and exhibit C-0168. As the Tribunal already addressed in section (1) *supra,* since the Counter-Memorial the Claimants have been aware of the existence of discrepancies between exhibits C-0009 and R-0068, and of the Respondent's allegations of inauthenticity. The Claimants themselves acknowledged before filing the Reply that "*Mexico has raised issues relating to the authenticity of a number of documents that Claimants have submitted as exhibits*" and therefore, that they required access to the complete Semovi file to "*adequately respond to Mexico's arguments and to present their case*."[83]

96. The Claimants had the version of Oficio DGJR-129 of the Semovi file since July 26, 2022. If they considered that they required the original version of that document they had plenty of opportunities to request it. To address the inauthenticity allegations, the Claimants could have also requested the original version of exhibit R-0068 as early as during the document production phase. However, the Claimants chose to wait until after the filing of the Armenta Report to request the production of the original version of Oficio DGJR-129 produced as part of the Semovi file by the Respondent. In sum, the Claimants had sufficient opportunities to request the production and submit evidence to address Mexico's challenge against exhibit C-0009.

97. Therefore, in accordance with section 16.3 of Procedural Order No. 1, the Tribunal sees no compelling reason or "*special circumstance*" to grant the Claimants access to the original version of Oficio DGJR-129 produced as part of the Semovi file by the Respondent at this stage of the proceeding and after the conclusion of the written phase.

[83] The Claimants' Reply to the Motion to Compel, p. 2.

(4) The Request to Strike a Jurisdictional Objection From the Rejoinder

98. The Claimants are requesting the Tribunal to "*strike paragraphs 327 to 337 of Mexico's Rejoinder Memorial*" in which the Respondent allegedly introduced a new jurisdictional objection consisting of "*Claimants' alleged preclusion from invoking the dispute resolution mechanism in the Treaty by reason of Lusad's alleged waiver of rights in its by-laws*." According to the Claimants, this new jurisdictional objection is being belatedly filed in light of ICSID Arbitration Rule 41(1), given that Lusad's by-laws were available since the Request for Arbitration. Thus, the Tribunal should dismiss it.[84] As an alternative relief, the Claimants request the Tribunal "*to be allowed to address Mexico's new jurisdictional objection in a written submission, including (if deemed necessary) additional documents and legal authorities.*"[85]

99. The Respondent's position is that paragraphs 327 to 337 of their Rejoinder do not envisage a new jurisdictional objection but only reinforce the jurisdictional objection presented in paragraphs 352 to 375 of its Counter-Memorial related to the nationality of the investors.[86]

100. The Tribunal observes that, in the Counter-Memorial, the Respondent argued that under the principle of effective and dominant nationality, the Claimants' nationality should be determined on the basis of that of their members. According to the Respondent, in multiple "*legal acts*" *Mr. Zayas has presented himself as a Mexican domiciled in Mexico*", one of those legal acts being Lusad's articles of incorporation, available on the record as exhibit C-0002.[87]

101. In the Rejoinder, the Respondent invokes the existence of an express agreement between the Claimants as Lusad's partners, and Mexico, in Lusad's articles of incorporation. According to the Respondent, under this express agreement, the Claimants not only would identify themselves as Mexicans for the purposes of their participation in Lusad, but they

[84] First Application, § D, pp. 10-12.
[85] First Application, § D, p. 12.
[86] Response to the First Application, p. 7.
[87] The Respondent's Counter-Memorial, ¶¶ 353-374.

would also waive their right to invoke the protection afforded by their Governments of origin to their rights and obligations under the Concession, including the NAFTA.[88]

102. While the Respondent's allegations in paragraphs 352 to 375 of the Counter-Memorial and in paragraphs 327 to 337 of the Rejoinder are both based on the same exhibit and relate to the nationality of the investors, the Tribunal is of the view that the existence of an express agreement in Lusad's articles of incorporation, and its understanding as a waiver to the protection afforded under the NAFTA, is a matter that was not openly and clearly raised or discussed during the proceeding, until the filing of the Rejoinder. The Respondent itself acknowledges that the argument in paragraphs 327 to 337 of the Rejoinder is not merely based on the effective and dominant nationality principle –as that in paragraphs 352 to 375 of the Counter-Memorial–, by quoting a new legal authority introduced with its Rejoinder, which states: "*la renuncia '[n]o se trata simplemente de una renuncia de derechos en virtud de tratados ni de un debate fáctico sobre la nacionalidad dominante y efectiva, sino de un compromiso por parte de un inversionista de no invocar su nacionalidad original en contra de un Estado soberano a cambio de que dicho Estado soberano acepte al inversionista como nacional propio*"'.[89] By contrast, paragraphs 327 to 337 of the Rejoinder bring a new argument of Lusad's articles of incorporation being an express waiver to invoke an ISDS procedure against Mexico, on the basis of good faith, *estoppel* and *pacta sunt servanda* principles.[90]

103. The Tribunal further observes that, in support of this argument, the Respondent introduced new legal authorities with its Rejoinder.[91] At least two of the new exhibits introduced to argue the existence of an agreement in Lusad's articles of incorporation were available to the Respondent before the filing of its Counter-Memorial: (1) exhibit R-0229, corresponding to the Law on Foreign Investment, and (2) exhibit R-0230, the Regulation

[88] The Respondent's Rejoinder, ¶ 334.
[89] The Respondent's Rejoinder, ¶ 336.
[90] The Respondent's Rejoinder, ¶ 336.
[91] The evidence introduced to support the Respondent's arguments in ¶¶ 327-337 of the Rejoinder are the following legal and factual exhibits cited in footnotes 418 through 426: **R-0229,** Ley de Inversión Extranjera; **R-0168,** CPEUM**; R-0230,** Reglamento de la Ley de Inversión Extranjera; **R-0164,** Taxinet Corp v. León, Case No. 16-cv-24266-FAM, Appellants' Brief, December 21, 2022; and, **RL-0157,** *Carlos Sastre y otros c. los Estados Unidos Mexicanos*, Caso CIADI No. UNCT/20/2, Laudo, 21 de noviembre de 2022.

of the Law on Foreign Investment. Both exhibits correspond to Mexican laws and regulations, and the Respondent has not invoked new factual allegations in paragraphs 327 to 337 of the Rejoinder.

104. In light of the foregoing, the Tribunal concludes that the Respondent has elaborated its initial argument in a manner such that it may qualify as a new legal argument contained in paragraphs 327 to 337 of the Rejoinder to dispute the Tribunal's jurisdiction in this arbitration. To ensure both Parties' right to present their case while also preserving equality of arms, the Tribunal grants leave for the Claimants to file, **by July 23, 2023**, a brief written submission, not to exceed 5 pages, to exclusively address Mexico's new legal argument. Since the Respondent did not file new factual evidence, the Claimants are only allowed to introduce new legal authorities with their written submission.

(5) The Request to Have Mr. Eduardo Zayas Attend the Hearing in Person

105. Lastly, the Claimants request the Tribunal to "*order Mexico to facilitate Mr. Zayas's in-person participation at the final hearing*." According to the Claimants, they will request the competent Mexican court permission for Mr. Zayas to travel to the United States to attend the hearing. [92]

106. The Respondent opposes this request on the basis that only the accused individual, the victim, his/her representatives and prosecution authorities can intervene and file requests within the criminal investigation. Thus, the Respondent cannot intervene in Mr. Zayas' criminal investigation to request the judge to facilitate his participation at the hearing. Moreover, the Respondent argues that there is no evidence that Mr. Zayas' virtual attendance is not a reasonable option.[93]

107. The Tribunal is not persuaded that there are grounds to order Mexico to facilitate Mr. Zayas' in-person participation at the hearing. As the Claimants indicate, it is for the Mexican courts to grant leave for Mr. Zayas to travel to the United States. Furthermore, the Claimants provide no compelling reason as to why Mr. Zayas' online participation at

[92] First Application, § E, pp. 12-13.
[93] Response to the First Application, p. 9.

the hearing would be inadequate, so as to require an additional intervention from the Tribunal. The mere possibility of a great –yet unspecified– benefit from Mr. Zayas' in-person attendance is insufficient for the Tribunal to intervene in criminal matters within the competence of local courts. Furthermore, there is no evidence or allegation of any obstacle posed by Mexico against the Claimants' intention to file a request before Mexican courts that could potentially justify the Tribunal's intervention to "facilitate" Mr. Zayas' in-person attendance. For the foregoing reasons, the Tribunal dismisses the Claimants' request.

(6) The Second Application

108. With the Second Application, the Claimants request the Tribunal to add the Mexican Judicial Decision into the record. The Tribunal takes note that the Respondent does not oppose adding this document into the record. Both Parties will be allowed to report to the Tribunal on any development that may occur in the criminal proceedings against Messrs. León and Zayas that are relevant to this arbitration. However, the Parties may not add new submissions with such reports.

109. Moreover, in the Second Application, the Claimants request permission to introduce into the record 13 internal e-mail exchanges among Mexican government officials.[94] The Claimants argue that a "*special circumstance*" exists under section 16 of Procedural Order No. 1 because the Emails were internal communications between government officials that were only made recently available to them by their witness, Mr. Muñana. The Claimants add that the Emails were also documents responsive to their document production requests.

110. As the Claimants indicate in their submissions, Procedural Order No. 1 does not define which situations can amount to a "*special circumstance*" justifying the introduction of new evidence outside the regular procedural opportunities granted to each Party. In the absence of such definition, the Tribunal finds in the IBA Rules and its Commentary a valuable guidance. The Commentary on the IBA Rules states that "*further Considerations of efficiency and good faith weigh in favour of giving a party a single opportunity to present*

[94] Second Application, p. 1.

its arguments and allowing additional opportunities only when it was not possible to make those arguments at the time."[95]

111. The Tribunal is not persuaded that the Claimants have demonstrated that it was not possible for them to submit the Emails with Mr. Muñana's testimony, at the corresponding procedural stage. The Claimants merely argue that the Emails were only recently provided by Mr. Muñana, a witness of the Claimants and under the control of the Claimants, but fail to provide any reasonable explanation for the delay of their own witness in providing Claimants with the Emails.

112. Consequently, the Tribunal does not find that the Claimants have proven any "*special circumstance*" as required in Procedural Order No. 1 to allow the submission of new evidence at this stage of the proceeding.

V. DECISION

113. Based on the foregoing reasons, the Tribunal:

(1) Denies the Claimants' request in section A of the First Application, for the reasons indicated in section IV (1) of this Procedural Order.

(2) Grants the Claimants' request in section B of the First Application subject to the conditions laid out in section IV (2) of this Procedural Order.

(3) Denies the Claimants' request in section C of the First Application, for the reasons indicated in section IV (3) of this Procedural Order.

(4) Denies the Claimants' main relief requested in section D of the First Application, and **grants** the Claimants' alternative relief requested in section D of the First Application, subject to the conditions laid out in section IV (4) of this Procedural Order.

(5) Denies the Claimants' request in section E of the First Application, for the reasons

[95] Commentary on the 2010 IBA Rules on the Taking of Evidence in International Arbitration, p. 20.

indicated in section IV (5) of this Procedural Order.

(6) Denies the Claimants' Second Application for the reasons indicated in section IV (6) of this Procedural Order.

For and on behalf of the Tribunal,

[Signed]

Mr. Eduardo Zuleta Jaramillo
President of the Tribunal
Date: July 3, 2023