

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 Libre 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 Lusak 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 Lusak 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 *functioning*⁶² 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=CjwKCAiAssfL-BhBDEiwAcLpwfoKtK4mbSiQCpfhXv6g1GBLivys4BPT3CiJgCgi1Xagx5XvUU1-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